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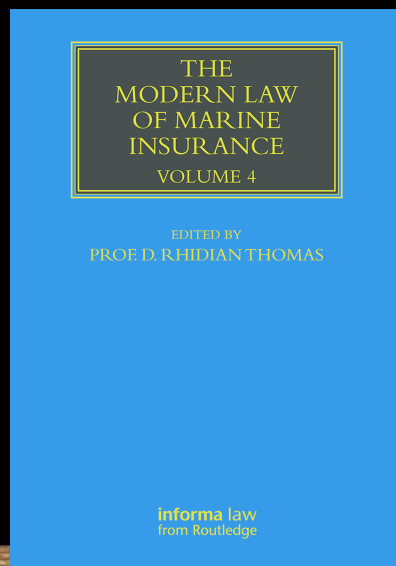
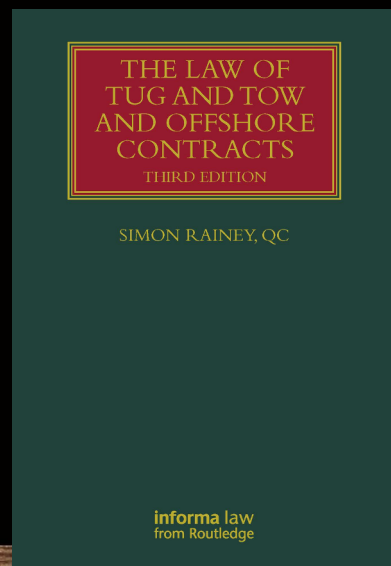
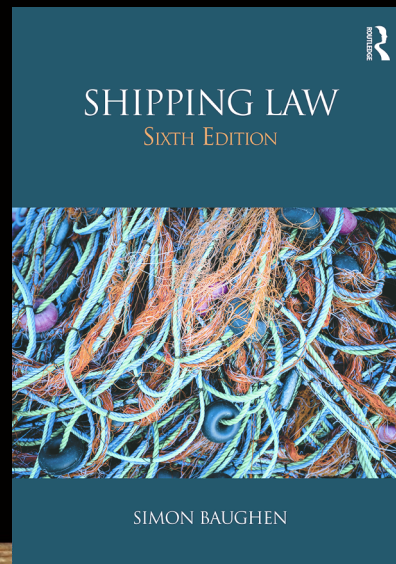
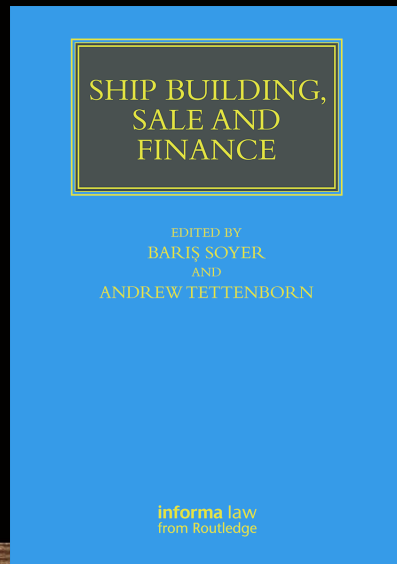
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Introduction

Like the samples on the counter of any good delicatessen, this FreeBook is intended to entice. It contains a choice selection of writings from members of Swansea University's Institute of International Shipping and Trade Law, an active research organisation with both academic and practitioner members, which is dedicated solely to the production and propagation of top-quality scholarship into maritime and commercial law. The present offering consists of five pieces from the last four years, written by four senior professors and one leading silk, delving into a wide range of maritime topics. They range from the practicalities of various forms of shipbuilding contracts, where a difference in a couple of words may mean a gain or loss of several million dollars, to a deep investigation into the possible future of carriage by sea under the Rotterdam Rules. Also present are two pieces on very different but highly important aspects of insurance – builders' risks and leading underwriter clauses – and a masterly treatment from a practical viewpoint of a recondite but vital part of maritime law, namely, towage contracts.

The Institute of International Shipping and Trade Law has a long-standing tradition of co-operation with top publishers Informa. It regularly produces works on particular aspects of shipping and commercial law, many emanating from its immensely popular annual symposia held in Swansea every September. All the pieces you see here, plus many more of similar quality, are available in Informa's well-known range of publications, which should need no introduction for the dedicated commercial lawyer.

Baris Soyer, Director, Institute of International Shipping and Trade Law



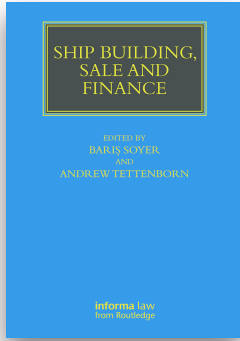


CHAPTER

1

Contracting by Numbers: The Different Characteristics of the Main Shipbuilding Contracts

Chapter 1. Contracting by Numbers: The Different Characteristics of the Main Shipbuilding Contracts



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Safely corralled behind the heavy electronic glass doors of a large commercial law firm, one of the first things to strike newbie lawyer is that a good deal of the law of contract that they are called on to practise is nothing like what they were meticulously taught as promising law students a few years earlier. Practical contract law is very often simply about the exegesis of well-tryed standard forms: it amounts not so much to an intellectual or academic endeavour as to a prosaic process of keeping checklists of what has and has not been altered from a template kept carefully unchanged on the firm's mainframe computer. Understandably so. Time is money and shipping clients are increasingly tight-fisted.

Given the choice between negotiating from scratch and using a tried-and-tested formula that everyone knows, practitioners understand and one's predecessors have successfully employed on countless occasions, the answer is a no-brainer.

Shipbuilding contracts, the subject of this chapter, are a classic example. Almost all vessels these days are built on the basis of one of five¹ standard forms. On principle, each of these provide a complete workable formula, just leaving such mundane details as the specification, the price, when payable and so on to be filled in. However, as always, there remains the important possibility of more or less extensive mutations to the boilerplate according to the parties' respective desires, bargaining strengths and legal nous. In order of age, the longest-standing, still used extensively in the Far East, is the SAJ² Standard Shipbuilding Contract³ dating from 1974. This is followed by the AWES⁴ Standard Shipbuilding Contract from 1978, the Standard Form Norwegian Shipbuilding Contract 2000 (NSC),⁵ the BIMCO-sponsored Newbuildcon which appeared in 2007, and the CMAC⁶ Standard Newbuilding Contract⁷ launched in 2012 for the Chinese shipbuilding industry. Of these, the SAJ form is probably the most frequently used, though subject to fairly extensive alterations (as might be expected from a template currently celebrating its fortieth anniversary, quaintly assuming the fastest mode of communication between go-ahead businesses to be by 'cable' and referring to such mid-twentieth-century curiosities as the convertible Japanese yen).

It is followed by the Norwegian form; the use of the AWES form, while still significant, has declined, partly in line with the reduction in European export buildings. Newbuildcon is fast gaining adherents; as regards the CMAC form, the most recent addition, it is fair to say that this has yet to establish itself. Within these templates, the



governing law chosen of course varies, but whatever form is used, a healthy proportion of contracts signed are governed by English law, with provision for LMAA or other London arbitration if anything goes wrong. Hence the relevance of this chapter, which will discuss these forms largely in light of the rules of English law.

The background against which one has to look at shipbuilding contracts is that, for all their advantages, standard forms are not an unmixed blessing. True, using substantial quantities of boilerplate saves vital time and trouble, as mentioned above. But since in shipbuilding there is as regards English law virtually absolute freedom of contract,⁸ representing ‘commerce, red in tooth and claw’,⁹ those using standard forms need to know when a boilerplate is satisfactory for the client and when it needs amending: which bits, in other words, to leave and which to negotiate on a bespoke basis. This is a serious concern with standard shipbuilding contracts. Two points in particular stand out. First, however detailed the forms may look, there are a significant number of matters left unresolved, which as any commercial lawyer will confirm is less than satisfactory for a client engaging on a major project that may well carry a price-tag of comfortably over \$100 million.

Second, while the essential structure of most shipbuilding contracts is the same (the greatest resemblance being to large-scale construction contracts),¹⁰ there remain a substantial number of variations between these forms which can be of major significance. Those acting for buyers, yards and financiers ignore such matters at their peril.

1.1 Uncertainties

1.1.1 The problem of design quality

Given the amount that may well be at stake in a newbuild project, one omission from many of the standard forms is surprising. While they all stipulate, with impressive precision, the dimensions, weight, speed, fuel consumption and other readily calculable details of the vessel to be built (or at least provide boxes where that information can be filled in), they are curiously vague and variable on the actual *quality* of design and construction that the customer is entitled to expect. Thus the buyer under the AWES form gets a reassuring but somewhat fuzzy promise that his ship will be built ‘in accordance with normal shipbuilding practices [in the place of building] for new vessels of the type and general characteristics of the vessel’.¹¹ Under the Norwegian form, by contrast, the vessel must be constructed ‘in accordance with first class shipbuilding practice in Western Europe’.¹² Newbuildcon similarly uninformatively mandates work ‘in accordance with good international shipbuilding and marine engineering practice’. As for the SAJ and CMAC forms, these coyly (and rather curiously)

say nothing whatsoever about quality. This creates, to say the least, potential for uncertainty and disagreement: even if there is such a thing as 'normal shipbuilding practice', it may well take two or more experts hired at huge expense to decide what it is. The matter may be especially relevant in the relatively short time after sea-trials and before the contractual delivery date, where there is most scope for argument (and consequent arbitral expense and delay) over what amounts to a shortcoming which the yard is legally bound to put right before handing over the vessel.¹³ Is there, for example, room for a contention that there is a difference in standard between first class (Norwegian form) and normal (AWES) shipbuilding practice (with the intriguing implication that all ordinary shipbuilding is by definition somehow second-rate)?

More to the point, diffuse provisions of this type, and *a fortiori* the complete non-existence of any standard laid down in some contracts, may leave the argument open that the default standards of s 14 of the Sale of Goods Act 1979¹⁴ have a part to play, especially in the light of Flaux J's recent decision in the related context of ship sale in *Dalmare SpA v Union Maritime Ltd*¹⁵ that only pretty clear words can oust them.¹⁶ It is true that the problem can be, and often is, overcome by the use of more certain and arbitrable standards such as those promoted by the International Standards Organisation;¹⁷ but the point remains that the forms as given are inadequate and can amount to a trap for unwary practitioners.

1.1.2 *The issue of insurance*

In any shipbuilding contract there is invariably a provision for property and risk to remain in the yard until delivery at which point they are transferred to the buyer.¹⁸ Back-to-back with this is a duty in the yard pending delivery to insure at its own charge the vessel and any buyer's supplies, a provision aimed partly at protecting the buyer's right to get his money back in the event of total destruction,¹⁹ and (no doubt) partly at making sure that the yard is in a position to continue with the work in the event of lesser damage.²⁰ Nevertheless, there are nagging uncertainties here as to two matters: first, precisely what has to be insured against, and second, what happens if the term is broken? As regards the former, the forms vary from the specific (Newbuildcon, as might be expected, cuts straight to the chase and mandates the 1988 Institute Clauses for Builder's Risk terms including war and strikes),²¹ through to the not-entirely-precise, which clearly leaves worrying scope for argument ('customary "all-risk" terms' in the Norwegian form)²² to the maddeningly vague (the CMAC requirement that any policy 'shall cover the damages or losses of the vessel's materials, hull and equipments which incurred [sic] by various marine perils, inland perils or the builder's errors and omissions').²³ The difficulty here is simply that, except for the Newbuildcon form, it is often going to be difficult or impossible to say whether or not the yard is in breach of




its obligation. Such indeterminacy ought to worry negotiators: might the yard be able to satisfy its obligation to the letter and yet leave the buyer unprotected against some significant risk? But that leads on to another point: assuming we can get over any uncertainty as to the *content* of the obligation to insure, what happens where the yard is in breach of it? Any immediate harm to the buyer from non-insurance is likely to be nil as long as the risk has not eventuated; if so, any damages from such failure are apt to be nominal. Hence the only live issue is whether failure by the yard might give rise to some other remedy. Specific performance is one possibility, though perhaps not a very practical one.²⁴ More importantly, does failure to insure allow suspension or cancellation by the buyer? Even here, the prospects for those seeking certainty do not look good.

None of the forms gives any such right expressly and the prospects of demonstrating that a failure to insure, especially against the background of the requirement of a refund guarantee to protect many of the buyer's interests, do not seem good. Indeed, in *Wuhan Ocean Economic Cooperation Co Ltd v Schiffahrts-Gesellschaft Hansa Murcia mbH*,²⁵ Cooke J held that where there was no immediate threat to the buyer's security even failure to maintain a refund guarantee, a rather more important obligation, was not repudiatory. In the light of this decision anyone arguing that a different rule should apply to failure to insure faces a somewhat uphill task. This is a matter that must be addressed in any properly drafted contract.

1.1.3 Payment and refund guarantees

Payment and refund guarantees issued by a bank or financier are a universal feature of shipbuilding contracts.²⁶ Payment guarantees cover the buyer's obligation to pay instalments as and when due at various stages of construction; refund guarantees cover the converse case of the yard's obligation in the event of rightful cancellation to reimburse sums paid by the buyer. Both effectively provide the parties with a vital element of credit insurance. However, with the possible exception of the Newbuildcon form, none of the standard forms deals clearly or satisfactorily with the vital point of precisely what must be done in this respect.²⁷

To begin with, what happens if a required guarantee is not forthcoming, or ceases to be effective (for example, because of governmental action, the insolvency of the guarantor, or for that matter, simple expiry)? It is not hard to see why this matters. As regards the buyer, without an effective refund guarantee in place there is a big risk that his very large investment (in which, it will be remembered, he has no ownership rights before delivery) will vanish into thin air if the yard becomes insolvent. Conversely, when it comes to the payment guarantee, the yard's cash-flow and the security available to its



financier (who will doubtless have lent against the yard's claim to future instalments) are seriously imperilled without assurance of the ability not only to sue for, but actually to collect, instalments as and when due. The position at common law is, unfortunately, not entirely clear here. In the one case where the issue arose as to whether the failure to preserve a guarantee (there a refund guarantee) was repudiatory so as to allow cancellation,²⁸ it was held that it was not; but this was partly on the special ground that there was no prejudice to the buyer on the facts,²⁹ hence the decision is not necessarily the last word on the point. Yet, in such a case, any properly advised party will want a clear option to escape: the seller to avoid having to continue construction without assurance of payment,³⁰ and the buyer in order (a) to have an option to cancel and get back his money from the yard while the going is good, and (b) to avoid having to pay further instalments which may well turn out to be irrecoverable from a bankrupt builder. Nevertheless, the majority of the standard forms give no such indication. Even where they contain a provision for a guarantee,³¹ only Newbuildcon and CMAC state clearly what is to happen if it is not there: namely, by making provision for withdrawal if no guarantee is provided at the beginning, and cancellation if the guarantor becomes insolvent and the guarantee is not replaced by another within 30 days.³² With the others the issue has to be settled by way of agreed amendment or fought out, unsatisfactorily, at common law.

Secondly, it is all very well for a shipbuilding contract to require a guarantee of a given liability: but there are guarantees and guarantees. For instance, their wording, especially in the case of refund guarantees, may give rise to important doubts as to just what obligations are being secured.³³ Again, both a payment and a refund guarantee may take the form either of an old-fashioned 'see-to-it' guarantee, conditioned on the guaranteed sum actually being presently due, or a purely documentary obligation in the nature of a performance bond or demand guarantee.

Differentiating between the two can be difficult, depending as it does on whether the bank's promise to pay sums unpaid by the contractual counterparty can plausibly be construed as dependent on those sums actually being outstanding or only on presentation of particular documents by the beneficiary.³⁴ The difference matters as and inertial advantage, forcing the other party to take out separate proceedings to dispute any liability and recover his money once the bank has disbursed payment; and (b) more importantly, may bypass the co-contractor's ability to delay payment by seeking arbitration.³⁵ When it comes to the requirements of the various forms, however, there is (save possibly in the case of Newbuildcon, referred to below) no consistent answer as to what kind of guarantee is required. This is obviously so in the case of the Norwegian form, which says nothing at all about the subject and thus leaves it entirely up to the parties to stipulate what they want: but the same problem appears elsewhere. The SAJ form appends a suggested primitive form of 'see-to-it' payment guarantee

(though, oddly enough, the text of the agreement itself does not explicitly require the buyer to provide it): refund guarantees are left unmentioned. The AWES form, another builder-drafted document, says laconically that, as regards payment, '[b]ank guarantees for the different instalments have to be provided by the purchaser before the effective date of the contract . . . to the satisfaction of the contractor',³⁶ leaving plenty of room, in the absence of a properly drafted provision, for lawyers to earn handsome remuneration by arguing about what kind of guarantee a reasonable builder should be satisfied with.³⁷ Once again, there is nothing at all on refunds. CMAC appends a form of both payment and refund guarantee, which the respective parties are bound to provide.³⁸ But neither makes it explicit whether it is a demand guarantee: the former would probably be so construed,³⁹ while the proper interpretation of the latter is anyone's guess.⁴⁰ The least unsatisfactory in a demand bond proper (a) gives the beneficiary an enormous cash-flow this respect is Newbuildcon, which again appends forms and requires them to be provided: but at least in this case it seems fairly clear the respective forms are indeed demand guarantees.⁴¹ Nevertheless, this is a matter which could do with careful scrutiny from anyone negotiating a contract and, *faute de mieux*, insistence on a bond which in terms states whether it is a demand bond, and precisely what obligations it covers, together with back-to-back terms in the contract itself.

1.2 Variations between standard forms

As mentioned above, most contracts to build substantial cargo vessels follow essentially the same structure. (True, there may be a need for substantial alterations to them as regards particular specialist vessels, such as those working on offshore installations,⁴² but this is by-the-by.)

There is almost invariably provision for payment in instalments at various stated stages of construction: for at least some form of guarantee or performance bonds to secure payment or repayment, or both, against an insolvent counterparty: for assignment: for standards of build: for supervision by the buyer during the build: for later changes to specifications: for subcontracting: for ultimate performance of the vessel and class compliance: for sea-trials and acceptance: for the builder's guarantee of quality once the vessel has been completed and handed over: and to a greater or lesser extent for the exclusion of other liabilities.

However, the fine details of many of these provisions vary considerably between the different forms, either owing to a greater or lesser degree of care taken in drafting them,⁴³ or alternatively because some of these forms are naturally more pro-builder than others (the SAJ template, for example, was drafted largely by builders' interests,




whereas Newbuildcon and the NSC were explicitly aimed at holding the ring between builders and buyers). It is some of these small differences that provide a lesson in the dangers and difficulties of standard forms.

1.2.1 Subcontracting and its effects

Whenever work is subcontracted, the yard invariably remains liable for the work of the subcontractor, independently of whether it is itself at fault.⁴⁴ Nevertheless, subcontracting remains a point of major importance for both parties. The yard obviously wants to retain as free a hand as possible.⁴⁵ The buyer, by contrast, unless he is simply using a well-known yard as a front-end for cheapskate construction elsewhere,⁴⁶ is likely to be concerned that the yard he has appointed will actually do the work: he has, after all, presumably chosen this yard for its reputation and personal competence as well as other things.⁴⁷ What is significant is that the standard forms vary spectacularly here. Under the SAJ contract, as might be expected with a builder-produced document, a laconic provision simply licenses the builder to subcontract 'any portion' of the construction work,⁴⁸ which with the possible exception of laying off the work completely to someone else (since one can plausibly argue that the whole of a project is not a 'portion' of it), gives virtual *carte blanche* to the yard. All the other forms, by contrast, have some limits, all based to a greater or lesser extent on the concept of an approved 'maker's list' of approved subcontractors appended to the agreement. But even here buyers need to be aware of the differences.

Under the Newbuildcon form, there remains a general right to subcontract, albeit limited to firms on the 'makers' list', plus a provision that while the buyer's consent is required to go outside the list, in the case of minor work this consent is not to be unreasonably refused.⁴⁹ In the Norwegian form, the right to subcontract at all is excluded in the case of the 'hull and major sections', with everything else being subject to the maker's list principle.⁵⁰ Under CMAC, there is a somewhat obscure provision which starts out by allowing anything to be delegated, but then provides that 'delivery and final assembly into the vessel' has to be at the builder's own yard.⁵¹

The result of leaving this clause in place, which should be borne in mind by buyers' representatives, is that large sections even of the hull, provided they are capable of being transported, may still turn out to have been fabricated in the back of beyond, and somewhere completely different from the yard originally signed up. All this may cause problems for a buyer, for a number of reasons. For one thing, it is all very well to say that the original yard guarantees the quality of the work; but the sensible buyer wants a good ship, not a lawsuit, a right to refuse acceptance until defects are corrected, or a promise of free repairs during a guarantee period.⁵²




For another, while it is true that the builder invariably assumes an obligation to produce a finished product satisfactory to class,⁵³ the potential for difficulty and delay is much reduced in so far as all subcontractors have been pre-approved by the classification society involved, which will not necessarily be the case where the builder has an entirely free hand in deciding whom to give work to. And yet again, assume that, as soon as the ink on the contract is dry, the buyer has – as is extremely common – agreed to time-charter the vessel when complete. Although it is often assumed that would-be charterers of newbuilds are not concerned with the details of building,⁵⁴ this cannot be guaranteed to be the case,⁵⁵ and under some forms in the case of substantial subcontracting there could be considerable difficulties.⁵⁶ As a result, it is not surprising that the variety of different provisions on subcontracting is matched by the tendency to replace or supplement them with bespoke provisions of the parties' own making: for example, requiring subcontractors to be on a classification society's approved list,⁵⁷ or demanding consultation before appointing subcontractors for certain purposes.⁵⁸

1.2.2 Supervision and modifications

Having a ship constructed is not like ordering a new Ford Focus. Shipbuilding contracts are invariably a highly cooperative long-term exercise between the buyer, the yard and others involved in the transaction. Since there is invariably a central guarantee that the finished vessel will be acceptable to the buyer's nominated classification society,⁵⁹ class is closely involved throughout the process (so much so, indeed, that none of the standard forms even bothers to provide specifically for its inclusion).⁶⁰ Similarly, all construction contracts take place under the watchful eye of a buyer's representative, whose right to be present on the spot is stipulated in some little detail.⁶¹ Apart from pointing out possible defects (of which more below), one of his functions is to negotiate over post-contract alterations in the specifications, which are an inevitable feature of any large-scale construction project taking place over an extended period. Such alterations may arise from a number of causes.

They include requests by the buyer to make changes; the builder's desire to take advantage of new developments or construction techniques, or his need to provide a substitute for particular components or methods of construction now impracticable; and (vitally) regulatory changes and the updating of detailed class requirements, which are matters that can happen quite suddenly in the course of any new building.


Obviously the ideal position here is swift and amicable agreement on such matters; indeed this is often forthcoming, since neither party wishes any delay or deadlock during construction while things are sorted out. But this can only take place against a clear background position on how far such alterations can be insisted on, by whom,



what their effect is on the timetable of construction and, most importantly, who pays. Here there are significant variations.


We can begin with alterations requested by the buyer. It is, of course, always possible for buyer and builder to agree *ad hoc* on such changes, with any consequent price and delivery adjustments. But this point is trivial: the important question is how far the contract goes further and actually gives any kind of right to the buyer to demand them. On this the SAJ and CMAC forms are spectacularly unimpressive, merely reiterating what we all know – that is, that the parties can agree, provided the buyer is happy to pay the extra.⁶² The AWES form is little better, giving the buyer the right to ask for modifications and obliging the seller to carry them out, but then emptying these provisions of all content by saying that any obligation lapses unless the parties within ten days ‘fully agree expressly and in writing’ on the modifications, any extra payment, and so on.⁶³ As regards the Norwegian form and Newbuildcon, the former makes any duty dependent on agreement,⁶⁴ but an accompanying provision for an objective means of assessing any price increase suggests that there must be at least some element of obligation,⁶⁵ thus creating the possibility of liability in a builder who refused even to negotiate. The latter, drawing doubtless on dissatisfaction with the other forms, makes things largely clear, by not only giving the buyer the right to ask for reasonable alterations which do not in the builder’s reasonable judgment interfere with the latter’s planning or programmes in respect of other commitments, but also saying that in the absence of agreement the builder is to do as requested, with matters of extra payment referred to arbitration.⁶⁶ In practice, of course, parties may prefer a bespoke provision; one along the lines of that contained in Newbuildcon, even if that form is not used, is ideal. Alternatively it would be possible to stipulate for an obligation in the builder to negotiate in good faith on a request for modification and then act accordingly.⁶⁷ This is problematical, at least where the governing law is a common law system,⁶⁸ since in such jurisdictions there remains a nagging doubt over whether an obligation to negotiate in good faith is one that can be enforced, and if so, how far.⁶⁹

Builders, for their part, stipulate for the right to make changes for the entirely legitimate reason of allowing maximum flexibility in the face of inevitable alterations in circumstances during the currency of the build. As a result, all shipbuilding contracts contain terms allowing minor builder’s alterations to accommodate changed circumstances and also substitution of materials or components where this is necessary to keep construction on track. Nevertheless, this still leaves problems. While the builder needs flexibility, the buyer will want to have at least some control, if only because what is minor is often not self-evident and is open to genuine disagreement. Of course, even when such changes are made, there is always the vexed question of who pays for any overshoot (or, almost as important, who gets the credit for any cost savings).⁷⁰



In all these there is again noticeable variation, which those negotiating such contracts are apt to miss but in fact would do well to draft round. Thus minor changes to suit the builder's working methods are generally allowed, though not universally (the CMAC form, puzzlingly, has no provision at all). Where changes are permitted, most forms are sensitive to the important fact that there may be room for argument over whether a change is indeed minor or whether it is something which, however apparently inconsequential to a builder in a hurry, is something that a buyer might legitimately feel strongly about. They thus require consent from the buyer, not to be unreasonably withheld.⁷¹ By contrast, and with potential disadvantage to buyers, one form (AWES) does not require consent, instead allowing changes willy-nilly in so far as they count as 'not affecting the vessel's performance characteristics' (whatever that means).⁷² Again, in all such affairs, cost matters. While in most cases changes of this sort do not affect the overall price, one form is different from the others. The carefully drafted Newbuildcon template, while protecting the buyer from any surcharge, specifically requires any cost savings obtained thereby to be passed on to him:⁷³ a difference which could involve sizeable sums. Similarly, while all the standard forms, without exception, allow the use of replacement materials (for entirely understandable reasons), how they go about it varies.

The SAJ, rather primitively, regards a claim to use this in the same way as a buyer's modification, subject to agreement between the parties.⁷⁴ The CMAC form provides for the use of replacement components, but starkly requires the permission of the buyer before this can be done at all, without giving further details of what happens if that consent is not forthcoming.⁷⁵ Going to the other extreme, the AWES form dispenses with the need for consent altogether.⁷⁶ In practice this may frequently be satisfactory, since the buyer will probably be consulted and may well be only too willing to agree; but there may equally well be substitutions with which he is not happy, and there is room for putting in some sort of provision for consent, at least if this is not to be unreasonably withheld, and for dispute resolution if differences remain irrevocable – which is the solution chosen by the Newbuildcon drafters.⁷⁷ Turning to a slightly different matter, compliance with class and other regimes (such as SOLAS and MARPOL) is absolutely central to all shipbuilding contracts. Unfortunately this has to be reconciled with the inconvenient fact that such regimes are apt to change frequently and unpredictably between contract and delivery. As a result, one of the few areas of near uniformity arises from the fact that all the standard forms contain a regime under which the builder is bound to build in compliance with the elements of such regimes as are compulsory⁷⁸ at the time of delivery, even if this involves a change of specifications in mid-construction, with associated adjustments in the price and, where necessary, in the delivery date as well. The ideal and most straightforward scheme is that in Newbuildcon, under which the builder is bound to carry out any necessary



alterations announced post-contract, with adjustments in so far as unagreed established by the dispute resolution procedure.⁷⁹ The CMAC form proceeds on the same lines, but suffers from some obscure drafting in the relevant clauses, which need careful adjustment and rewriting.⁸⁰ Similarly, the SAJ scheme requires work provided the buyer agrees to any extra costs and other changes proposed by the builder,⁸¹ though significantly it lacks any provision for reference to arbitration in the event of dispute.⁸² Normally the criterion of whether the new regime applies is simply whether the changes come into effect on or after the signing of the contract, even though they may have been formally announced earlier.⁸³


1.2.3 Termination of the contract

All the standard forms allow, as might be expected, for termination by the yard in respect of non-payment of instalments, and do so fairly similarly.⁸⁴ The right of the buyer to cancel for the builder's shortcomings, by contrast, is more unevenly covered, despite the fact that it, and the clarity with which it is expressed, can matter a great deal. To take a straightforward example, suppose contractual difficulties arise shortly before an instalment becomes payable. A swift and incontrovertible cancellation by the buyer will immeasurably strengthen his hand in preventing a call by the builder on the guarantor – and hence inevitably on the buyer – for the instalment concerned.⁸⁵ The absence of a rightful cancellation, on the other hand, will leave him helpless against such a demand, with the attendant effects on cash-flow.⁸⁶

Furthermore, uncertainty in cancellation rights provides a further trap for the buyer. If he does not cancel, he faces the consequences just mentioned. Assuming he does, he also takes a big risk. If he is right, at least he can activate the repayment guarantee to recover sums already paid. If he is wrong, he is deprived even of this, on the basis that his cancellation will itself be regarded as an unlawful repudiation, which is not covered by the guarantee.⁸⁷ By way of background, it seems clear that even if the contract does not say so expressly, where there is a genuine repudiation by the builder, the buyer retains the right to accept it and cancel.⁸⁸ But such cases are rare and, in any case, are of limited use to the buyer because of the uncertainty of what amounts to a repudiatory breach and the enormous risks to the buyer if he gets it wrong.

It follows that normally the buyer will have to rely on specific cancellation rights under the contract. Unfortunately, these can vary subtly in at least two cases.

First, take late delivery. Shipbuilding contracts invariably use a sliding scale model for late completion, with short delays triggering a price rebate and delays beyond a certain date allowing cancellation.⁸⁹ But there is a catch. What are



referred to as permissible delays (in effect, delays due to *force majeure*, default of the buyer or agreed changes in specification) are outside this scheme.⁹⁰ The result can be surprising. In the SAJ and AWES forms, for example, there is theoretically no end to the buyer's duty to accept in so far as the only delay is due to *force majeure* or otherwise permissible. Unless steps are taken to rewrite the relevant provisions, he must apparently continue cooling his heels (and keeping his payment guarantee active) until the sounding of the last trump, or at least until he has a chance of persuading a sceptical arbitrator that the delay has been such as to frustrate the contract. There is an obvious need for an absolute 'walk-away' date even where the delay is no-one's fault. To be fair, the other forms go some way to dealing with this. The Norwegian form gives a long-stop of 270 days including *force majeure*;⁹¹ Newbuildcon and CMAC, 270 days including all forms of delay.⁹²

A second point of difficulty is failure of the yard to progress the building, before this has developed into an actual postponement of the delivery date. Suppose it becomes clear to the buyer that work on the vessel has stopped or virtually ground to a halt – an event that often, though not invariably, indicates insolvency or financial difficulties. The buyer has an important interest in being able to escape from the contract at that point, without necessarily having to wait for an actual delay in delivery that would justify cancelling the contract some months hence.⁹³

At common law, any right to do so is limited. An express or implied representation that work has not only stopped but has been terminated, or that the vessel will not be delivered before the right to cancel is triggered, will do.⁹⁴ If it is clear that there will inevitably be a failure to perform entitling the other side to escape, there is the authority (though not the certainty) that this can be treated by the other party as a repudiation.⁹⁵ Short of this, the other party must, it seems, bide his time, even if he reasonably thinks it rather unlikely that he will, in fact, receive performance.⁹⁶

Those negotiating on behalf of buyers need to note that the treatment this subject gets from the different forms is various. Under SAJ and AWES, nothing is said about stoppage. It follows that without an amendment of the form the buyer remains bound when work grinds to a halt, unless the yard itself makes it clear by words or conduct that it will not perform the contract. The Norwegian form does deal with the matter, but clumsily and badly. Having started promisingly by giving the buyer a right to demand security from a builder who is insolvent or unlikely to be able to perform it would, one might have thought, have followed this through and allowed cancellation if no such security was forthcoming. But no: the only right given is to pay any sums owing into an escrow account instead of to the yard and then deduct them from any final payment.⁹⁷ This is better than nothing, but hardly satisfactory to the buyer. It is left to Newbuildcon (and to CMAC which copies Newbuildcon word-for-word on the point) to



produce a satisfactory solution. Under clause 39 of Newbuildcon, where work stops for a stated number of days, the buyer is given the right to demand that it restarts within a given period; if it does not the buyer can cancel the contract.⁹⁸ In addition there is an automatic right to cancel forthwith in the event of insolvency.⁹⁹

1.2.4 Rejection

Buyers do not lightly refuse to accept a brand new vessel tendered to them which is already freighted with a big investment of time and dollars, particularly if, as frequently happens, they have pre-chartered her and inability to perform that charter will cost them a lot of money in profits foregone or damages payable to an irate charterer, as the case may be. Nevertheless, the right to decline delivery remains very significant. There may be matters of very serious complaint, over build quality or otherwise; furthermore, it is worth remembering that with refusal to accept delivery the underlying issue may be a claim not to outright refusal, but rather to a demand to delay acceptance pending correction of real or imagined defects.¹⁰⁰

In a few cases the matter is straightforward; indeed is tied in with cancellation. All the standard forms, for instance, say that deficiencies in speed, fuel consumption or deadweight tonnage lead to a sliding scale of price reductions up to a limit, and beyond that allow cancellation;¹⁰¹ not infrequently this scheme is extended further by bespoke agreement to cover other readily measurable matters.¹⁰² The difficulties come in a different area: namely, where at or after sea-trials the vessel is alleged to have some other defect in construction or design which means she does not comply with the contractual specification.¹⁰³ The SAJ and CMAC forms, perhaps surprisingly, are curiously pro-buyer here: taken literally, the buyer only has to take the vessel if she wholly conforms to all specifications; they can thus insist on the correction of any defect, however minor, as a condition of acceptance.¹⁰⁴ The other three forms have a more up-to-date regime, incorporating a 'minor defects' exception: but even here there are variations which can mean a lot to the buyer. AWES, for example, having referred to conformity with the contract and class and regulatory control, goes on to say¹⁰⁵ that the buyer must accept the vessel despite non-conformities that are 'of minor importance and do not prevent safe operation of the vessel' against a commitment to deal with them within the guarantee period.¹⁰⁶ This could leave the buyer in an awkward situation since, taken literally, it could make the buyer accept a vessel even though she had (minor) defects going to class and hence to tradeability as such;¹⁰⁷ furthermore, although the yard agrees to deal with the defects, any downtime to the vessel is, it would seem, for the buyer's account. The latter point is better dealt with by the Norwegian and Newbuildcon forms, which explicitly make the yard pay for downtime¹⁰⁸ and, in the case of Newbuildcon, require it to give third-party security as well.¹⁰⁹ Only


Newbuildcon is entirely satisfactory on the first point, with a specific limitation of minor defects to those that 'do not affect Class or the operation of the vessel'.¹¹⁰

1.2.5 Extent of liability for defects

In connection with defects found after delivery, all forms follow the same broad 'clean slate' model – that is, providing a carefully modulated guarantee, essentially involving an unconditional promise by the yard to repair defects within a certain time wherever the vessel is,¹¹¹ and then using a broad brush to exclude all other liability that might otherwise arise.¹¹² There is invariably an exclusion of responsibility for consequential losses such as downtime, and any costs of bringing the vessel in for repair are always for the buyer's account. Nevertheless, elsewhere, parties may discover all too late that the extent of the buyer's rights can still vary considerably.

Most importantly, there is the issue of the extent of the free work to be done where parts are defective. Obviously the cost of removing and replacing the defective part is covered. But what of repairing damage done to neighbouring components (for example, a shaft tunnel cracked because of vibration caused by a defective propeller-shaft) or to the vessel as a whole (as with damage to shell plating caused by the disintegration of a badly made screw? CMAC is highly generous here, imposing responsibility for 'defects and damages caused by any of the [guarantee] defects',¹¹³ which seems to create a pretty open-ended liability for any physical damage, allowing both above examples. Newbuildcon is not quite as munificent, allowing claims for consequential damage only if 'caused as a *direct and immediate* consequence of such guarantee defects',¹¹⁴ but still probably has the same effect. The Norwegian form restricts any duty to repair other damaged parts that 'can be considered to form part of the same equipment or system', and even then suggesting a ceiling on recovery:¹¹⁵ the result would presumably be that the first, but not the second, instance above would be covered. As for the SAJ and AWES forms, by limiting the guarantee liability to repair of the defect concerned and excluding all other liability, they effectively provide the buyer with a new shaft or propeller and then tell him he is on his own. There are other differences too. For instance, where repairs are done other than at the original yard, the SAJ, CMAC and Newbuildcon give the buyer full recovery of all reasonable costs incurred;¹¹⁶ by contrast, AWES and the Norwegian form limit reimbursement to the yard's own would-be charges,¹¹⁷ thus heaping up serious potential problems for owners trading in high-cost areas and unwilling to send their vessels thousands of miles away for repair at their own charge as to lost time.

1.2.6 Assignment and security



Financing is crucial in shipbuilding contracts. Third-party payment and refund guarantees aside, particularly important here is financing through assignment of the benefit of the contract to a lender (whether by yard or buyer), and the creation of security interests in the vessel in the course of construction.

We can begin with assignment. When it comes to assignment of the benefit of the contract to a potential lender, both parties need assurance that this is permissible. Furthermore, since English law, in common with a number of other systems, provides that the validity of any transfer of rights by assignment depends on the terms of the contract giving rise to the right assigned,¹¹⁸ the financier has to be assured that any assignment will be effective to create a valid security.

In view of its significance, not surprisingly assignment is touched on in the boilerplate of all the forms. Nevertheless the treatment varies sufficiently between them, both in type and completeness, as possibly to trip up an unwary negotiator. The SAJ form, drafted in the early days when financing was not as developed as it is now, contains a bald ban on assignment without the consent of the other party.¹¹⁹ Unless this is re-written – and this must be a top priority for any competent adviser faced with the SAJ form – any party needing finance (or re-finance) may find himself in difficulties, either because he can only do so on the terms dictated by the other party, or because lenders may well shy away from contracts of this sort. The other forms, it must be admitted, are more satisfactory here, either providing for consent coupled with a vital ‘not to be unreasonably withheld’,¹²⁰ or (more radically) giving an absolute right to assign to a financier, and limiting any right of veto to other assignments.¹²¹ The latter seems more satisfactory, in that it is not entirely clear what advantage is gained by giving the other party any kind of control over financing matters.¹²² As with assignment, so with mortgages and hypothecs. To be sure, in contrast to assignment, the *validity* of any such mortgage in the hands of the financier depends not on the contract but on the provisions of the law of the place of building.¹²³

Contractual controls remain important, if only because the interests of the yard, the buyer and their respective creditors must be reconciled. To see why, take the provisions of the SAJ form. This, like the Newbuildcon version, puts no limits on the power of the yard to hypothecate the half-built vessel: a feature it shares with the CMAC and Norwegian forms, which indeed go further and expressly provide for such an unqualified right.¹²⁴ The problem here is that unless discharged before delivery, such a mortgage on principle binds the vessel in the hands of the buyer (indeed, if it did not there would be little point in it). Hence the buyer not only has no guarantee of receiving an unencumbered vessel at delivery, but may also face further financing difficulties. He will almost invariably have agreed to create a mortgage over the vessel on completion and registration: as his prospective financier will be aware, this may

prove difficult if she is already subject to an existing mortgage created by a now-insolvent yard in favour of another bank. The answer, of course, is to give the buyer at least some right to consent to such mortgages. The AWES form does just this,¹²⁵ simply prohibiting their creation without the buyer's written approval: but however convenient for the buyer, this may go too far. It is quite possible to protect the buyer's interests even if a mortgage is given: all that is necessary is for any mortgage to provide that it lapses on delivery of the vessel, with the lender's interests being protected by an assignment to it of the yard's right to payment of the relevant instalments of the price. Rather better in this respect, it is suggested, would be a right of veto in the buyer, but subject to the 'consent not to be unreasonably withheld' proviso, it being understood that the criterion of reasonableness would be whether the buyer's interests were properly protected.

1.3 Conclusion

The conclusion to be drawn from this chapter will be fairly obvious from what has gone before. The savings of time and trouble that come from using standard forms can only be fully utilised by those who know the strengths and weaknesses of each of them, and which bits of the boilerplate need to be discarded. A close look at the variations between them and the details of the problems they raise, such as is provided in this chapter, is as essential as it ever was.

Notes

1 There is a sixth, the 1980 MARAD (US Maritime Administration) form. But its use is effectively limited to buildings commissioned by the US government, and it will not be extensively discussed here.

2 Shipbuilders' Association of Japan.

3 Sometimes called the JCon Form.

4 Association of European Shipbuilders and Ship-Repairers.

5 Agreed between, among others, the Norwegian Shipowners' Association and the Norwegian Shipbuilders' Association. Sometimes known as SHIP 2000.

6 China Maritime Arbitration Commission.

7 Alias the Shanghai Form.

8 The Unfair Contract Terms Act 1977 is almost invariably irrelevant. This is because of two provisions. One is s 27(1), disapplying it where English law governs only by party choice: given the virtual disappearance of serious shipbuilding by British yards and indeed in the UK as a whole, this will nearly always be the case. As if this was not enough, s 26 disapplies the Act in any case where the contract is for the sale of goods which are, at the time of the conclusion of the contract, in the course of carriage, or will be carried, from the territory of one State to the territory of another. The fact that in the nature of things the buyer of a

cargo ship almost invariably wants to sail her to a country other than where she was built is, it seems, sufficient to trigger s 27 in this context (compare the aircraft sale case of *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2009] EWCA Civ 290; [2010] QB 86).

9 A lapidary and memorable phrase of Jonathan Hirst QC, sitting as a deputy High Court judge: see *Western Bulk Carriers K/S v Li Hai Maritime Inc* [2005] EWHC 735 (Comm); [2005] 1 CLC 704 at [1].

10 On which, see generally the excellent S Curtis, *The Law of Shipbuilding Contracts* 4th edn (Informa Law, 2012) at pp 1–2. different characteristics of the main shipbuilding contracts

11 AWES, cl.1(c). Throughout this chapter, when referring to standard forms capitalisation and other common editorial practices will be ignored.

12 Norwegian form, cl. II.1.

13 After delivery has taken place, it seems clear that all the forms are generally sufficient to exclude the Sale of Goods Act duties and indeed almost any implicit duty on the builder: see in particular *China Shipbuilding Corp v Nippon Yusen Kabukishi Kaisha* [2000] 1 Lloyd's Rep 367.

14 On which there is some authority in the shipbuilding context, but much of it elderly and of limited help in the case of modern cargo vessel construction. Representative examples are *McDougall v Aeromarine of Emsworth Ltd* [1958] 1 WLR 1126; *Dixon Kerly Ltd v Robinson* [1965] 2 Lloyd's Rep 404; and *Britain SS Co Ltd v Lithgows Ltd*, 1975 SC 110. See, too, the ship sale case of *Dalmare SpA v Union Maritime Ltd* [2012] EWHC 3537 (Comm); [2013] 1 Lloyd's Rep 509, referred to below.

15 [2012] EWHC 3537 (Comm); [2013] 1 Lloyd's Rep 509. The case concerned a ship sale under Saleform 1993, but the reasoning is wider. Its result was disconcerting; significantly, those drafting cl. 18 of the present Saleform 2012 hastily took the opportunity to put the exclusion of statutory implied terms beyond question for the future. For a comprehensive analysis of this judgment see Chapter 8 by Simon Rainey QC.

16 Such words appear, it is suggested, only in Newbuildcon, cl. 37(d), and possibly in CMAC, cl. XIX.4. In the Newbuildcon version, the wording of the guarantee explicitly '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 for and to the Buyer'. Presumably this extends to pre-delivery defects.

17 Which has a large number of specific shipbuilding standards for those who care to use them: for those interested, they can be found in Part 47 of the ISO catalogue.

18 See e.g. Newbuildcon, cl. 31. But note a curiously insidious provision in the SAJ form, which any well-advised buyer must insist on rewriting in a sensible way. 'Title and risk of loss of the vessel and her equipment', it is said, 'shall be in the builder, excepting risks of earthquake, war and tidal waves' (SAJ form, VII.5). If this Delphic provision means that the buyer has to insure his building vessel right from the outset against these risks alone, or take the risk of having to pay for the ship in the event (a not insignificant chance in Japan) of damage to it caused by tidal waves or similar occurrences, it is not attractive.

19 Hence its universal limitation to the total amount paid by the buyer from time to time, this being the amount at stake as regards that party. Although refunds are largely taken care of today by the custom of requiring the buyer to furnish a third-party refund guarantee, it has to be remembered that some of the older forms, such as the SAJ, contain no such provision.

20 For a comprehensive analysis on standard contracts used in insuring new built ships see Chapter 6 below.

21 Newbuildcon, cl. 38.

22 Norwegian form, cl. XI.2.

23 CMAC, cl. XXVIII.1.

24 There seems no reason why there should not under English law be specific performance of a contract to insure, in the same way as there can be specific performance of an obligation to repair (e.g. *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch 64) or to service property (*Posner v Scott-Lewis* [1987] Ch 25).

25 [2012] EWHC 3104 (Comm); [2013] 1 Lloyd's Rep 273.

26 See Newbuildcon, cl. 14(b),(c) and CMAC, cl. V.7, where the term appears in the boilerplate. The SAJ and AWES forms require a buyer's payment, but not a seller's refund, guarantee: see SAJ, Appendix, and AWES, cl. 7(b).

27 For a legal analysis of refund guarantees in shipbuilding context see Chapter 5 below.

28 See *Wuhan Ocean Economic & Technical Cooperation Co Ltd v Schiffahrts-Gesellschaft Hansa Murcia mbH & Co KG* [2012] EWHC 3104 (Comm); [2013] 1 Lloyd's Rep 273.

29 This was a case where the guarantee expired by effluxion of time. The reason for the lack of prejudice to the buyer was that under the guarantee's own terms it had only to seek arbitration, in which case it would have stood automatically reinstated.

30 An option to suspend, rather than cancel, may suffice here in the event of short-term problems: but for any long-term difficulties it is vital for the yard to avoid having a half-built ship on its hands subject to possible commitments to a bankrupt buyer.

31 Which all save the Norwegian form do, though the details vary (as will appear below). The provision is patchy. The SAJ form appends a suggested buyer's guarantee in a somewhat outdated form, but does not demand it. It says nothing about a refund guarantee. AWES brusquely demands a buyer's guarantee (see – with the exception of the Newbuildcon form – cl. 14) but not satisfactorily.

32 Newbuildcon, cl. 14(b), (c). See too cl. 39(a)(i) (while no effective refund guarantee in place, buyer is protected from having to pay any instalments even if he cannot cancel). CMAC does something similar, though without the suspension right. Clause XXVII provides for a right of cancellation if the guarantee is rendered ineffective, while cl. XXXII makes the entire effectiveness of the contract depend on the provision of the guarantees in the first place. The difference between this and Newbuildcon is that apparently under CMAC there is no actual duty to provide the guarantee: hence a person who signs a shipbuilding contract but fails to do so is not liable in damages, the only 'remedy' being his right to plead the lack of any effective contract at all.

33 An obvious example is *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900, a case which has passed into the canon of authorities on contractual construction. The issue there was whether a refund guarantee drafted with more haste than accuracy covered the case where the yard failed to repay instalments, not because of cancellation by the buyer, but because of its own insolvency and what were in essence Chapter 11 proceedings against it in its home state of Korea. An earlier instance, also ensconced in the contractual canon – this time on the nature of the right of cancellation for breach – was the payment guarantee case of *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 WLR 1129.

34 The difference will not be gone into here, save to say that where a document is issued by a bank in a solidly commercial context, and especially where it contains wording such as 'on first demand', the courts lean fairly strongly in favour of a demand guarantee: see *Caja de Ahorros del Mediterraneo v Gold Coast Ltd* [2001] EWCA Civ 1806; [2002] CLC 397 at [15]–[27] (Tuckey, LJ), itself a shipbuilding case concerning a refund guarantee. Other shipbuilding instances include *WS Tankship II BV v Kwangju Bank Ltd, Seoul*



Guarantee Insurance Co [2011] EWHC 3103 (Comm); *Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA* [2012] EWCA Civ 1629; [2014] 1 Lloyd's Rep 266; and *Sea-Cargo Skips A/S v State Bank of India* [2013] EWHC 177 (Comm). See generally on the point G Andrews & R Millett, *Law of Guarantees* 6th edn, (Sweet & Maxwell, 2012) Ch 16.

35 This was the point at issue in *Caja de Ahorros del Mediterraneo v Gold Coast Ltd* [2001] EWCA Civ 1806; [2002] CLC 397 and *Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA* [2012] EWCA Civ 1629; [2014] 1 Lloyd's Rep 266, above. The same point arose in *Rainy Sky SA v Kookmin Bank* [2009] EWHC 2624 (Comm); [2010] 1 All ER (Comm) 823, where a similar result was reached. This part of Simon J's judgment was not appealed when the case went to the Supreme Court at [2011] UKSC 50; [2011] 1 WLR 2900 on another point.

36 See cl. 7(b).

37 There is little doubt that some term in the nature of reasonableness falls to be implied here.

38 See cls V.6 (payment) and V.7 (refund). The forms are in Appendix A (refund) and B (payment). Certainty is not helped by the fact that cl. V.7 in its wording provides for a refund guarantee to be payable in the event of cancellation by the *builder*. No doubt this is a typo and should read 'buyer'.

39 The relevant phrase is in Paragraph 4: 'Should the buyer fails [sic] to punctually pay any installment or interest and such failure is last for fifteen (15) days, we will, upon receipt by us from you of the first written demand for the same, pay to you or to your order the amount of the second, third and fourth installments and relevant interest.' Despite the conditionality of the first part, the reference to a first written demand is probably sufficient here.

40 The phrase runs 'Should the seller fails [sic] to repay to you such any or all [sic] installments due as provided by the articles under the contract, and you suspend to terminate the contract [sic] due to the extension of the delivery date, we will make such payment to you without interest. In the event that the delivery date is delayed for [] days and you terminate the contract in accordance with the clause 3 of Article 8 or clause 1 (3), 2 (3), 3 (3), or 4 (3) of Article 3 of the contract, we shall pay to you the aforesaid amount of installments together with interest at the rate of [] percent (%) per annum, or [] percent (%) per annum in other circumstances. Within thirty (30) running days upon receipt by us from you of a repayment demand, we shall pay to you the sun [sic] as follows.' Whether the reference to a 30-day period for payment, or a subsequent provision in Paragraph 2 for delay of payment in the event of a dispute going to arbitration, is sufficient to turn this into a documentary demand guarantee is an open question.

41 See Appendices A(i) to (iii). By referring to the precise documentation to be provided (notably a demand and a copy of any demand served on the other party), it seems clear that the obligation here must be a purely documentary one.

42 Where, oddly enough, there seem to be few, if any, specialised forms; as a rule the ordinary forms are simply adapted in a belt-and-braces operation.

43 Without wishing to offend, it is obvious from a brief reading that (for instance) a great deal more meticulous effort went into drafting the Newbuildcon than the SAJ form.

44 This is true of contractual liability at common law (e.g. *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, at 848 (per Lord Diplock)). In fact, however, this is explicitly stated under every form (e.g. SAJ, cl. IX.1).

45 To some extent this may also be supported by the buyer: a wide discretion as to choice of subcontractors may reduce costs and accelerate delivery.

46 Which happens. Giveaway bespoke clauses on the following lines are not unknown: 'The construction of the hull and major sections are accepted by the buyer to be subcontracted in a low-cost country. The builder shall remain fully liable for the due performance of such work as if done by the builder at the builder's yard.'

47 Hence at common law a contractor cannot normally subcontract skilled work without the customer's agreement: see J Beatson, *Anson's Law of Contract* 29th edn, (OUP, 2010) at 448.

48 See cl. I.4 SAJ.

49 Newbuildcon, para. 19: 'The Builder shall employ the sub-contractors as set out in the Specification or Maker's List. Except for minor work, the Builder shall not employ other sub-contractors without the Buyer's approval, which shall not be unreasonably withheld.'

50 Norwegian form, cl. II.4.

51 See cl. X CMAC.

52 Especially as the terms of the guarantee, when coupled with the invariable exclusion of other liabilities, may leave substantial defects uncovered, as shown by *China Shipbuilding Corp v Nippon Yusen Kabukishi Kaisha* [2000] 1 Lloyd's Rep 367. They also often exclude other expenses such as downtime while defects are being put right. The effect of builders' guarantees is discussed below.

53 E.g. Newbuildcon, cl. 3; Norwegian form, cl. II.3.

54 The facts in the well-known tanker case of *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 are an obvious illustration. Faced with the certainty of ruinous losses due to the 1974 oil crisis, the Shelltime charterer of a new build tanker tried to throw up the deal merely because actual construction had been (as was entirely usual) subcontracted to another Japanese yard; hence the builder was not the one mentioned in the charter. He lost. A virtual carbon copy, also arising under a Shelltime form, was *Sanko Steamship Co Ltd v Kano Trading Ltd* [1978] 1 Lloyd's Rep 156.

55 In *Reardon Smith v Yngvar Hansen-Tangen*, above, the charterers were opportunistic and entirely undeserving. They were invoking a technical arrangement between yard and subcontractor, both equally reputable, which was completely standard (since the yard itself could not produce ships of the requisite size). It is not difficult to imagine situations where this would not be the case, and where a build discrepancy might allow cancellation: see below.

56 For instance, under SUPPLYTIME 2005, unlike the Shelltime charter in *Reardon Smith v Yngvar Hansen-Tangen*, many of the details of the vessel are expressly warranted by the owner to be correct: see para. 3(a) ('The Owners undertake that at the date of delivery under this Charter Party the Vessel shall be of the description and Class as specified in ANNEX "A", attached hereto . . .'). This clearly creates a potential liability in damages in the owner: and it seems not unlikely that, at least in some instances, it would justify rejection by the charterer as well.

57 See, e.g., a provision on the lines of 'the Builder may subcontract the fabrication of [components] to European Subcontractors who are certified by the Classification Society as meeting DNV MPQA standards'.

58 Indeed, this is explicitly required by one of the standard forms, namely the Norwegian: see cl. II.4.

59 See, e.g., Newbuildcon, cl. 3; Norwegian form, cl. II.3.

60 The Norwegian and Newbuildcon forms, however, provide directly for their presence at sea trials: see respectively cl. VII.3 and cl. 27(c).

61 One such representative is allowed under SAJ (SAJ, cl. IV.2): a reasonable number elsewhere.

62 SAJ, cl. V: 'The Specifications may be modified and/or changed by written agreement of the parties hereto, provided that such modifications and/or changes or an accumulation thereof will not, in the Builder's judgment, adversely affect the Builder's other commitments, and provided, further, that the Buyer shall first agree, before such modifications and/or changes are carried out, to alteration in the Contract Price, the Delivery Date and other terms and conditions of this Contract and Specification occasioned by or resulting from such modification and/or changes ...'. (See too CMAC, cl. XII.1, which is much the same, only longer). Even then one is left wondering why or how the parties' ability to vary a contract by mutual agreement could be excluded where inconvenient to one of them. To be fair, however, it might just be arguable that if (as is entirely possible) the governing law was that of a civil law jurisdiction there might be some sort of good faith obligation on the builder to consider the buyer's request.

63 AWES, cl. 3. The statement that any requirement lapses in the absence of quick express agreement in writing would seem to exclude any possibility of a reference of the matter to arbitration under the dispute resolution clause in cl. 15.

64 See cl. VI ('... provided further that the parties shall first agree to possible adjustment in contract price, ...').

65 Since otherwise the words would be idle. Compare *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 (obligation to pay reasonable price where means of ascertainment of price fail).

66 See cl. 24(a), (b) and (e).

67 For instance, a possible clause reads: 'This contract, the plans and the specification may be modified from time to time by agreement of the parties. The builder shall act in good faith and on an open book basis to implement modifications requested by the buyer, ... subject to the buyer agreeing to necessary modifications to the contract price, the delivery date and any other relevant provisions of this contract. The builder agrees to act in good faith and on an open book basis to implement any such modifications (i) at the lowest cost reasonably possible; (ii) within the shortest period of time reasonably possible; and (iii) without any loss in the relative priority of the building work for the ship compared to other construction work in the shipyard ...'.

68 If it is a civil law system there is less difficulty, since such systems almost invariably accept the possibility of an obligation to negotiate in good faith.

69 Because of suggestions by Lord Denning MR in *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297, at 301–302 and Lord Ackner in *Walford v Miles* [1992] 2 AC 128, at 138, and also the decision in *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2012] EWCA Civ 548; [2012] 2 All ER (Comm) 963. It is true that the matter is still in flux: see, e.g., *Petromec Inc v Petroleo Brasileiro SA Petrobras (No 3)* [2005] EWCA Civ 891; [2006] 1 Lloyd's Rep 121 at [115]–[121] (Longmore LJ) and *Butters v BBC Worldwide Ltd* [2009] EWHC 1954; [2009] BPIR 1315 at [151] (Peter Smith J). But, perhaps in contrast to an enthusiastic law professor, no sane buyer wants a clause incorporated that could encourage such arguments.

70 A matter of some significance; indeed, to an increasing extent, contracts actually contain terms requiring one or both parties to seek and promote possible cost savings.

71 See SAJ, cl. V.1; Norwegian form, cl. VI.1; Newbuildcon, cl. 25. Presumably if consent were unreasonably withheld there would be liability in damages represented by the lost opportunity to engage in any cost savings: cf. the recent charter case of *Falkonera Shipping Co v Arcadia Energy Pte Ltd* [2014] EWCA Civ 713; [2014] 2 Lloyd's Rep 406.

72 AWES form, cl. 3(b).



73 See cl. 25.

74 See cl. V.3. It is not said what happens if the parties fail to agree, or what the builder can do if faced by an intransigent buyer demanding (say) a reduction in price. In order to avoid the possibility of deadlock, any person using the SAJ form is well advised to replace this article with a properly drafted one, containing a provision for the buyer's consent not to be unreasonably withheld, for some form of arbitration in the event of irreconcilable disagreement, and for a formula for dealing with any extra costs (or savings).

75 See cl. XII.3. The same comment applies as above. Query whether this is one of the cases where the English courts would imply a ban on entirely arbitrary refusal. Compare Leggatt LJ in *Abu Dhabi National Tanker Co v Product Star Shipping Co Ltd* [1993] 1 Lloyd's Rep 397, at 404 ('where A and B contract with each other to confer a discretion on A, that does not render B subject to A's uninhibited whim ... [T]he authorities show that not only must the discretion be exercised honestly and in good faith but ... it must not be exercised arbitrarily, capriciously or unreasonably').

76 See cl. 3(b).

77 A result achieved by a combination of cls 25 and 42(b). Unlike the other forms, which put the risks of substitution on, and conversely allow any savings to enure to, the builder, Newbuildcon also gives the buyer credit for any costs saved as a result of such substitution.

78 Changes merely advisory are invariably treated as buyers' modifications. See e.g. SAJ, cl. V.2(b); Newbuildcon, cl. 26(c).

79 Newbuildcon, cl. 26(b). The AWES scheme is similar, save that it makes provision for a specific cut-off date to be stated in the contract (see arts 1(c) and 3(c)). This can be a useful provision where at the time of signing the contract it is known that changes will take effect in the near future, and the quoted price has already taken account of them.

80 It says in cl. XII.2(2) that in the absence of agreement on price adjustment, extension of delivery, increase or decrease of speed, deadweight or the need for additional security, the builder may ignore the rule changes and proceed as before. It then says in cl. XII.2(3) that in the absence of agreement on price adjustment or extension of delivery, the builder 'shall' proceed with such modifications as required by the rules with any consequential matters being referred to arbitration. Unless 'shall' is read as 'may', these clauses flatly contradict each other. With respect, the drafting here can be politely described as a dog's breakfast and, for anyone seeking to use this form, a completely new and comprehensible *ad hoc* provision is essential.

81 SAJ, cl. V(2)(a). Presumably it would be implied that any proposals must be reasonable.

82 The duty to proceed being simply expressed to be conditional on agreement. A proper bespoke clause dealing with failure to reach that agreement is vital here.

83 Note, however, the Norwegian form, which under cl. VI.2 excludes from any adjustment of the contract terms changes publicised but not effectual at the time of contracting, on the basis that the builder ought already to have taken account of these in setting the price. It does not really matter which solution is adopted, provided those negotiating shipbuilding contracts are clear over the prospective rule changes which they do or do not want to be in account at the time of contracting.

84 Two of the more modern forms (Newbuildcon and the Norwegian form) go further and say, rightly, that where the buyer is clearly insolvent the seller need not wait for non-payment but can cancel straight away: see Newbuildcon, cl. 39(d) and Norwegian form, cl. 12.3. With the other forms, this obvious piece of boilerplate has to be affixed by hand.

85 True, if the guarantee is a demand guarantee and there is a genuine dispute it will not invalidate a good faith demand: see e.g. *Turkiye Is Bankari v Bank of China* [1998] 1 Lloyd's Rep 250 and the recent decision in *Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA* [2012] EWCA Civ 1629; [2014] 1 Lloyd's Rep 266 (the latter involving the exact scenario in the text). But even there it still strengthens the buyer's hand considerably in negotiations to be able to put the beneficiary (or the beneficiary's financier) on clear notice of a valid termination.

86 It is true that if the demand is indeed unjustified the buyer may in the fullness of time have a claim on the builder's refund guarantee to repay him the amount reimbursed to his bank. But no sane businessman wishes to be without many millions of dollars for months or years on end, however cast-iron any assurance that he will get them back eventually.

87 Since, however much the buyer may be in good faith, a cancellation without the right to do so is a repudiation; invariably refund guarantees apply only where the buyer *rightfully* cancels under the terms of the contract. Nor, for that matter, is it likely that the buyer can recover from the builder direct: cf *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 WLR 1129.

88 Such a rule formed a clear assumption lying behind *Wuhan Ocean Economic & Technical Cooperation Co Ltd v Schiffahrts-Gesellschaft Hansa Murcia mbH & Co KG* [2012] EWHC 3104 (Comm); [2013] 1 Lloyd's Rep 273 (though in that case there was held to be no repudiatory breach).

89 For example, 210 days under the SAJ form (cl. III); 180 days under the Norwegian form (cl. IV.1(b)). On the operation of such clauses, where contractual provision is made for arbitration of a claim to terminate, see *Nanjing Tianshun Shipbuilding Co Ltd v Orchard Tankers Pte Ltd* [2011] EWHC 164 (Comm); [2011] 2 All ER 789.

90 See, e.g. SAJ, cl. III.1(e); Norwegian form, cl. VIII.1.

91 See cl. IV.1(c).

92 Newbuildcon, cl. 39(a)(iii); CMAC, cl. XXVII.3.

93 In particular, he will want to avoid the risk that by cancelling the contract he will himself be regarded as being in repudiatory breach, thus imperilling his right to a refund. There are other reasons too: for example, the buyer may have an entirely understandable wish not to have to maintain a payment guarantee in force for a vessel he is highly unlikely to get.

94 Implicit in *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm); [2014] 1 Lloyd's Rep 255 (where, however, the contract had been affirmed after the renunciation). That repudiation remains as an independent ground for cancellation in a shipbuilding contract was confirmed in *Wuhan Ocean Economic & Technical Cooperation Co Ltd v Schiffahrts-Gesellschaft Hansa Murcia mbH & Co KG* [2012] EWHC 3104 (Comm); [2013] 1 Lloyd's Rep 273.

95 *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401, at 441 (Devlin J); *Shepherd (FC) & Co Ltd v Jerrom* [1987] QB 301, at 323 (Mustill LJ); see too *Geden Operations Ltd v Dry Bulk Handy Holdings Inc* [2014] EWHC 885 (Comm); [2014] 2 Lloyd's Rep 66. Sometimes apparent incapacity coupled with silence or prevarication may be taken as renunciation of any intent to perform (see, e.g. the recent charter case of *SK Shipping (S) Pte Ltd v Petroexport Ltd* [2009] EWHC 2974 (Comm); [2010] 2 Lloyd's Rep 158).

96 So held in *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401. See too *The Madeleine* [1967] 2 Lloyd's Rep 224, and *The Mihalis Angelos* [1971] 1 QB 164, at 200–201, 207–208 (Edmund Davies and Megaw LJ).

97 See cl. III.3.

98 Newbuildcon, cl. 39(a)(ii). The periods themselves are for negotiation: boxes are supplied to fill them in. The equivalent in CMAC is cl. XXVII.1(2).

99 Newbuildcon, cl. 39(d). The equivalent in CMAC is cl. XXVII.4.

100 Nor should the buyer's bargaining position be ignored in this respect. Where negotiations over previous contractual problems are ongoing, a yard's mind may be concentrated wonderfully by the prospect of having a completed but undelivered vessel on its hands taking up room, obstructing further work, and tying up cash-flow.

101 See, e.g., SAJ form, cl. III; Norwegian form, cl. IV.

102 For example, it may extend to volumetric capacity (cubic or bale, as the case may be), as in the Norwegian form, cl. IV.5 or AWES, cl. 5(c). The Newbuildcon form encourages this further, not only dealing with capacity in cl.11 but suggestively leaving a space blank for other matters to be similarly dealt with; see cl.12. Obvious candidates would be TEU container capacity, or vehicle numbers on a ro-ro ferry (on the latter of which, cf *Cenargo Ltd v Empresa Nacional Bazán* [2002] EWCA Civ 524; [2002] CLC 1151).

103 By way of background explanation, the universal scheme of all shipbuilding contracts is that delivery is due on a particular date, but that at some time before that date sea-trials are to be carried out. At a given (short) period after these sea-trials, the buyer must indicate whether or not he will accept delivery of the vessel. Delivery itself is a formal act consisting of the handover of the ship and a sheaf of papers.

104 See the unqualified words of SAJ, cl. VI.4: '... should the results of the trial run indicate that the Vessel, or any part or equipment thereof, does not conform to the requirements of this Contract or the Specifications, ... then the Builder shall take necessary steps to correct such non-conformity...' CMAC, cl. XIII.4, is almost word-for-word the same.

105 See cl. 4(d).

106 A period that varies from newbuild to newbuild, but is typically set at one year from delivery.

107 True, in practice, this might be unlikely, and one suspects that class might often be open to negotiation. But the potential for uncompensated trouble and disruption to the buyer remains highly noticeable.

108 Norwegian form, cl. VII.4(d)(ii); Newbuildcon, cl. 27(d)(iv)(2).

109 Newbuildcon, cl. 27(d)(iv)(3).

110 Newbuildcon, cl. 27(d)(iv).

111 More precisely, repairs are either done at the original yard, or arranged by the buyer elsewhere in consultation with the builder. E.g. SAJ, cl. IX.1–3; Newbuildcon, cl. 35.

112 E.g. SAJ, cl. IX.4 ('The Builder shall have no responsibility or liability for any other defect whatsoever in the Vessel than the Defects specified in Paragraph 1 of this Article. Nor the Builder shall [sic] in any circumstance be responsible or liable for any consequential or special losses, damage or expenses including, but not limited to, loss of time, loss of profit or earning or demurrage directly or indirectly occasioned to the Buyer by reason of the Defects specified in Paragraph 1 of this Article or due to repairs or other works done to the Vessel to remedy such Defects'); and Norwegian form, cl. X.1 ('... the Builder shall have no responsibility for defects or the consequences thereof (including loss of profit and loss of time) discovered after Delivery and Acceptance of the Vessel'). See, too, Newbuildcon, cl. 37(b), (d).

Consistent with their reputation for upholding freedom of contract, the English courts are apt to take such broad exclusions entirely seriously: see, e.g., *China Shipbuilding Corp v Nippon Yusen Kabukishi Kaisha* [2000] 1 Lloyd's Rep 367 (in substance concerning the SAJ clause above, holding that it exonerated the yard even



for breaches of express terms of the contract).

113 CMAC, cl. XIX.4.

114 Newbuildcon, cl. 35(b).

115 Norwegian form, cl. X.3.

116 SAJ, cl. 12(a); CMAC, cl. XIX.3; Newbuildcon, cl. 35(d)(i).

117 AWES, cl.12(a) (reimbursement 'shall not exceed the estimated costs of carrying out the guarantee work at the CONTRACTOR'S yard(s)'); Norwegian form, cl. X.3(b).

118 A point finally established by *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 AC 85. Within the EU this will, it seems, go further and preclude any other law being applied that might otherwise recognise the assignment: Rome I Regulation, Article 14.2.

119 SAJ, cl. XIV. For good measure, there is also an entirely obsolete requirement of government consent for any assignment by the buyer, which any competent negotiator will immediately demand struck.

120 Norwegian form, cl. XIII; AWES, Article 18.

121 See Newbuildcon, cl. 45; CMAC, cl. XXIV. Such other assignments normally concern cases where the buyer decides he does not want personally to take delivery but to re-sell, or with matters such as corporate re-organisation. The yard may justifiably want to retain some control over who it is dealing with here.

122 Indeed, where the assignment is of a right to payment, no more and no less, some legal systems simply override any contractual restrictions on assignment for precisely this reason. See, e.g. the German Commercial Code (HGB), § 354a, following the precedent of the UCC, § 9-408 (less relevant in these circumstances).

123 On the basis that the validity of the creation of any proprietary interest in a chattel depends on the *lex rei sitae*: L. Collins *et al*, *Dicey & Morris on the Conflict of Laws* 14th edn, (Sweet & Maxwell, 2008) ch. 24. How far a mortgagee can hold a mortgage known to have been given in breach of contract will no doubt vary between legal systems.

124 CMAC, cl. XXV.2; Norwegian form, cl. XI.

125 AWES, cl. 8(b).

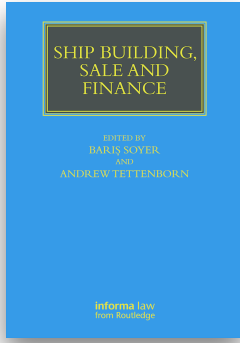


CHAPTER

2

The Evolving Nature of Builders' Risks Cover

Chapter 2. The Evolving Nature of Builders' Risks Cover



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6.1 Introduction

Builders' risks cover forms a significant part of the contractual matrix in any construction project. It is often a requirement of any shipbuilding contract, standard or otherwise, that such cover is put in place by the time the construction commences.¹

Although it is customarily the shipyard which is the purchaser of this insurance product, the primary role of builders' risks cover is to provide financial security so that the project could continue in the event of a casualty occurring during the process of construction. Under English law, a shipbuilding contract is viewed as a contract for the sale of goods and, unless it is otherwise provided in the contract itself, the risk of loss of or damage to the ship during construction and until delivery to the buyer is borne by the builder.² The existence of a builders' risks cover provides peace of mind to the buyer who will operate in the knowledge that in the event of an unexpected casualty, the builder will secure adequate funds to repair the damage and keep the building contract on track.³ It is not uncommon to see the buyer being named as an assured in addition to the shipyard in builders' risks policies.⁴ This happens usually for two reasons: either to protect the buyer's interest in an instance where the building contract stipulates that ownership of the newly built ship passes progressively to the buyer as the buyer pays instalments of the price, or to provide a security to the buyer for the advances made during the construction period.⁵ In both instances, there would be no difficulty for the buyer to demonstrate that he has insurable interest: in the former instance because he owns property which is at risk⁶ and in the latter instance because he has paid one or more instalments of the contractual price.⁷


Turning to contemporary practice, it is very common to see standard shipbuilding contracts stipulating that the insurance must be effected on the Institute Clauses for Builders' Risks (ICBR) (1/6/88).⁸ The origins of the ICBR 1988 can be traced to a form developed in 1963 and still in frequent use in the London insurance market and beyond.⁹ The ICBR 1988 is in many respects similar to the standard forms used to insure hull risks against marine losses, with the exception that insurance provided under the ICBR 1988 is on an 'all-risks' basis.¹⁰ The following perils have been excluded from the scope of the cover provided by the ICBR 1988: war risks (including terrorist or other politically motivated activities),¹¹ strikes,¹² malicious acts,¹³ nuclear risks,¹⁴ earthquake and volcanic eruption,¹⁵ cost of renewing faulty welds¹⁶ and any liability



upon the builder by way of workmen's compensation as a result of accident or illness (which extends to any contractual obligation to indemnify the buyer in respect of liabilities to his own employees).¹⁷

In 2007, following an extensive review carried out by the Joint Hull Committee, the International Underwriting Association of London published the London Marine Construction All Risks Wording (Mar CAR) (01/09/07) which was intended to revise the ICBR 1988. A number of factors motivated the market forces to undertake this review. The insurers offering builders' risks cover suffered significant losses between October 2002 and January 2004. Some of these losses were caused by hurricanes on the Gulf Coast and were significant in volume.¹⁸ Another motivating factor was the desire to clarify some of the historical ambiguities that were inherent in the ICBR 1988 with the intention of achieving a higher degree of contract certainty. Lastly, the general view in the market was that the ICBR 1988 is not appropriate for the insurance of complex modern constructions, such as high-value cruise vessels and LNG carriers; it was felt that there was a desperate need for a new form that would provide a more flexible and user-friendly approach to construction insurance in a maritime context.¹⁹

The Mar CAR 2007 is a more comprehensive form than the ICBR 1988. It contains five parts: Part I provides cover on an 'all risks' basis for hull and machinery, collision, liability, war and strikes risks, terrorism, political activity and malicious acts;²⁰ Part II lists exclusions from cover; Part III deals with issues concerning claims; Part IV provides general provisions and definitions; and Part V includes provisions for a number of 'optional buy-back' extensions of coverage for which an additional premium is payable. The Mar CAR 2007 is drafted in the form of a policy wording rather than a set of clauses; the intention is that it can be used as a template which can then be tailored to an individual client's specific needs if required. This provides the flexibility needed to offer cover for complex modern constructions. The Mar CAR 2007 also includes a special provision²¹ which can be used to provide cover for related construction activities such as conversion and repair. More fundamentally, a number of provisions that appeared in the ICBR 1988 have been modified to achieve more contractual certainty.²² The Mar CAR 2007 has certainly gained a reasonable degree of industry support but it appears that the ICBR 1988 is still widely used by the insurance market.²³ It is the view of the author that, from a legal perspective, Mar CAR 2007 offers a more precise indemnity package for the assured; but at the same time several key concepts and definitions remain unclear, and some of the recently introduced provisions could potentially fuel litigation. To this end, in the next part amendments made to the policy wording of the ICBR 1988, which were perceived to have shortcomings, will be analysed. This analysis is significant not only in demonstrating the improvements made by the Mar CAR 2007 form but also raising awareness, amongst those who continue using the ICBR 1988 form as the basis of their builders'



risks cover, as to the amendments in the form that they need to negotiate in the contracting process with their underwriters to ensure that their interests are fully protected. In the final part of the chapter, potentially problematic aspects of the Mar CAR 2007 will be discussed in the light of legal authorities and similar provisions that appear in other standard insurance contracts. The author's view is that, despite the improvements achieved by the introduction of the Mar CAR 2007, there remain some significant legal difficulties that would benefit from further clarification.

6.2 Changes introduced by the Mar CAR 2007 – problematic aspects of the ICBR 1988


6.2.1 Position of contractors/subcontractors

Shipbuilding is a rather complex project involving the assembly of materials obtained from a variety of suppliers. Even if a contemporary shipyard possesses all the requisite technical know-how and manpower to put increasingly complex structures in place, it is inevitable that it will need to utilise a number of contractors and subcontractors which would be responsible for supplying and assembling different parts of a new ship under construction.²⁴ The standard contracts that shipbuilders enter into with their contractors and subcontractors would invariably require the builder to extend the insurance cover obtained for the construction process for their benefit. To achieve this goal, contractors and subcontractors need to be included in the builder's insurance policy as co-assureds, but the ICBR 1988 is surprisingly silent on this matter. To fill this gap, in practice, brokers often add a generic phrase stressing that the policy is extended to 'contractors, subcontractors and affiliates' of the builder. The use of such a standard phrase could potentially give rise to two major legal difficulties.

First, it becomes a matter of construction whether a particular contractor or subcontractor would come under the definition of the assured in each case. If the view adopted by the court is to the effect that the definition cannot be extended to a particular contractor or subcontractor, in case of that contractor or subcontractor acting negligently this will enable the insurer to exercise rights of subrogation to bring an action in the name of the assured builder against that party in respect of loss or damage to property for which the builder is insured.²⁵ This was the position adopted by the court in *Hopewell Project Management Ltd and Hopewell Energy (Philippines) Corp v Embank Preece Ltd*.²⁶ There, a firm that was engaged by a project developer involved in the construction of a power station to provide engineering consultancy contended that it was covered by a clause in the CAR policy which defined the assured as, *inter alia*, 'all contractors and subcontractors' and should accordingly be treated as a co-assured.

Mr Recorder Jackson QC reached the decision that this phrase was limited to those






contractors and subcontractors carrying out 'physical works of construction' and accordingly did not cover a firm providing only professional (i.e. consultancy) services. In similar fashion, the Court of Appeal of British Columbia in *Canadian Pacific Ltd v Base-fort Security Services (BC) Ltd*²⁷ reached the conclusion that a firm responsible for security on a construction site did not come under the definition of 'General Contractors and/or Contractors and/or Sub-Contractors' in the CAR policy. Hollinrake J viewed only 'those persons whose contributions are an integral and necessary part of the construction process itself' as coming within the definition of 'Insured' in the policy. Others, such as security companies, whose contributions are collateral to the construction process in the view of Hollinrake J would fall short of the definition.²⁸

The second difficulty relates to whether contractors and subcontractors, assuming that they are included in the definition of the assured in the policy, would have an insurable interest to enable them to insure the entire works and recover the whole of the loss insured despite having only limited proprietary and possessory rights in the works. If that holds true, then the contractor or subcontractor can recover the whole of the insured sum in case of a total loss (obviously holding the excess over his own interest on trust for the others). Lloyd J was adamant in *Petrofina (UK) Ltd v Magnaload Ltd*²⁹ that this represented the legal position. There, during the process of extension works to an oil refinery, a gantry came loose and fell to the ground, damaging the works. The insurer, having indemnified the assured (main contractor), brought a subrogated action against the subcontractors who were responsible for the heavy lifting system which had collapsed. The subcontractors argued that they were the co-assureds, as they were insured for loss or damage to the entirety of works, not just their own. The subcontractors' defence was upheld. In reaching this decision, Lloyd J relied on the well-established rule that a bailee could insure for the full value of the goods even though their interest in the goods was limited.³⁰ He was heavily influenced by a Canadian authority in which it was held on a similar set of facts that the subcontractors had a 'pervasive interest' in the contract works on the basis that they had 'such a relationship with the entire works that their potential liability therefore constituted an insurable interest in the whole'.³¹

It is debatable, to say the least, whether a parallel can be drawn between the position of a bailee and a subcontractor in the manner Lloyd J has done, given that a bailee has a contractual and legal right over the goods left in his care, whilst working on the works does not, on its own, create similar rights for a contractor over the goods belonging to others. However, the reasoning adopted by the Supreme Court of Canada in *Commonwealth Construction* has an instinctive appeal and seems to have found further support amongst other British judges. Most notably, Colman J in *National Oilwell (UK) Ltd v Davy Offshore Ltd*³² was prepared to hold that a subcontractor should be able to insure against loss of or damage to property involved in a common project not



owned by him and not in his possession, either as a result of potential liability arising from the existence of a contract between the assured and the owner of property or from the assured's proximate physical relationship to the property in question.³³

The Court of Appeal's judgment in *Deepak Fertilisers & Petrochemicals Corporation v Davy McKie (London) Ltd and ICI Chemicals and Polymers Ltd*,³⁴ however, has cast some doubt on the correctness of the stance taken by several first instance judges on the matter. The defendant contractor was responsible for designing and supervising the construction of a power plant in India which exploded with tragic consequences after it began operating. An action was brought in the name of the employees against the contractor for negligence. It was argued that the defendant contractor was a co-assured and, accordingly, an action brought in the name of the employers was excluded. The Court of Appeal had no difficulty in finding that the defendant contractor enjoyed an insurable interest in the property, although he had no proprietary interest in it, up to the point of completion and commissioning because he had an expectation of remuneration in respect of the contract works, which was dependent on the continued existence of the property. However, in overruling the decision of the first instance judge on this point, it was held that the defendant contractor would have no insurable interest after the works were completed by reason of his potential liability for them after completion and commissioning, as the effect of this would be to convert the policy from a property policy to a liability policy.³⁵ This seems at odds particularly with the reasoning adopted by Colman J in *National Oilwell*, who deemed it adequate to establish insurable interest that the contractor has a potential liability stemming from an existing contract with his principal. Although the issue did not arise for decision, in *Feasey v Sun Life Assurance Co of Canada*,³⁶ the majority of a differently constituted Court of Appeal expressed the view that there is no reason why potential liability for damage to property should not create an insurable interest in the property as long as the assured was in a legal relationship to the property (i.e. a contractor or subcontractor undertaking part of the construction) and the relevant liability fell within the subject of insurance.³⁷ It is the view of the author that in the light of the fact that courts have demonstrated a tendency in the last few decades of taking a more liberal stance on the issue of insurable interest, the majority judgment in *Feasley* correctly represents the current state of law, but it is also undisputable that the law on this point is far from settled.³⁸

Turning to the Mar CAR 2007, it is pleasing to see that provisions have been added to offer a solution for both of these legal problems. Clause 56.2 provides a definition of people who will be treated as 'additional assured' for the purposes of the policy. Accordingly, a contractor or subcontractor to whom benefit of this policy has been provided for in their written contract with the assured or contractor, respectively, will be treated as an additional assured (in effect a co-assured).

Therefore, contractors or subcontractors, regardless of the nature of the function they serve in the construction, will benefit from this policy as long as they have a written contract with the assured or contractor and the benefit of this policy is extended to them in that contract. This would provide a solution to the legal problems that manifested themselves in the case of *Hopewell Project Management Ltd and Hopewell Energy (Philippines) Corp v Embank Preece Ltd*. Similarly, difficulties surrounding insurable interest would not arise under the Mar CAR 2007 as clause 42.1 stipulates that 'additional assureds shall be insured under this insurance to the extent of their respective rights and interest in the Subject Matter Insured, but in no case shall any Additional Assured be insured under this insurance to any greater extent than provided for in their written contract with the Assured'. This provision is supplemented by clause 42.3 which prevents additional assureds from exercising their rights themselves. The assured is authorised to make claims on their behalf under the policy, thus averting the possibility that the additional assured would recover the full insured sum under the policy in case of a total loss.

6.2.2 Matters concerning coverage

6.2.2.1 Damage or loss caused by latent defect

Clause 5 of the ICBR 1988 stipulates that cover is available for loss or damage to the subject-matter insured 'caused or discovered during the period of this insurance including the cost of repairing, replacing or renewing any defective part condemned solely in consequence of the discovery therein during the period of this insurance of a latent defect'. This provision might give the impression that any loss or damage of a defective part is covered even if this is simply a case of discovering a latent defect on that part. However, in the context of hull policies since the decision of the Court of Appeal in *Promet Engineering (Singapore) Pte Ltd v Sturge (The Nukila)*³⁹ it is clear that a distinction should be made between a previous latent defect on a part simply becoming patent and the latent defect operating upon the insured property so as to occasion damage to it.⁴⁰ Loss or damage of the former type is not covered under a standard hull policy, whilst if a latent defect in a part progresses to cause damage on that part or any other part, that damage will be covered by the policy.⁴¹

It would be logical to follow the stance adopted in hull policies in the context of builders' risks policies as well, but due to the manner in which clause 5 is worded, it is not clear under the ICBR 1988 whether cover is provided against simple discovery of a latent defect without that effect causing loss or damage. Clause 3 of the Mar CAR clarifies the position by stating that the cover is extended to the 'cost of Repairing physical loss or physical damage caused by latent defect and discovered during the




period of insurance'. This means that the basic cover provided under the Mar CAR 2007 will not extend to the cost of rectifying the latent defect or the latently defective part,⁴² which is in line with the position adopted by standard hull policies.

6.2.2.2 Cover for losses caused by tsunami

Clause 6 of the ICBR 1988 excludes from the scope of cover loss or damage caused by 'earthquake or volcanic eruption'. This brings to mind a significant question as to whether the assured could recover for losses caused by tsunami if his cover is based on the ICBR 1988. A tsunami is usually caused by earthquakes, volcanic eruptions, other underwater explosions, landslides, glacier calvings, meteorite impacts and other disturbances above or below water. Accordingly, an insurer could plausibly argue that the proximate cause⁴³ of loss in a case when the insured vessel is lost or damaged as a result of tsunami, is, in fact, 'earthquake' or 'volcanic eruption' either of which is an excepted peril. On the other hand, there is a considerable body of case law as to which occurrences qualify as 'perils of the seas',⁴⁴ and the use of the word 'peril' denotes that something fortuitous or accidental is envisaged.⁴⁵ Recently, it has been stressed by the Supreme Court in *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The Cendor Mopu)*⁴⁶ that there is no threshold in identifying what will amount to a fortuity. The question in each case is whether sea and weather conditions were such as to have caused a fortuitous accident or casualty.⁴⁷ This might lend support to the submission that as long as the loss is not attributable to internal failure or deficiencies,⁴⁸ any external fortuitous event, including unexpected movement of the sea and waves however caused, could qualify as a peril of the sea. If taken to its natural conclusion, the assured could argue that the proximate cause of loss or damage caused by tsunami is 'perils of the seas' and, therefore, covered by the ICBR 1988. No such difficulty would arise under the Mar CAR 2007 as the 'earthquake and volcanic eruption' exclusion has been removed, meaning that in those instances the assured would obviously be able to make a claim under the policy.

6.2.2.3 Constructive total loss

The relevant provision of the ICBR 1988, which deals with constructive total loss, is modelled on the corresponding provision in standard hull clauses. Therefore, in ascertaining whether the subject matter insured is a constructive total loss, the insured value is taken into consideration and the assured could claim constructive total loss only in instances where the cost of recovery and/or repair would exceed the insured value under the policy.⁴⁹ This makes perfect sense in the context of hull insurance where the value of the subject matter of insurance normally remains unchanged



throughout the policy period (subject to market fluctuations and reasonable depreciation, of course). However, ship construction is a progressive venture and it is very unlikely that the cost of recovery and/or repair would exceed the insured value unless the loss occurs very late in the project. This, therefore, limits the prospect of claiming constructive total loss under the builders' risk policy although, in reality, the parties may wish to abandon a construction project at an early stage in the event of significant damage or loss.

The Mar CAR 2007 incorporates a new provision⁵⁰ allowing the assured to seek abandonment of the works if the cost of repairing the damage to the ship under construction does not exceed the sum insured, but does exceed the 'works value'.⁵¹

This provision, in effect, creates an additional contractual constructive total loss regime allowing the assured to abandon the project part of the way through the construction work. Needless to say, in such instance the assured could not claim the whole of the insured value as indemnity, but only the works value plus the profit percentage thereon at the time of loss. Given that most standard shipbuilding contracts enable the parties to bring the construction project to an end in cases where a significant loss or damage occurs, this new provision brings builders' risk insurance in line with commercial practice and assists the shipyards by giving them the assurance that they will be able to recover for their losses if they choose to bring the shipbuilding contract to an end for economical or physical reasons.

6.2.2.4 Notice provision

Most indemnity policies would contain a provision requiring the assured to give notice to the underwriters in case of an event or loss or damage occurring that might give rise to a claim. The ICBR 1988 is not an exception in that regard and clause 14 stipulates that in the event of loss, damage liability or expense which may result in a claim the assured shall give 'prompt notice to the underwriters prior to repair'. If the subject matter is under construction abroad, notice should be given 'to the nearest Lloyd's Agent so that a surveyor may be appointed to represent the underwriters should they so desire'.

This provision leaves a lot to be desired in terms of clarity. For example, it will be a question of fact in each case whether prompt notice has been given or not. The word 'prompt' presumably implies 'vigorous action, without any delay'⁵² but surrounding circumstances concerning a casualty or event (e.g. the precise location, availability of witnesses, legal or physical restrictions) will be expected to play a key role in each instance in determining whether the notice was given promptly or not. More significantly, the provision fails to identify the consequence of breach. The insurer could

attempt to argue that the provision is a 'condition precedent' which discharges himself from liability in relation to that claim in case of non-compliance.

The only factor that goes in favour of the insurer minded of contending that the notice obligation has this kind of legal effect is the fact that it has been qualified by the use of the word 'shall'. On the other hand, there is nothing in the clause suggesting that the assured would be deprived of the claim if the notice requirement is not fulfilled. Therefore, one should not be surprised if the judge decides to construe the clause against the interests of the insurer (i.e. *contra proferentem*). A provision of this nature that relates to the claims stage and sets out a procedure that needs to be followed by the assured in case of an event arising that could give rise to a claim, without specifying the consequences in case of its breach, could have been treated as a severable innominate term, following the reasoning of Waller LJ in *Alfred McAlpine plc v BAI (Run-Off) Ltd*,⁵³ thus allowing the insurer to reject the claim in question if it is seriously breached but leaving the contract in place. However, it is doubtful whether the analysis of Waller LJ survives the judgment of the Court of Appeal in *Friends Provident Life & Pensions Ltd v Sirius International Insurance*.⁵⁴ If it does not, this provision is likely to be treated as a mere condition that results in damages only,⁵⁵ but it is fair to say that this is far from certain.

Fortunately, the new notice provision that appears in the Mar CAR 2007 is much clearer both in terms of the time that the assured is allowed to comply with its requirements and also the legal consequence of its breach. Clause 26 of the Mar CAR requires the assured or his project management to give notice to the underwriters as soon as possible and certainly within 180 days of becoming aware of loss or damage, loss that may result in a claim and in case of physical loss or damage to the subject matter insured prior to the commencement of any repair work. It has been set out expressly in clauses 26.2 and 26.3 that in case of breach of these obligations, no claim shall be recoverable under the policy for such loss, damage or liability or expense, unless the underwriters agree to the contrary in writing.

6.3 Problematic aspects of the Mar CAR 2007

6.3.1 Meaning of physical loss and damage

The coverage provided by the Mar CAR 2007 is against all risks of 'physical loss of or physical damage'.⁵⁶ This represents a deviation from the position adopted by the ICBR 1988 which provides indemnity for 'loss of or damage'.⁵⁷ The use of the word 'physical' before 'loss' and 'damage' is a positive development which clearly indicates that the policy's coverage could not be extended to include defects and non-physical losses such as economic losses. Despite the fact that there is consensus amongst the judges




that 'physical loss or damage' requires 'some altered state',⁵⁸ there still remains difficulty in identifying the degree to which the insured works have to be materially altered to constitute 'physical loss or damage'. It is, for example, debatable whether temporary damage would qualify as 'physical damage' for the purposes of a policy of this nature.

In the context of tort law, the view taken by courts is that the adverse change in the physical condition does not need to be permanent to constitute damage. In *Losinjaska Plovidba v Transco Overseas Ltd (The Orjula)*⁵⁹ drums of hydrochloric acid and sodium hypochlorite shipped in two containers were carried on board a vessel from Felixstowe to Benghazi in Libya. The vessel was expected to make a call to Rotterdam *en route* to load further cargo. On approaching Rotterdam, it was noted that one of the containers containing the acid was leaking. The vessel was ordered to a tank-cleaning berth where the containers were removed and the vessel's contaminated deck and hatch covers were decontaminated by using soda and fresh water. It transpired, following inspection, that the drums of chemicals had not been properly stowed within the containers. The bareboat charterer of the vessel raised claims in contract and/or tort of negligence against the shipper of the cargo, the supplier, freight forwarder and road haulier in the UK. On behalf of the defendants, it was contended that there could be no duty of care in relation to the contamination of the vessel as the incident did not amount to physical damage but only left a layer of hydrochloric acid over the part of the deck and hatch covers. Mance J (as he then was), gaining some assistance from a number of criminal cases,⁶⁰ found in favour of the bareboat charterers and he said:

Here, specialist contractors were engaged in undertaking the decontamination work using soda to neutralise the acid before washing the deck and hatch covers down with fresh water; further, it is pleaded, not perhaps surprisingly, that the vessel was required to be decontaminated of the hydrochloric acid before she could sail from the special berth to which she had been directed after discovery of the leakage. On these alleged facts, I would have no hesitation in concluding that the vessel should be regarded as having suffered damage by reason of her contamination.


A similar outcome emerged in *British Celanese Ltd v A H Hunt (Capacitors) Ltd*,⁶¹ which involved a claim arising from a power interruption that resulted in some machinery becoming clogged with solidified material that had to be cleaned out before that machinery could be used again. It was the contention of the defendant that the fact that the machinery had to be cleaned did not evidence that the clogging of the machinery constituted an injury to property. Lawton J disagreed and found that the clogging did constitute physical injury.⁶² It is submitted that a parallel can be drawn between these authorities and insurance contracts on shipbuilding risks. It is immaterial whether the condition of the property can be restored to its original status



by repair or by replacing the defective part or simply by cleaning it. The key consideration must be whether the functionality of the relevant property is adversely affected or not and the need for work and the expenditure of money has arisen to restore the property to its former usable condition. If both of these conditions are satisfied, there should be 'loss or damage' within the meaning of the policy even if this is temporary in nature.

It is arguable that a similar outcome should follow in a case where the paint or coating applied by a shipyard is excessive. The issue was raised in the *State of Netherlands v Youell*⁶³ where the shipyard, during the process of constructing submarines for the Dutch Navy, failed to prevent excessive thickness in the primer coating although the Navy had drawn this point to the attention of the shipyard. The yard refused to carry out repairs without prior payment by the Navy. Once the payment was made to the yard, the Navy sought indemnity from the underwriters. Originally the underwriters attempted to argue that the policy in question was a joint policy, meaning that the failings of the yard could prejudice cover in favour of the Navy, but this was rejected. An alternative argument to the effect that the yard was the Navy's agent for the purposes of the statutory duty to sue and labour also did not receive the support of the court. The dispute between the parties was settled following the decision of the Court of Appeal,⁶⁴ so the need to determine whether the de-bonding of excessive paint could amount to 'damage' did not arise. However, in the light of the authorities discussed above, it is submitted that as long as it can be shown that application of excessive painting has an impact on reducing the functionality of the vessel in construction, that should be adequate to qualify the cost of de-bonding and repainting as 'physical loss or damage'.⁶⁵


At this juncture, one should make reference to a related matter that could give rise to difficulties under the Mar CAR 2007. It is clear that the insurance does not cover the cost of replacing, repairing, or rectifying of a latent defect or defect in material, design or workmanship.⁶⁶ Therefore, if painting of a vessel reveals that her frame has been defectively cast so as to cause shrinkage cracks requiring its replacement, there is no 'damage' within the scope of the policy, so the cost of replacing the frame is not recoverable.⁶⁷ The interesting question in this context is whether the cost of repainting the frame (and the vessel) after the defective frame is replaced would be recoverable under the policy. Put differently, is this a case of a latent defect or defective workmanship causing physical loss or damage that is covered by the policy? The problem here is that the painting itself is not faulty but it is an ancillary component that needs to be replaced when the faulty component is rectified. Although the Mar CAR 2007 is silent on this point, it is submitted that this should be treated as 'physical loss' caused by a defective part given that replacement of a defective part renders the original painting wasted and necessitates the application of a new coat of paint.



Therefore, it is the view of the author that, in this instance, the cost of repainting the new frame should be recoverable under the policy, although the cost of replacing the defective part itself is not covered.

An even more intriguing question is whether there is 'physical loss or damage' if materials suffer from a degree of stress (fatigue) but they can still be used for the purpose for which they are intended. There is authority pointing to the direction that if the stress that the materials suffer causes a reduction in their life expectancy, this amounts to physical damage. *Ranicar v Frigmobile Pty Ltd*⁶⁸ concerned a claim in respect of a consignment of shellfish that were found upon delivery to be at a temperature higher than contracted. Expert evidence indicated that this did not cause any apparent damage to the shellfish but had, in fact, shortened their life expectancy.

On that basis, it was held that the insured property suffered a 'loss or damage' within the meaning of the Institute Cargo Clauses (All Risks). It is submitted that a similar reasoning can be applied here, and if the life expectancy of materials used in construction are shortened due to their having suffered from stress (or fatigue), this should qualify as a 'physical loss or damage'. Logically, a similar conclusion should be reached in a case where stress leads to a diminution in the value of the materials used. A more difficult question is whether we can talk about 'damage or loss' to materials in a case where they undergo a molecular change although they show no clear evidence of any impairment. A molecular change is likely to have an impact on the life expectancy or quality of the materials used so it should be possible to qualify such a change as a 'physical damage or loss' within the meaning of Mar CAR 2007. Support for this can be drawn from a case, *Quorum AS v Schramm*,⁶⁹ which concerned a fine art insurance on the Degas pastel *La Danse Grecque*. The pastel had been insured in respect of 'direct physical loss or direct damage'. The pastel was stored in a strong room in a specialist warehouse. On 7 October 1991 there was a fire in the warehouse which destroyed all the contents except for the materials stored in the strong room. Although no smoke penetrated the strong room, it was agreed that, on the balance of probability, the insured pastel was exposed to rapid change in heat and humidity within the strong room as a result of fire. Following the fire, the pastel was examined by an expert who noted two tears in the paper which was partially detached from the backing board which itself was bowed and with evidence of recent mould. The expert also believed that the pastel had been damaged by being in that environment but he said that it was difficult to observe the damage. He made recommendation that a number of restoration works be carried out. Underwriters accepted liability for some tears and bowing of the board as direct physical damage caused by fire but the assured's contention was that the pastel suffered further damage not readily observable by the naked eye.⁷⁰ Further experts in Paris stated that the picture superficially appeared in good condition, but it had been through severe stresses which had probably shortened



its life expectancy and it was impossible to give any guarantee for the duration of the effects of the restoration. Experts appointed by the parties for the purpose of the hearing agreed that there would have been molecular changes to the pastel as a result of the heat and humidity and also sub-molecular changes at a chemical level that were irreversible. Agreeing with the evidence of the experts, Thomas J (as he then was) held:⁷¹

... there was sub-molecular damage to the pastel caused by fire: that was in my view, damage to the picture. In my view such damage is clearly direct physical damage resulting from fire, even though it might not be visible and its extent could not be determined without testing, which could not be carried out because of its effects on the pastel.


It is appreciated that providing an exhaustive definition for the term 'physical loss or damage' is not an easy task and might not be practical but, in the light of the discussion above, it will be very useful if it can be specified with clarity whether the term includes: (i) loss or damage incurred as a result of temporary causes; (ii) loss or damage when the functionality of the materials or their life expectancy are affected even if there is no apparent physical impairment; and also (iii) loss or damage suffered as a result of molecular change in the structure of materials even though they suffer from no apparent physical impairment.

6.3.2 Due diligence provision

Clause 48 of the Mar CAR 2007, in a similar fashion to other standard contracts used in the energy insurance sector,⁷² stipulates:

Although the consequence of breach of this obligation is clearly set out in cl. 48(2), it is submitted that the first part of the clause lacks clarity and has the potential to create legal disputes in many respects. The first difficulty is identifying the appropriate standard of care required of the assured under this provision. A due diligence proviso, which often appears in a standard hull policy, is designed to qualify the cover provided under an Inchmaree clause by stating that cover for loss or damage caused by certain types of perils⁷³ will be available 'provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or managers of the property insured'. In two recent English authorities on the subject,⁷⁴ negligence has been accepted as the appropriate standard of care required under an Inchmaree clause. This would mean that the underwriter will be liable for loss or damage caused by an Inchmaree peril only if he has not negligently contributed to the occurrence of that peril.

One might be tempted to argue that a similar degree of standard is adequate for the insurer to rely on clause 48 of the Mar CAR 2007 as a defence. It is submitted that the




judicial line taken in the context of Inchmaree clauses is not appropriate here for two reasons. First, the due diligence proviso as appears in the context of an Inchmaree clause serves the purpose of defining the scope of the cover provided.

Clause 48, on the other hand, is very different in nature as it creates an obligation on the part of the assured and its breach deprives the assured from indemnity for any loss, damage or liability attributable to such breach. Secondly, if negligence is adequate for the insurer to be able to rely on clause 48, this might thwart the commercial objective of the policy, which is designed to provide cover against all risks and liabilities associated with shipbuilding.

As it stands, clause 48 is more akin to 'reasonable care' clauses commonly found in liability insurance policies. Commenting on a clause of that nature, Diplock LJ in *Fraser v BN Furman (Productions) Ltd* said:⁷⁵

Obviously, the condition cannot mean that the insured must take measures to avert dangers which he does not himself foresee, although the hypothetical reasonably careful employer would foresee them. That would be repugnant to the commercial purpose of the contract, for failure to foresee dangers is one of the commonest grounds of liability in negligence. What, in my view, is 'reasonable' as between the insured and the insurer, without being repugnant to the commercial object of the contract, is that the insured should not deliberately court a danger, the existence of which he recognises, by refraining from taking any measures to avert it . . . What, in my judgment, is reasonable as between the insured and the insurer, without being repugnant to the commercial purpose of the contract, is that the insured, where he does recognise a danger should not deliberately court it by taking measures which he himself knows are inadequate to avert it. In other words, it is not enough that the employer's omission to take any particular precautions to avoid accidents should be negligent; it must be at least *reckless*, that is to say, made with actual recognition by the insured himself that a danger exists, and not caring whether or not it is averted. The purpose of the condition is to ensure that the insured will not, because he is covered against loss by the policy refrain from taking precautions which he knows ought to be taken.⁷⁶

It is submitted that the assured would be in breach of clause 48 only if he acts 'recklessly' for the reasons discussed above.⁷⁷ The next difficulty with this clause is identifying the person who will qualify as the assured in a case where the assured is a corporate entity. Would it be, for example, necessary to assess the actions of the directing mind or will of the insured corporation or could the actions of those lower in the ranks of management be attributable to the assured company? Applying the test laid down by the Court of Appeal in *Meridian Global Funds Management Asia Ltd v Securities Commission*,⁷⁸ it will be necessary to determine whose act in the company



structure for the purpose of clause 48 was intended to count as the act of the company. Taking into account the language of the clause and its content, it can be suggested that the actions of the person entrusted with the management of the assured company with regard to the day-to-day running of its affairs would possibly count as the act of the assured company. This is obviously a fact-sensitive issue and in each instance the burden will be on the insurers to prove that the appropriate person failed to act with regard to matters that come under the scope of clause 48.

A related, but equally fascinating, question is what the position will be when the assured company (e.g. a building yard) decides to delegate one of these functions to another organisation. Let us assume that the insured building yard appoints a company which is responsible for the security of the building yard. One evening, an employee of the security company fails to activate the alarm, leading to theft of machinery belonging to the subject matter of insurance. When determining whether clause 48 has been breached or not, is the insurer expected to show that the assured shipyard acted recklessly in engaging this particular security company, or would it be adequate to demonstrate that the security company acted recklessly in appointing the individual whose error led to the loss? Drawing a parallel from other areas of law,⁷⁹ it can tentatively be suggested that if management of a particular operation is delegated to a separate corporate entity, for the purpose of clause 48, that entity should be regarded as the assured,⁸⁰ but of course it would have been a much better solution had this been explicitly dealt with in clause 48.

6.3.3 Protecting the right to recovery

Clause 39(1) of the Mar CAR 2007, putting the assured under a duty to protect the rights of his insurer, stipulates the assured shall take reasonable steps to:

39.1.1 assess as soon as possible whether there are any prospects of a recovery from third parties in respect of matters giving rise to a claim or to a potential claim under this insurance;


39.1.2 protect any claims against such third parties if necessary by the commencement of proceedings and the taking of appropriate steps to obtain security from the claim from third parties;

39.1.3 keep the Underwriters and the appointed average adjuster (if any) advised of the recovery prospects of any action taken by third parties;

39.1.4 co-operate with the Underwriters in the taking of such steps as may be reasonably required to pursue any claims against third parties.

Some hull policies contain an equivalent provision,⁸¹ but the problem is that the





consequence of breach of a provision of this nature is not expressly spelt out even though clause 39(2) imposes a correlative obligation on the insurer to pay the reasonable costs incurred by the assured pursuant to clause 39(1). Given the fact that this clause is secondary in nature and deals with the issue of subrogation, one might be tempted to argue along the lines that its breach sounds only in damages.⁸²

However, there is certainly room for arguing that breach of this obligation could deprive the assured from the cover. It can, for example, be argued by drawing a parallel with surety contracts that the breach of clause 39 is repudiatory, as there is a similarity between an assured failing to protect the subrogation rights of his insurer and a creditor releasing a surety by granting indulgence to the principal debtor.⁸³

In the view of the author, on the basis that breach of this obligation is unlikely to be causative of the loss or damage, it is very plausible that the appropriate remedy will be damages in the shape of a reduction from the claim. Considering the complicated nature of shipbuilding contracts and the various parties that the assureds are expected to deal with in the course of a shipbuilding process (i.e. suppliers and subcontractors not insured under the policy) it is not a distant possibility that this obligation might be breached; it is certainly a cause for concern that the policy fails to identify the applicable remedy with precision.

6.4 Conclusion

The insurance market has proved on several occasions how sophisticated it can be by amending standard forms in use when practice and evolution of case law necessitate such a change. Almost 20 years after its introduction, the ICBR 1988 has been subjected to an extensive review process. The outcome was the Mar CAR 2007, which is a more elegant contractual document.

Despite its superior features, Mar CAR 2007 is not yet in use in practice as much as the ICBR 1988. This chapter, by illustrating the failings of the ICBR 1988, intends to send a strong message to those assureds who continue using it as the basis of their cover. Using the ICBR 1988 without making any changes could create hazardous consequences for the assureds. Although it advances contractual certainty considerably, it has also been highlighted in the chapter that there remain several provisions in the Mar CAR 2007 that need to be reassessed and ideally modified.

As far as standard forms used to insure shipbuilding risks are concerned, it is fair to say that the evolution that has naturally taken place in the market represents a significant improvement, but there is still some way to go to achieve the desired contractual certainty.

Notes

1 For example, BIMCO's NEWBUILDCON, cl 38(a), stipulates: From the time of first steel cutting or equivalent (or delivery of the Buyer's Supplies, whichever is earlier) until the Vessel is completed, delivered to and accepted by the Buyer, the Builder shall ... effect and maintain at no cost to the Buyer, Builder's Risk Insurance for the Vessel and Buyer's Supplies ...

2 Section 20(1) of the Sale of Goods Act 1979 reads: Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether the delivery has been made or not. Since passing of ownership is invariably delayed until final handover and acceptance, it follows that risk remains with the builder throughout the build process.

3 In some cases, if the insured vessel suffers an actual or constructive loss, the contract might be terminated if the builder and buyer are unable to agree within a reasonable time on an extension to the delivery date and/or any other amendment to the contract. See, for example, cl. 38(b) of NEWBUILDCON.

4 Article 9 of the Association of West European Shipbuilders and Repairers (AWES) Standard Shipbuilding Contract provides that the insurance policies shall be in the joint names of the builder and the purchaser, that in the event of damage to the ship the insurance money shall be applied by the builder in making good such damage, and that, in the event of loss of the ship, the insurance money shall be paid to the purchaser to the extent of any instalments of price previously paid to the builder and thereafter any balance of insurance money shall be paid to the builder.

5 The same result can be achieved by assigning the builders' risks policy to the buyer. It should be noted that the mere existence of a loss payee clause in the policy would not be adequate to facilitate an effective assignment. Donaldson J, in *Iraqi Ministry of Defence v Arcepey Shipping Co Ltd SA (The Angel Bell)* [1979] 2 Lloyd's Rep 491 at 497, expressed the view that 'a loss payable clause gives no rights to the loss payee unless it constitutes or evidences an assignment of the assured's rights under the policy or evidences the fact that the designated person is an original assured'. Hence, contemporary builders' risks policies indicate that for assignment to be binding, it is necessary that a dated notice of such assignment signed by the assured, and by the assignor in the case of subsequent assignment, is endorsed on the policy and the policy with such endorsement is produced before payment of any claim or return of premium thereunder.

6 *Anderson v Morice* (1876) 1 App Cas 713.

7 *Ebsworth v Alliance Marine Insurance Co* (1873) LR 8 CP 596.

8 Clause 38(a)(ii) of NEWBUILDCON reads: '[S]uch Builder's Risk Insurance shall: be on terms no less than Institute Clauses for Builder's Risk terms (1/6/88) including Institute War and Institute Strike Clauses'. Similarly, Article XX.1 of the Shipbuilders' Association of Japan (SAJ) Form is usually amended to provide that the insurance coverage should be placed on the terms of the ICBR 1988, rather than the Japanese wording. On the other hand, Norwegian Standard Form Shipbuilding Contract 2000 does not specify the form that should be used for insuring the newbuild apart from stating that customary 'All Risks' terms should be used. Similarly, Article XXVIII of the China Maritime Arbitration Commission Standard Newbuilding Contract does not specify the form that the builders' risks insurance must be placed upon except indicating that the insurance must be with 'a qualified Chinese insurance company'.

9 Cover for builders' risks is also available under the Nordic Marine Insurance Plan of 2013, Chapter 19 and some newbuild ships are insured under the Nordic Plan.

10 The ICBR 1988 provides cover for loss or damage of the subject matter insured, collision liabilities, protection and indemnity liabilities, salvage and general average contributions, launching failure and sue and labour expenses.

11 See cl. 21 of the ICBR 1988.

12 See cl. 22 of the ICBR 1988. The perils of war and strikes may be reinstated into the builder's policy by agreement with the underwriters on the terms of the Builders' Risks War Clauses and Strikes Clauses respectively.

13 See cl. 23 of the ICBR 1988.

14 See cl. 24 of the ICBR 1988.

15 See cl. 6 of the ICBR 1988.

16 See cl. 5 of the ICBR 1988.

17 See cl. 19 of the ICBR 1988.

18 For example, the amount of indemnity paid for the loss of *The Diamond Princess* was \$310m. The loss of *The Pride of America* cost the sector \$228m (figures obtained from *Willis Marine Builders' Risk Review*, Summer/Autumn 2005).

19 For the sake of completeness, it must be stressed that WELCAR is the form that is often used in offshore construction projects. WELCAR was introduced to the market in April 2001 by a Lloyd's Syndicate, Wellington, and was revised in 2011 following a review undertaken by the Joint Rig Committee.

20 The ICBR 1988, on the other hand, excludes war and strikes risks and malicious acts from its scope. Cover for such risks needs to be purchased additionally if the ICBR 1988 is used as the basis of cover when insuring ships under construction.

21 See cl. 43 of the Mar CAR 2007.

22 For a more comprehensive analysis of the changes introduced by the Mar CAR 2007 see S. Curtis, *The Law of Shipbuilding Contracts* (4th edn, Informa Law, 2012), Art. XII, pp. 222–232.

23 See, P. Reed, *Construction All Risks Insurance* (Sweet & Maxwell, 2014) at 23-042.

24 Most of the sophisticated builders use a module or block process. Full blocks of vessels are built separately and often by different contractors and then moved into place for final construction.

25 *BP Exploration Operating Co Ltd v Kvaerner Oilfield Products Ltd and another* [2004] EWHC 999 (Comm); [2005] 1 Lloyd's Rep 307.

26 [1998] 1 Lloyd's Rep 448.

27 (1991) 767 (BC CA).

28 Conversely, see the judgment of Deputy Judge Mr Anthony Colman QC in *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd* [1991] 2 Lloyd's Rep 288 where it was held that the policy was extended in favour of a subcontractor for work on shipbuilding, even though the subcontractor was not employed to work in the shipyard but to fabricate parts (the propeller and ancillary equipment) on its own premises. The decision of the Court of Appeal [1992] 2 Lloyd's Rep 578 turned on the facts of the case and it was held that there was insufficient evidence of intention that the contractor should insure on behalf of this particular subcontractor. However, the reasoning adopted by the first instance judge on the definition of the assured covering subcontractors that do not work on the premises but engage in the production process at their own premises remains valid.



29 [1984] QB 127.

30 *Tomlinson (A) Hauliers Ltd v Hepburn* [1966] AC 451.

31 *Commonwealth Construction Co Ltd v Imperial Oil Ltd* [1978] 1 SCR 317, at 322–323.

32 [1993] 2 Lloyd's Rep 582.

33 *Ibid.*, at 611. See also, *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd* [1991] 2 Lloyd's Rep 288 and *Anthony John Sharp and Roarer Investments Ltd v Sphere Drake Insurance plc (The Moonacre)* [1992] 2 Lloyd's Rep 501.

34 [1999] 1 Lloyd's Rep 387.

35 *Ibid.*, at [65]–[67].

36 [2003] EWCA Civ 885; [2003] Lloyd's Rep IR 637.

37 *Ibid.*, at [94]–[97] per Waller LJ. Similarly, Dyson LJ at [122], said: '... I can see no useful purpose in holding that a contractor has an insurable interest in [a] plant (of which he supplies only a small component) up to the time of completion and commissioning, but not thereafter. On the facts of a case like *Deepak*, the subcontractor's commercial interest in the plant as a whole during the construction and commissioning stage lies at least as much in his potential liability for damage caused to the plant by his breach of contract and duty as in his interest in not losing the opportunity to do the work and be remunerated for it if the plant is damaged or destroyed by any of the risks covered by an all risks policy.'

38 Dissenting from the majority, Ward LJ *ibid.*, at [185]–[188], held that the only insurable interest possessed by a subcontractor in the plant is his own pecuniary loss in the event of damage to the plant; his liability for the loss of the plant could not support a property policy as there was no legal or equitable relationship between the subcontractor and the subject matter itself.

39 [1997] 2 Lloyd's Rep 146.

40 That said, Hobhouse, LJ, *ibid.*, at 157, acknowledged the potential for evidential difficulty in determining whether a latent defect had progressed so as to have occasioned damage.

41 Clause 2.2.2 of the International Hull Clauses (01/11/03) makes reference to the position established by the Court of Appeal in *The Nukila*: 'This insurance covers loss of or damage to the subject matter caused by any latent defect in the machinery or hull *but does not cover any of the costs of correcting the latent defect*' (emphasis added).

42 It is open to the assured to purchase additional cover under cl. 57 of the Mar CAR 2007 to cover the cost that would have been incurred to replace, repair or rectify a latent defect that is discovered prior to the occurrence of the physical loss or physical damage.

43 In identifying the proximate cause of a loss the court's function is to identify the cause without which the loss would not have occurred. See the House of Lords' judgment in *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350.

44 See, e.g., *Canada Rice Mills Ltd v Union Marine & General Insurance Co Ltd* [1941] AC 55; *Baxendale v Fane (The Lapwing)* [1940] P 112; *Samuel (P) & Co Ltd v Dumas* [1924] AC 431 and more recently in *Versloot Dredging v HDI-Gerling Industrie Versicherung AG (The DC Merwestone)* [2013] EWHC 1666 (Comm); [2013] 2 Lloyd's Rep 131.

45 Rule 7 of the Rules for Construction of Policy attached to the MIA 1906 stipulates: 'The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas.'

46 [2011] UKSC 5; [2011] 1 Lloyd's Rep 560.

47 *Ibid.*, at [104] per Lord Clarke.

48 See, e.g., *Dedgdon v Pembroke* (1874) LR 9 QB 581 and *Lamb Head Shipping Co Ltd v Jennings (The Mare)* [1992] 1 Lloyd's Rep 402.

49 Clause 12 of the ICBR 1988.

50 Clause 31 of the Mar CAR 2007.

51 That is, the cost of the works to date.

52 *R v Berkshire Justices* (1878) 4 LR QB 469, at 476, per Cockburn CJ.

53 [2000] 1 Lloyd's Rep 437. See also *K/S Merc-Scandia XXXXII v Certain Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275; [2001] 2 Lloyd's Rep 563.

54 [2005] EWCA Civ 601; [2005] 2 Lloyd's Rep 517.

55 It was held in *Stoneham v Ocean Railway and General Accident* (1887) 19 QB 237 that a term which required the company to give notice in case of a fatal accident within seven days was a contractual term, the breach of which imposed an obligation upon the assured's representatives to reimburse the company for extra expenses that they might incur from having to investigate the circumstances of an accident at a long interval after its occurrence.

56 See cl. 2 of the Mar CAR 2007.

57 See cl. 5 of the ICBR 1988.

58 See *Pilkington UK Ltd v CGU Insurance plc* [2004] EWCA Civ 23; [2004] Lloyd's Rep IR 891, at [51], per Potter LJ.

59 [1995] 2 Lloyd's Rep 395.

60 Particularly the unreported Court of Appeal authority of *R v Henderson and Batley* (29 November 1984) cited with approval by the Court of Appeal in *Cox v Riley* (1986) 83 Crim App R 54 and *R v Whiteley* [1991] 93 Crim App R 25.

61 [1969] 1 WLR 959.

62 It is worth noting that a similar stance has been adopted in other common law jurisdictions. For example, in *Ranicar v Frigmobile Pty Ltd* [1983] Tas R 113, at 116, Green CJ said: '... the phrase "damage to" when used in relation to goods, is a physical alteration or change, not necessarily permanent or irreparable, which impairs the usefulness of the things said to be damaged.'

63 [1997] 2 Lloyd's Rep 440.

64 [1998] 1 Lloyd's Rep 236.

65 This presupposes that 'part' could be regarded as a part in the manner described in *The Nukila* [1997] 2 Lloyd's Rep 146. There is no definition of what a part is in the Mar CAR 2007 and, as acknowledged by Mustill J in *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay)* [1985] 1 Lloyd's Rep 264 at 273, it may be difficult to find a complete answer to this question and provide a comprehensive definition as to what a part is.

66 See, cl. 3 of the Mar CAR 2007.

67 See, e.g., *Hutchins Brothers v Royal Exchange Insurance Corp* [1911] 2 KB 398.

68 [1983] Tas R 113.

69 [2002] 1 Lloyd's Rep 249.

70 There were also disputes between the parties, as to the value of the pastel before and after the fire and whether the policy was a valued policy or not, which the trial judge had to deal with.

71 [2002] 1 Lloyd's Rep 249, at 264.

72 See, e.g., cl. 4E of the London Standard Platform Form 2009. Similar provisions exist in control of well and operations policies.

73 Such as bursting of boilers or breakage of shafts; latent defect in the machinery or hull; negligence of master, officers, crew or pilots; negligence of repairers or charterers or barratry of master, officers or crew.

74 *Sealion Shipping Ltd Toisa Horizon Inc v Valiant Insurance Co (The Toisa Pisces)* [2012] EWHC 50 (Comm); [2012] 1 Lloyd's Rep 252 (aff'd on different grounds by the Court of Appeal [2012] EWCA Civ 1625; [2013] 1 Lloyd's Rep 108) and *Versloot Dredging v HDI-Gerling Industrie Versicherung AG (The DC Merwestone)* [2013] EWHC 1666 (Comm); [2013] 2 Lloyd's Rep 131 (aff'd on different grounds by the Court of Appeal [2014] EWCA Civ 1349).

75 [1967] 1 WLR 898, at 905–906 (emphasis added).

76 See also Jackson J in *Tate Gallery (Board of Trustees) v Duffy Construction Ltd & Anor (No 2)* [2007] EWHC 912 (TCC); [2008] Lloyd's Rep IR 159 at [26]: 'In a policy of liability or property insurance a reasonable precautions clause in the conventional form is not breached by negligence. Recklessness is what constitutes a breach of such a clause.'

77 A similar point has been made by G. Leloudas & B. Soyer, 'Standard Contracts Used in the Offshore Insurance Sector' published as Chap. 10 in *Offshore Contracts and Liabilities* (2014, Informa Routledge), at p. 243, with regard to cl. 4E of the London Standard Platform Form 2009 which is drafted in a very similar manner.

78 [1995] UKPC 5.

79 In *The Marion* [1984] 2 Lloyd's Rep 1 (HL), the management company's act or omissions were deemed to be acts or omissions of the shipowning company for the purpose of breaking the limits.

80 There is authority to the effect that failure by an employee to take reasonable precautions would not amount to breach of a reasonable care condition on the part of the assured in liability policies, *Woolfall & Rimmer Ltd v Moyle* [1942] 1 KB 66; but evidently the situation here is rather different given that the management of a particular aspect of operations has been delegated to another entity.

81 Clause 49 of the International Hill Clauses 2009. A similar provision appears in cargo policies; see, e.g., cl. 16(2) of the Institute Cargo Clauses (A, B and C) (1/1/09).

82 *Noble Resources v Greenwood (The Vasso)* [1993] 2 Lloyd's Rep 309. Prior to the decision of the Court of Appeal in *Friends Provident Life & Pensions Ltd v Sirius International Insurance* [2005] EWCA Civ 601; [2005] 2 Lloyd's Rep 517, this provision could have been treated as a severable innominate term allowing the insurer to discharge himself from the liability with regard to the claim concerned in case of its breach in a serious fashion, as stipulated by Waller LJ in *Alfred McAlpine plc v BAI (Run-Off) Ltd* [2001] 1 Lloyd's Rep 437. However, it is very doubtful whether the analysis of Waller LJ survives the judgment of the Court of Appeal in *Friends Provident*.

83 *Andrews v Patriotic Assurance Co of Ireland* (1886) 18 LR Ir 355.



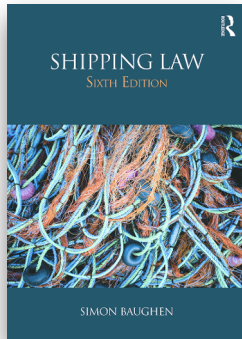


CHAPTER

3

The Future? The Hamburg Rules and the Rotterdam Rules

Chapter 3. The Future? The Hamburg Rules and the Rotterdam Rules



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The Hague and Hague-Visby Rules embody a compromise between the interests of shipowners and those of cargo owners. By and large, this compromise has succeeded in imposing a clear and uniform regime for dealing with cargo claims arising out of sea carriage. However, changing transport patterns have meant that the Rules are now starting to show their age. For example, the emergence of the sea waybill after the 1968 Visby amendments to the Hague Rules means that this document falls outside both the Hague and Hague-Visby Rules, which are focused exclusively on the bill of lading. Neither version of the Rules can deal with multimodal carriage. Indeed, the 'tackle to tackle' focus of the Rules means that they do not cover the whole of the sea carrier's period of responsibility under 'port to port' carriage. Furthermore, cargo interests have, for a long time, felt that the balance achieved in the Rules unduly favours sea carriers. In particular, they have criticised the burden of proof adopted by the Rules, as well as the fact that a carrier can escape liability under Art IV(2)(a) and (b) in circumstances in which cargo has been lost or damaged due to the negligence of its servants or agents. In this chapter, we shall examine two alternative regimes that have been, or are in the process of being, drafted to meet these criticisms. The first is the Hamburg Rules. The second is the Rotterdam Rules, an UNCITRAL convention that has been open for signing since September 2009.

The Hamburg Rules

The Hamburg Rules are an updated and more 'cargo-friendly' version of the Hague and Hague-Visby Rules. They came into force on 1 November 1992. However, they have not been adopted by any of the major trading nations, including the UK. Nevertheless, it is quite feasible that disputes involving the Hamburg Rules will come before English courts or arbitrators. This may be because the cargo claim arises out of a voyage where the state of loading is a Contracting Party to the Hamburg Rules.

Alternatively, the parties may voluntarily adopt the Hamburg Rules by a 'clause paramount'. As the Hamburg Rules are, in most respects, more onerous on carriers than the Hague-Visby Rules, such a voluntary incorporation would be effective even where the bill of lading was subject to the mandatory effect of the Hague-Visby Rules, by virtue of Art V of those Rules.¹ A brief outline will now be given of the Hamburg Rules, pointing out the salient differences between their provisions and the equivalent

provisions in the Hague-Visby Rules.

Ambit of operation

The Hague-Visby Rules attach to contracts covered by bills of lading; the Hamburg Rules attach to all 'contracts of carriage by sea' except charterparties.² Therefore, waybills will fall within the ambit of the Hamburg Rules, whereas they would generally fall outside the scope of the Hague-Visby Rules. Under Art 2(1) of the Hamburg Rules, all contracts of carriage by sea between different states will be subject to their provisions if:

- the port of loading is in a Contracting State; or
- the port of discharge, including an optional port of discharge that becomes an actual port of discharge, is in a Contracting State; or
- the bill of lading, or other document evidencing the contract of carriage, is issued in a Contracting State; or
- the bill of lading or other document evidencing the contract of carriage by sea incorporates the Hamburg Rules or the legislation of any State giving effect to them.

The major changes from the Hague-Visby regime are that the port of discharge is now significant and not only the port of loading, and contractual documents other than bills of lading are brought within the ambit of the Rules.

Who is liable?

Contractual claims

The Hague-Visby regime focuses on the liability of the 'carrier', which may be either a shipowner or a charterer, but not both simultaneously.³ Under the Hamburg Rules, the position is changed, for Art 10 subjects both the 'contractual carrier' and the 'actual carrier' to the Rules. Under Art 10(1), the contractual carrier remains responsible for the part of the contract performed by another carrier ('the actual carrier'). Article 11(1) permits the contractual carrier to exclude its liability for loss or damage to the goods while in the custody of the 'actual carrier', provided that:

the actual carrier is named in the contract of carriage

AND details are given in the contract of carriage of that part of the contract of carriage to be performed by the named actual carrier

AND judicial proceedings can be instituted against the actual carrier in a court

competent under para 1 or 2 of Art 21.

The 'actual carrier' will be liable only for the part of the contract of carriage that it personally performs. This would cover other shipowners where the contracting carrier exercises a contractual liberty to trans-ship. It would also cover a shipowner where a time charterer's bill of lading is issued.⁴ Article 10(2) extends 'all the provisions of this Convention governing the responsibility of the carrier' to the actual carrier.⁵ This is emphasised by Art 11(2), which provides:

The actual carrier is responsible in accordance with the provisions of para 2 of Art 10 for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in his charge.

Non-contractual claims

Article 7 contains similar provisions to those contained in Art IV*bis* of the Hague-Visby Rules. Article 7(2) purports to extend the protection of the Hamburg Rules to servants or agents of the carrier but does not refer to independent contractors. Even without the specific exclusion of 'independent contractors' contained in Art IV*bis*(2) of the Hague-Visby Rules, this provision does not cover such third parties, for, under English law, an independent contractor is neither a servant nor an agent. Article 7(2) does, however, have one advantage over the equivalent provision in the Hague-Visby Rules, in that 'servants or agents' will be protected in respect of a wider period of responsibility under the Hamburg Rules, by virtue of Art 4, than is the case under the Hague-Visby Rules.

Period of responsibility

The Hague-Visby Rules apply only to contracts of carriage *by sea*. Their ambit is limited to the period starting with the commencement of loading and terminating with the completion of discharge. In contrast, Art 4(1) of the Hamburg Rules provides that:

The responsibility of the carrier for the goods . . . covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.

Therefore, the Hamburg Rules will extend to any period of storage at the port of loading in the carrier's custody prior to actual loading and any equivalent period at the port of discharge prior to taking of delivery. It is arguable that the Rules might apply when the carrier obtains custody at an inland point. Article 4(2) provides that:

For the purposes of paragraph 1 of this article, the carrier is deemed to be in charge



of the goods—

(a) from the time he has taken over the goods from:

(i) the shipper, or a person acting on his behalf.

However, Art 4(2) has to be read in conjunction with Art 4(1), which makes specific reference to the carrier being in charge of the goods *at the port of loading*, and therefore it is probable that the words in Art 4(2)(a)(i) will not be extended to a taking over of the goods from the shipper at an earlier stage. Further support for this construction can be derived from the definition of ‘contract of carriage by sea’ in Art 1(6) as:


... any contract whereby the carrier undertakes against payment of freight to carry goods by sea *from one port to another*.

Basis of liability

The Hamburg Rules dispense with the two-pronged liability scheme of the Hague-Visby Rules in favour of a unitary system. Under Art 5, once the claimant can prove that the loss or damage took place while the goods were in the charge of the carrier, as defined by Art 4, the carrier will be presumed to be liable for the loss or damage. Delay is treated as a separate head of liability under Art 5(1) and has its own special limitation figure in Art 6. The presumption of liability under Art 5 can be rebutted only if the carrier proves that ‘he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences’. The exceptions provided by Art IV(2) of the Hague-Visby Rules have no equivalent in the Hamburg Rules. Consequently, a negligent carrier who could have relied on Art IV(2)(a) of the Hague and Hague-Visby Rules would no longer be able to escape liability under the Hamburg Rules.

However, the wording of Art 5 leaves some residual uncertainty as to whether the carrier remains liable for the defaults of its independent contractors. The imposition of liability in such circumstances would depend on whether the courts were prepared to analyse the carrier’s duties under the Hamburg Rules as being ‘non-delegable’ in the same way that they have been analysed in the context of the carrier’s duty of due diligence under Art III(1) of the Hague and Hague-Visby Rules.

There is no specific provision relating to deviation. Article 5(6) exempts the carrier from liability ‘where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea’. This provision is narrower in ambit than the liberty given by the Hague-Visby Rules to make a ‘reasonable deviation’. However, if a deviation were ‘reasonable’ under the Hague-Visby Rules, it is likely that the same facts would enable the carrier to prove what is required under the Hamburg



Rules to displace the presumption of liability under Art 5(1). The Rules are silent as to the effects of deviation under a Hamburg Rules contract. If the UK were ever to become a Contracting State, the matter would be governed by the common law principles set out in Chapter 4. The Hamburg Rules provide only two exceptions to the carrier who is unable to rebut the presumption of fault.

Fire

Where goods are lost or damaged by fire, Art 5(4) provides that the carrier will be liable only if the claimant can prove that the fire arose from the 'fault or neglect on the part of the carrier, its servants or agents'.

In some respects, the Hamburg Rules worsen the position of a claimant whose goods have been lost or damaged due to fire, for the burden of proof is placed on its shoulders and not those of the carrier, as is the case with the fire exception in the Hague-Visby Rules. However, the Hague-Visby exception can be lost only if the claimant can prove that the fire took place due to the fault or privity of the carrier. Under the Hamburg Rules, the claimant will succeed if it manages to prove fault or neglect on the part of the carrier's servants or agents. It must also be remembered that, under the Hague-Visby Rules, the claimant could prevent reliance on the fire exception if it could establish that the fire was due to the unseaworthiness of the vessel. In practice, the position of a claimant whose goods have been lost or damaged due to fire will be much the same under the Hamburg Rules as under the Hague-Visby Rules.

Live animals

With carriage of live animals, the carrier is not liable under Art 5(5) for loss, damage or delay arising out of 'any special risk inherent in that kind of carriage'. If the carrier can prove that the damage was caused by such a risk and that it complied with any special instructions given by the shipper, the burden of proof will shift to the claimant to prove negligence on the part of the carrier. If it fails to discharge this burden, the carrier will escape liability.

Deck cargo

Unlike the position with the Hague and Hague-Visby Rules, deck cargo under the Hamburg Rules is treated in exactly the same way as any other cargo in that its carriage cannot be taken outside the ambit of the Hamburg Rules. Article 9(1) provides that cargo may be carried on deck either in accordance with agreement with the

shipper or the usage of a particular trade, or if required by statutory rules or regulations.

If loss occurs due to unauthorised carriage of cargo on deck, Art 9(3) provides that the carrier will be strictly liable for losses resulting solely from the carriage on deck. The carrier will not be able to rely on the defence under Art 5(1) that 'he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences'. However, Art 9(4) provides that 'carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act or omission of the carrier within the meaning of Art 8'. This will entail the carrier losing its right to rely on the limitation provisions in Art 6, although it will still be able to rely on the time bar in Art 20.

Package limitation

Article 6(1)(a) provides a package⁶ limitation of 835 'units of account' (defined in Art 26 as the Special Drawing Right (SDR)) with an alternative of 2.5 units of account per kilogram of the gross weight of the goods. The claimant may choose whichever basis yields the higher figure. The Hamburg Rules limit amounts to a 25 per cent uplift of the equivalent Hague-Visby figures. Article 6(1)(b) provides for a separate limitation figure to cover the carrier's liability for delay of an amount equal to two-and-a-half times the freight payable for the goods delayed but not exceeding the total freight payable under the contract of carriage. Article 6(1)(c) provides that the total liability of the carrier under all heads cannot exceed the maximum limit on a total loss of the goods as calculated under Art 6(1)(a). The carrier's right to limit under international conventions such as the **1957** and **1976 Limitation Conventions** is preserved by Art 25(1). As with the Hague-Visby Rules, the right to limit can be lost, by virtue of Art 8(1), if the carrier intentionally or recklessly causes the loss. This provision applies, *mutatis mutandis*, to the right to limit of any servant or agent of the carrier who relies on the Rules by reason of Art 7(2).

Time bar

Article 20(1) provides a two-year limitation period for any action 'relating to carriage of goods under this Convention',⁷ extendable at any time within the period by a declaration in writing to the claimant by the defendant. The period commences on the date of delivery or, in the case of nondelivery, on the last day on which the goods should have been delivered.

Article 19 provides for the notice of the following claims to be given with a specified



time:

- (a) claims by consignee for loss or damage – 15 consecutive working days after delivery;
- (b) claims by consignee for delay – 60 consecutive days after delivery;
- (c) claims by carrier/actual carrier against shipper for loss or damage – 90 consecutive days of either the occurrence or the delivery of the goods.

Failure to give the appropriate notice amounts to prima facie evidence of, respectively, delivery in good condition, delivery on time, absence of loss or damage to the carrier.

Bar on contracting out

Article 23(1) makes 'null and void' any:

... stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea ... to the extent that it derogates, directly or indirectly, from the provisions of this Convention.

The wording is wider than the equivalent provision, Art III(8), contained in the Hague and Hague-Visby Rules. It strikes down clauses that derogate *indirectly* from the Hamburg Rules. Moreover, it strikes down '*stipulations*' and not just clauses '*relieving the carrier or ship from liability for loss or damage ...*'.

The classification of a clause as an 'obligation' clause, as in *Renton (GH) & Co Ltd v Palmyra Trading Corp of Panama*,⁸ would not suffice to remove it from consideration under Art 23(1). Such a clause might therefore be held void if it were to derogate directly or indirectly from the Hamburg Rules.

Jurisdiction

The Hague-Visby Rules contain no provisions dealing with jurisdiction, although provisions in the bill of lading referring disputes to a non-Hague-Visby jurisdiction have been held invalid by reason of Art III(8).⁹ Article 21 of the Hamburg Rules expressly deals with jurisdiction and gives the claimant the option of suing the defendant in one of the following places:¹⁰


- (a) the principal place of business, or, in the absence thereof, the habitual residence of the defendant; or
- (b) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

- (c) the port of loading or the port of discharge; or
- (d) any additional place designated for that purpose in the contract of carriage by sea.

The Convention only gives the claimant the *option* of suing at one of these venues.¹¹ It does not itself confer jurisdiction on any of the venues. That issue still has to be established in accordance with the national law of the state concerned. An additional seat of jurisdiction is provided by Art 21(2), the courts of any port or place in a Contracting State at which the carrying vessel, or a sister ship, may have been arrested in accordance with the applicable rules of the law of that state and of international law. In this eventuality, the defendant may insist on the removal of the suit to one of the five venues specified in Art 21(1). However, the defendant must provide adequate security for the claim before the suit is removed from the place of arrest. The claimant's ability to choose from the venues specified in Art 21 may be curtailed by the effect of other international conventions such as the 1968 Brussels Convention, now EC Regulation 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (the 'Judgments Regulation'). The wide range of possible seats of jurisdiction specified by the Hamburg Rules leaves open the possibility of a jurisdictional conflict when goods are carried between a Hague-Visby State and a Hamburg State. The courts of the state of loading would regard the contract as being mandatorily subject to the Hague-Visby Rules. However, the courts in the state of discharge would regard the contract as being mandatorily subject to the Hamburg Rules. Accordingly, a real risk exists of conflicting judgments coming into existence in relation to the same cargo claim. The claimant would proceed in the courts of the state of discharge, whereas the defendant would want to seek a declaration as to its liability in the courts of the port of loading. The Hamburg Rules lack any provision by which this potential impasse could be resolved. Much would depend on the domestic rules applied to questions of *lis alibi pendens* by each of the competing courts.¹²

Evidential status of shipping documents

Article 14 imposes an obligation on the carrier to issue a bill of lading to the shipper 'when the carrier or actual carrier takes the goods into his charge'. Article 15 goes on to specify the statements that must be contained in the bill of lading and is considerably wider in its ambit than the equivalent provision in Art III(3) of the Hague-Visby Rules.¹³ Article 16 deals with reservations in the bill of lading and the evidential effect of statements in the bill of lading. Article 16(1) requires the carrier or other person issuing the bill of lading to insert in the bill of lading a reservation specifying any inaccuracies, grounds of suspicion or the absence of reasonable means of checking particulars



concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods. Article 16(2) then goes on to provide that a bill of lading that fails to record the apparent order and condition of the goods is deemed to have recorded their shipment in 'apparent good order and condition'. Article 16(3) deals with the evidential effect of such statements in broadly similar terms to those adopted by Art III(4) of the Hague-Visby Rules, except for particulars in respect of which and to the extent to which a reservation permitted under Art 16(1) has been entered. Art 16(4) provides that bills of lading that do not expressly indicate that freight is payable by the consignee or do not set forth demurrage payable by the consignee at the port of loading are prima facie evidence that no such freight or demurrage is payable by the consignee. In the hands of a third party in good faith relying on absence of such statements in the bill of lading, proof to the contrary is not admissible by the carrier. This provision clarifies the existing law under which a 'lawful holder' of a bill of lading might be subject to a common law liability to freight if the bill of lading neither incorporates the terms of a charterparty nor is claused 'freight prepaid'.

Article 17(1) repeats the shipper's guarantee as to the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading, and provides for an indemnity to the carrier in respect of loss resulting from inaccuracies in such particulars. The shipper's liability is to continue after it has transferred the bill of lading and the carrier's right to an indemnity does not affect its liability to parties other than the shipper. Article 17(2) deals with the effect of any indemnity or guarantee issued by the shipper to the carrier in relation to losses arising from issuing a bill of lading without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods. As regards third parties, including consignees, such an indemnity or guarantee is void and of no effect. However, under Art 17(3) the indemnity or guarantee is enforceable against the shipper, unless the failure to include a reservation in the bill of lading was done with the intention to defraud a third party acting in reliance on the bill of lading. If that is in respect of particulars furnished by the shipper the carrier has no indemnity under Art 17(1). Under Art 17(4) intentional fraud in failing to include a reservation in the bill of lading will have the additional consequence of removing the carrier's right to limit when sued by third parties, including the consignee, for the loss sustained in reliance on the description of the goods in the bill of lading.

Article 18 provides that statements in documents, other than bills of lading, have only prima facie evidential effect. Article 1(7) defines 'bill of lading' as 'a document . . . by which the carrier undertakes to deliver the goods against surrender of the documents', which, under English law, would cover a straight bill of lading, but not a sea waybill.



The Rotterdam Rules

The Hamburg Rules made several significant improvements to the scheme adopted by the Hague and Hague-Visby Rules. First, they covered the full period of the carrier's responsibility under 'port to port' carriage, rather than being limited to the 'tackle to tackle' period. Secondly, they applied to all contracts of carriage by sea except charterparties, rather than being confined to 'bills of lading or other similar documents of title'. Thirdly, the imposition of liability on both the 'contracting carrier' and the 'actual carrier' reduced most of the problems associated with the identification of the single carrier under the Hague Rules. In addition, deck cargo was brought within the ambit of the Hamburg Rules. Fourthly, the Hamburg Rules applied mandatorily to carriage to a Contracting State and not just to carriage from a Contracting State. Fifthly, the Hamburg Rules contained specific provisions to deal with jurisdiction and arbitration, as well as the relationship of the Hamburg Rules to other international conventions. Sixthly, a unified system of liability was adopted, based on presumed fault as opposed to the two-tier system of the Hague Rules, with all its complications as to the allocation of the burden of proof. It is, perhaps, this final feature that has led to the fact that the Hamburg Rules can now be regarded as 'dead in the water' due to the fact that, to date, they have failed to be adopted by any major maritime nation.

Apart from the problems associated with such a major shift in favour of cargo interest, there is also the fact that the Hamburg Rules did not go far enough to address the realities of modern shipping practice. Three particular issues were either not addressed at all or addressed only sparingly. First, the wording of Art 7 extends the protection of the Hamburg Rules to the 'servants or agents' of the contracting carrier and the actual carrier, but makes no mention of the independent contractors engaged by these parties. Secondly, the Hamburg Rules are limited to 'port to port' carriage at a time when a significant amount of sea carriage forms part of 'door to door' carriage. Thirdly, the issue of electronic documentation is dealt with in only a limited fashion through Art 14(3), which recognises the validity of an electronic signature on the bill of lading.

In 1999, following three years of consultations among the international shipping community, the Comité Maritime International (CMI) started work on drafting a new convention on sea carriage. The CMI's draft outline instrument was completed in early 2001 and remitted to a working group of the UN Commission on International Trade Law (UNCITRAL) for further development.


Work on the new convention was finalised in January 2008. On 3 July 2008, UNCITRAL approved the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which was adopted by the Legal Committee of the General



Assembly on 14 November 2008.¹⁴ The signing ceremony for the Rotterdam Rules was held in Rotterdam from 20 to 23 September 2009. Since then, 24 countries have signed the Convention: Armenia, Cameroon, Congo, Democratic Republic of Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, Luxembourg, Madagascar, Mali, the Netherlands, Niger, Nigeria, Norway, Poland, Senegal, Spain, Sweden, Switzerland, Togo and the United States of America. The Convention will come into force one year after ratification by the twentieth UN Member State. The Rotterdam Rules have so far been ratified by three states: Spain, Togo and Congo. Whether the new convention avoids the fate of the Hamburg Rules remains to be seen. The project is ambitious in that it is not confined to the familiar territory of the sea carrier's liability for cargo. It also tackles important associated issues that have, hitherto, been left exclusively to national law, such as: the cargo owner's title to sue and its liability under negotiable transport documents, as bills of lading are referred to in the Convention; the obligations of the consignee in respect of delivery of the cargo; and the cargo owner's right of control over the cargo during the voyage – particularly its right to vary the discharge port. The Convention has been drafted so as to allow electronic documentation to be covered in the same way as conventional paper documentation. It also covers multimodal carriage involving sea carriage, which raises difficult issues of how the new Convention will interact with existing carriage conventions such as CMR (UN Convention Relative au Contrat de Transport International de Marchandises par Route). The Convention also contains optional chapters on jurisdiction and arbitration.

Chapter One – general provisions

Article 1 contains the salient definitions of the Convention in paras (1) to (30). 'Contract of carriage' in para (1) is defined as a contract whereby the carrier undertakes 'to carry goods from one place to another' against payment of freight. The reference to payment of freight causes a problem with a 'freight prepaid' bill under which the original bill of lading shipper has not undertaken to pay freight. Such a bill of lading will not constitute a 'contract of carriage' under the definition set out in para (1) and will therefore fall outside the Convention. Article 42 deals with 'Freight prepaid' statements, but treats them solely as creating an estoppel. It does not deal with the other function of such clausing, as seen in the Court of Appeal's decision in *Cho Yang Shipping Co Ltd v Coral (UK) Ltd*, that it amounts to evidence as to whether the original bill of lading holder ever undertook to pay freight.¹⁵ Article 1(1) goes on to state that 'The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage'.¹⁶ This definition means that there may be contracts of carriage that fall under the Convention as well as under another carriage convention, such as CMR. Articles 26 and 82 attempt, not entirely successfully, to deal



with this issue. The overlap will only apply as regards the carrier under the contract of carriage. Sub-carriers that are not 'maritime performing parties' will incur no liability under the Convention.

'Carrier' is defined in para (5) as 'a person that enters into a contract of carriage with a shipper'. In para (6) a novel concept is introduced into the Convention – that is, the 'performing party', defined as:¹⁷


... a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, keeping, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

The term 'performing party' does not include any person who is retained by a shipper or consignee, or is an employee, agent, contractor, or subcontractor of a person (other than the carrier) who is retained by a shipper, documentary shipper, controlling party, or consignee. The definition brings within its scope *any* independent contractor engaged by the carrier to perform any of the carrier's responsibilities under its contract of carriage, to the extent that such a party actually performs such services. The carrier is responsible for the acts of performing parties, but the performing party itself will only fall under the Convention if it is a 'maritime performing party'. The term is defined in para (7) 'as a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area'. The application of the Convention to maritime performing parties entails a major expansion in its scope over that of the Hague Rules, which deal only with the 'carrier', and over that of the Hamburg Rules, which deal with the 'contracting carrier' and the 'actual carrier'.

On the cargo-owning side of the contract of carriage, the 'shipper' is defined in para (8) as 'a person that enters into a contract of carriage with a carrier'. The Convention also refers to the 'documentary shipper', who is defined in para (9) as 'a person, other than the shipper, that accepts to be named as the shipper in the transport document or electronic transport record'.

This would cover a consignor who has no express contractual relations with the carrier, as is the case with a seller under a fob contract. Under English law, such a party is regarded as having a contract with the carrier under the terms of the bill of lading and would therefore fall within the Convention's definition of a 'shipper' in para (8) as 'a person that enters a contract of carriage with a carrier'. The position may be different in





other jurisdictions, as can be seen by the Canadian decision in *The Roseline*.¹⁸ The Convention's reference to the 'documentary shipper' will ensure that such a party will be subject to the obligations imposed by Chapter Seven. The 'holder' is defined in para (10) to cover persons in possession of a negotiable transport document. With an order document, the holder person must be identified in it as the shipper or the consignee, or the holder must be the indorsee. With a blank indorsed order document or bearer document, the holder is the bearer of the document.¹⁹ The 'consignee' is defined in para (11) as 'a person entitled to take delivery of the goods under a contract of carriage or a transport document or electronic record'.

Article 1 then goes on to define the documentation covered by the Convention. 'Transport document' is widely defined in para (14) as: 'a document issued pursuant to a contract of carriage by the carrier or a performing party that (i) evidences the carrier's or a performing party's receipt of goods under a contract of carriage, or (ii) evidences or contains a contract of carriage'. The Convention distinguishes between negotiable and non-negotiable transport documents. The former are defined in para (15) as:


... a transport document that indicates, by wording such as 'to order' or 'negotiable' or other appropriate wording recognised as having the same effect by the law governing the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being 'non-negotiable' or 'not negotiable'.

The latter are defined in para (16) as being transport documents that are not negotiable transport documents.

The definition of a 'negotiable transport document', therefore, covers a traditional bill of lading but not a straight bill of lading. Similar definitions are used to cover negotiable and non-negotiable electronic records in paras (19) and (20), respectively. A negotiable electronic record must be subject to rules of procedure, 'which include adequate provisions relating to the transfer of that record to a further holder and the manner in which the holder of that record is able to demonstrate that it is such holder'.

Article 2 provides for regard to be had to the Convention's international character and the need to provide uniformity in its application and the observance of good faith in international trade. Article 3 provides for the various formalities required by the Convention, such as notices, agreements, and declarations, to be in writing. However, electronic communication may be used instead, 'provided the use of such means is with the consent of the person by which it is communicated and of the person to which it is communicated'.

Article 4 deals with non-contractual actions as against the carrier. Paragraph (1) provides:



Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:

- (a) The carrier or a maritime performing party;
- (b) The master, crew or any other person that performs services on board the ship;
or
- (c) Employees of the carrier or a maritime performing party.

Paragraph (2) deals with non-contractual suits against the shipper, as follows:

Any provision of this Convention that may provide a defence for the shipper or the documentary shipper applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted against the shipper, the documentary shipper, or their subcontractors, agents or employees.

These provisions are wider than Art IV*bis* of the Hague-Visby Rules in that they extend the coverage of the Convention to non-contractual suits against the shipper and documentary shipper as well as to their subcontractors, agents and employees. They also extend the coverage of the Convention to noncontractual suits against maritime performing parties, so rendering redundant, as regards such parties, the esoteric jurisprudence that has built up around ‘Himalaya’ clauses and actions in bailment.

Chapter Two – scope of application

Article 5 of the Convention provides that it will cover:

... contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:

- (a) The place of receipt;
- (b) The port of loading;
- (c) The place of delivery; or
- (d) The port of discharge.

The additional requirement that the port of loading of a sea carriage and the port of

discharge of the same sea carriage must be in different states means there must actually be sea carriage for the Convention to apply. It will not apply to a contract of carriage that gives an option to carry by sea, which is not, in fact, taken up, nor will it apply to a contract where there is sea carriage between ports in the same state (e.g. from Avonmouth to Southampton). Article 5 does not contain a provision equivalent to Art X(c) of the Hague-Visby Rules whereby the Rules apply when their provisions, or those of legislation giving effect to them, are incorporated into a bill of lading. Article 5 needs to be read in conjunction with the definition of 'contract of carriage' in Art 1.1. Article 6 then takes out various contracts of carriage from this definition, most notably charterparties. Paragraph (1) deals with liner transportation²⁰ and excludes

'(a) Charterparties; and

(b) Contracts for the use of a ship or of any space thereon, whether or not they are charterparties.' Paragraph (2) provides that the Convention does not cover contracts of carriage in non-liner transportation except when:

(a) there is no charterparty or contract for the use of a ship or of any space thereon between the parties, whether such contract is a charterparty or not; and

(b) The evidence of the contract of carriage is a transport document or an electronic transport record that also evidences the carrier's or a performing party's receipt of the goods.

Thus, non-liner bills in the hands of third parties fall within the Convention, as do bills of lading in the hands of an original shipper that has not concluded an express contract of carriage with the carrier. It seems, however, that para (2)(a) excludes an express non-liner contract for the use of space on a ship that is evidenced by a transport document, such as a bill of lading. As regards the original contracting parties, such a contract would fall outside the Convention, although as regards these parties, such a contract of carriage would fall within the ambit of the Hague and Hague-Visby Rules.²¹ Article 7 then goes on to exclude the exclusions in Art 6 as regards third parties and provides:

Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charterparty or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.

The effect of Arts 6 and 7 is that the Convention will cover traditional bills of lading, straight bills of lading and waybills, but not charterparties. However, in the non-liner trade, express contracts for the use of space on a ship that are evidenced by a non-transport document will fall outside the Convention as regards the original



contracting parties. The Convention also contains a partial derogation from its provisions as regards volume contracts, in Art 80.

Chapter Three – electronic communication

Article 8 provides for the functional equivalence of transport documents recorded by using electronic communication 'provided the issuance and subsequent use of an electronic record is with the express or implied consent of the carrier and the shipper'. Article 9 requires the contract particulars to contain the agreed rules of procedure as to the transfer of the electronic record to a further holder, the manner in which the holder can demonstrate that it is a holder, and the way in which confirmation is given that delivery has been made to the consignee or that the electronic record has ceased to have effect, having been replaced by a paper document. Article 10 deals with a subsequent agreement between the carrier and the holder to switch from a negotiable transport document to its electronic equivalent, and vice versa. All originals of a negotiable transport document must be surrendered to the carrier when the switch is made to a negotiable electronic transport record. When the switch is made the other way, the negotiable transport document must contain a statement that it replaces the negotiable electronic transport record.

Chapter Four – obligations of the carrier

Article 11 provides: 'The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.' Delivery is specifically mentioned as an obligation of the carrier, unlike the position under the Hague-Visby Rules in which delivery is mentioned only in Art III(6). Article 12 provides for the carrier's period of responsibility to run from the receipt of the goods by the carrier or a performing party to the time of their delivery; an expansion from the 'tackle to tackle' rule that governs the ambit of the Hague and Hague-Visby Rules. The parties may agree as to the time and location of receipt and delivery of the goods, but such a provision will be void to the extent that it provides for receipt to be subsequent to the initial loading of the goods, and for delivery to be prior to their final unloading. The parties, therefore, are free to agree to contract on a 'tackle to tackle' basis where the contract involves sea carriage only.

The Convention has not adopted the simple 'presumed fault' model of the Hamburg Rules, but has based the obligations of the carrier on a modified version of the Hague Rules. Article 13 is an equivalent provision to Art III(2), but includes a reference to delivery. Paragraph 2 provides for the validity of 'fiostr' (free in, out, stowed and trimmed)

clauses whereby some of these functions may be performed 'by or on behalf of the shipper, the documentary shipper or the consignee', provided that this agreement is referred to in the contract provisions.

Article 14 is an equivalent provision to Art III(1), but the carrier's due diligence obligation of seaworthiness now continues throughout the voyage. The obligation of seaworthiness is also expressly extended to containers that are supplied by the carrier.²²

There then follow two provisions dealing with the carrier's right to decline to load cargo or to dispose of cargo already loaded. Article 15, in wording similar to that to be found in Art IV(6) of the Hague and Hague-Visby Rules, entitles the carrier or a performing party to decline to receive or to load, and to 'take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless if the goods are, or appear likely to become during the carrier's period of responsibility an actual danger to persons, to property or to the environment'. Article 16 permits these parties, notwithstanding Arts 11, 13 and 14, to sacrifice goods at sea 'when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure'.

Chapter Five – liability of the carrier for loss, damage, or delay

(i) Liability of the carrier

The carrier's liability is addressed in Art 17, para (1) of which states that the carrier shall be liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the event or circumstance that caused or contributed to the loss took place during the carrier's period of responsibility. This restates the existing law about what the claimant must prove when making a cargo claim. However, the Article then goes on to contain a complex scheme for determining when the carrier may escape liability, involving a shifting burden of proof. Article 17 provides two ways for the carrier to escape liability. Paragraph (2) relieves the carrier of liability 'if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18'. This would cover misdelivery claims and would allow the carrier to avoid liability in situations such as arose in the *Motis* case, in which delivery was made against a convincing forgery of the bill of lading.²³


Alternatively, the carrier may be relieved of liability under para (3) if it proves that the following circumstances caused or contributed to the loss, damage, or delay. There then follow a variety of exceptions in headings (a)–(o), along the lines of Art IV(2) of the

Hague Rules. A notable omission from the list is the exception of neglect or default in the navigation or management of the vessel, which is to be found in Art IV(2)(a) of the Hague Rules. The 'catch-all' defence in Art IV(2)(q) has also been removed. New defences are provided under headings (i), (n) and (o).

- (a) Act of God
- (b) Perils, dangers, and accidents of the sea or other navigable waters
- (c) War, hostilities, armed conflict, piracy, terrorism, riots and civil commotions²⁴
- (d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in Article 18²⁵
- (e) Strikes, lockouts, stoppages, or restraints of labour
- (f) Fire on the ship²⁶
- (g) Latent defects not discoverable by due diligence
- (h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to Art. 33 or 34²⁷
- (i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with Art 13, para (2), unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee
- (j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods
- (k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier²⁸
- (l) Saving or attempting to save life at sea
- (m) Reasonable measures to save or attempt to save property at sea
- (n) Reasonable measures to avoid or attempt to avoid damage to the environment
- (o) Acts of the carrier in pursuance of the powers conferred by Arts 15 and 16

If the carrier brings itself within para (3), it may still incur liability. The burden of proof now shifts to the claimant. Paragraph (4) provides that the carrier is liable for all or part of the loss, damage or delay, if the claimant can prove one of two things. The first is 'that the fault of the carrier or of a person referred to in Art 18 caused or contributed to the event or circumstance on which the carrier relies'. The second is 'that an event or





circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 18.4’.

Paragraph (5) then provides that the carrier will still be liable if:


- (a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods, and (b) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) that it complied with its obligation to exercise due diligence pursuant to article 14.

Paragraph (6) then provides that ‘When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.’ This leaves open the possibility that loss could be apportioned between the carrier and the cargo claimant, contrary to the position under English law in which the carrier is either liable in full or not liable at all, save where the carrier can establish that it is covered by an exception in the Rules as regards a specific part of the cargo that is lost or damaged.

Article 18 defines the parties for whom the carrier is responsible. These include not only any performing party, the master or crew of the ship, the employees of the carrier or a performing party, but also ‘any other person, including a performing party’s subcontractors and agents, who performs or undertakes to perform any of the carrier’s responsibilities under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control’. However, although the carrier is responsible for the defaults of performing parties, not all performing parties fall under the Convention. Only maritime performing parties may incur liabilities under the Convention and may rely on the rights and immunities granted to the carrier by the Convention.

(ii) Liability of maritime performing parties

Article 19 provides for maritime performing parties to be subject to the same responsibilities and liabilities as those imposed on the carrier under the instrument for the period in which they have custody of the goods or at any other time to the extent that they are participating in the performance of any of the activities contemplated by



the contract of carriage. They are also entitled to the carrier's rights and immunities during the same period. Under Art 19(1)(b) they will be liable if:²⁹

The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; and either (ii) while it had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

A maritime performing party's responsibility will not be increased by the carrier accepting greater contractual responsibilities than those imposed by the Convention, unless the maritime performing party itself has also agreed to that increase.

Article 20 provides that the liability of the carrier and one or more maritime performing parties is joint and several, but only up to the limits provided in the Convention. Furthermore, their aggregate liability shall not exceed the overall limits of liability under the Convention. This is, however, without prejudice to the provisions of Art 61, which stipulate when a party will lose the right to limit its liability under the Convention.

(iii) Calculation of loss and notice of loss

Article 21 deals with the carrier's liability for delay. 'Delay' is defined as occurring when 'the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed upon'. The 'time agreed upon' is not limited by reference to an express agreement, as was the case in the penultimate draft of the Convention, and therefore may cover a breach of the implied obligation to proceed on the voyage with reasonable dispatch. The Convention is pointedly silent about the shipper's liability for delay.

Article 22 provides that compensation for loss or damage to the goods is to be calculated by reference to the value of those goods at the place and time of delivery, which is fixed according to the commodity exchange price 'or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery'. Article 59 provides that this measure of calculation also applies to claims for loss of or damage to the goods arising out of delay.

Article 23 establishes a presumption of delivery of the goods by the carrier in accordance with their description in the contract particulars,³⁰ 'unless notice of loss of or damage to the goods, indicating the general nature of such loss or damage, was

given to the carrier or the performing party that delivered the goods before or at the time of the delivery'; alternatively, 'if the loss or damage is not apparent, within seven working days at the place of delivery after the delivery of the goods'. Such a notice is not required where the loss or damage has been established by a joint inspection of the goods. There is no compensation for delay unless 'notice of loss due to delay was given to the carrier within 21 consecutive days following delivery of the goods'. Notices given to the performing party that delivered the goods have the same effect as if they had been given to the carrier, and notices to the carrier have the same effect as if they had been given to a maritime performing party. Paragraph (2) provides that a failure to give the notices referred to in Art 21 shall not affect the right to claim compensation for loss of or damage to the goods under the Convention, nor will it affect the allocation of the burden of proof under Art 17. However, no reference is made here to claims for delay and claimants will need to take particular care to give the appropriate notice of such claims.


Chapter Six – additional provisions relating to particular stages of carriage

Article 24 provides that if a deviation constitutes a breach of the carrier's obligations, under applicable law, that will not prevent the carrier or a maritime performing party from relying on Convention defences or limitations, except as provided in Art 61, which specifies when the right to limit is lost. This alters the common law position whereby a deviation will deprive a carrier of its contractual rights and immunities and reduce it to the status of a common carrier from the moment of the deviation onwards, even if the deviation is not causative of the loss or damage claimed.

Article 25(1) permits carriage of deck cargo in three situations only: (a) such carriage is required by law; (b) the goods are carried in or on containers on decks that are specially fitted to carry such containers; (c) the carriage on deck is in accordance with the contract of carriage, or the customs, usages, and practices of the trade in question.³¹ The carrier may not rely on this third heading as against good-faith third-party holders of a negotiable transport document, or electronic equivalent, unless the deck carriage is stated in the contract particulars. The Convention's provisions as to the carrier's liability apply to loss of, damage to or delay in the delivery of goods carried on deck as permitted by Art 25(1). However, in the first and third of the situations in which deck carriage is permitted, the carrier is not liable where the loss, damage or delay is caused by the special risks involved in the deck carriage. Where the deck carriage is not permitted under

Art 25(1), the carrier is liable for loss, damage or delay that is exclusively caused by the carriage of the goods on deck, and may not rely on the defences in Art 17. Presumably,






the burden of proving this will fall on the claimant. Where the cargo is carried on deck and the carrier has expressly agreed with the shipper to carry it under deck, para (5) prevents the carrier from limiting its liability 'to the extent that such loss, damage, or delay' resulted from the carriage of the goods on deck.

Article 26 deals with the situation in which the loss, damage, or the event causing delay, occurs during the carrier's period of responsibility, but solely before their loading onto the ship or solely after their discharge from the ship. In this event, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

- (a) pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;
- (b) specifically provide for the carrier's liability, limitation of liability, or time for suit; and
- (c) cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

This attempts to provide a network solution to the problems of competing conventions that occur with multimodal carriage. Provisions of another international 'instrument' will prevail over the Convention, but only to the extent that they relate to the carrier's liability, limitation of liability and time for suit, cannot be departed from to the shipper's detriment under the terms of the other 'instrument' and would have applied to a hypothetical contract between the shipper and the carrier for the particular stage of carriage where the loss, damage, or event causing delay occurred.³² Thus, provisions of the Convention relating to the right of control will still prevail over those in the other 'instrument' and will also prevail where the claimant is unable to prove where during the carriage the loss occurred. There is a more fundamental problem with the CMR in that a hypothetical road contract for, say, the pre-maritime leg of the carriage would, in many cases, fall outside the ambit of that Convention. For example, if goods were damaged on the UK road leg of a contract for road carriage from the UK to France involving roll-on, roll-off (ro-ro) carriage by sea, the hypothetical contract would be for domestic UK road carriage. This would not be 'international road carriage' as required by Art 1 of the CMR. However, it is possible to read Art 26 so that one looks at the hypothetical contract in its entirety for 'the particular stage of carriage where the loss of, or damage to goods ... occurred'. The hypothetical contract would be the same as



the actual contract of carriage, but a contract subject to the CMR. On this reading, the CMR would prevail as regards issues of liability, limitation and time for suit. However, conflicts would still arise as regards other issues, such as the right of control or jurisdiction. An example would be where there is a carriage by road and by sea between states that are parties to both the CMR and the Convention, but where only the state of delivery has opted into the jurisdiction regime contained in Chapter Fourteen of the Convention. The CMR, but not the Convention, permits suit to be commenced in the place where the branch or agency through which the contract was made is located. The CMR and the Convention also contain rather different provision as regards arbitration and choice of law agreements.

Chapter Seven – obligations of the shipper

Article 27 sets out the shipper's obligations as regards the condition of the goods on delivery. They must be 'ready for carriage and in such condition that they will withstand the intended carriage, including their loading, handling, stowage, lashing and securing and discharge, and that they will not cause injury or damage'. This would probably cover a situation such as arose in *Transoceanica Societa Italiana di Navigazione v H S Shipton & Sons*,³³ where the goods are loaded in such a condition as to cause delay in the discharging process. A similar obligation is imposed by paragraph (3) in relation to goods that are delivered in or on a container or trailer packed by the shipper. Paragraph (2) provides that the obligations of the shipper and documentary shipper under 'fiost' contracts are to be performed properly and carefully. This provision may well give rise to a claim for detention against these parties, similar to that which arises under *Fowler v Knoop*,³⁴ although it is uncertain whether a carrier can claim against a shipper under the Convention in respect of economic loss resulting from delay. Article 28 requires the carrier and shipper to respond to requests from each other for information and instructions required for the proper handling and carriage of the goods.

Article 29 requires the shipper to provide, in a timely manner, information, instructions and documents that are reasonably necessary for the handling and carriage of the cargo, compliance with rules and regulations relating to the intended carriage, and the compilation of the contract particulars and the issuance of the transport documents or electronic records. Unlike the information and instructions required under Art 28, this information must be provided by the shipper whether or not it is requested by the carrier.

Article 31 deals with the information that the shipper must supply for inclusion in the contract particulars and the transport document or electronic transport records. These include:

- (a) the particulars referred to in Art 36(1);³⁵
- (b) the name of the party to be identified as the shipper in the contract particulars;
- (c) the name of the consignee, if any; and
- (d) the name of the person to whose order the transport document or electronic transport record is to be issued, if any.

The information must be provided in a timely manner and its accuracy at the time of its receipt by the carrier is guaranteed by the shipper, who is required to indemnify the carrier against loss or damage resulting from the inaccuracy of such information.³⁶ This is a provision that will become increasingly important in the light of the sanctions imposed for misdescription of containerised cargoes under customs measures such as the US 24 Hours Advanced Manifest Rule, which came into effect on 2 February 2003 in respect of all containerised cargo for discharge at US ports. Article 32 is the counterpart to the first sentence of Art IV(6) of the Hague and Hague-Visby Rules, which refers to 'goods of an inflammable, explosive or dangerous nature'. However, Art 32 refers only to 'danger' and also introduces a reference to danger to the environment. This will bring in cargo that is legally dangerous by reason of any public law liability that the carrier may incur in carrying it due to the threat it poses to the environment. The power to dispose of dangerous goods, which is to be found in the second sentence of Art IV(6), is now to be found in Art 15. Subparagraph (b) makes it clear that the regime for dangerous cargo extends to compliance with legal requirements as to marking and labelling of the goods. These legal requirements are laws, regulations or other requirements and apply at any stage of the intended carriage, not just at the port of discharge. However, the provision does not cover legal requirements that prevent the cargo being unloaded at the port of discharge, of the sort encountered in *Mitchell Cotts & Co v Steel Bros Ltd*.³⁷ This type of 'legally dangerous' cargo would fall under Art 29 instead, and would be subject to a fault-based liability, rather than strict liability.

Article 30 imposes on the shipper and documentary shipper a fault-based liability regime for breaches of obligations under Chapter Seven. However, strict liability is imposed for breaches of the shipper's obligations under Arts 31 and 32. Liability is incurred only as regards 'the carrier' and not any other party, such as performing parties or owners of other cargo that sustain loss or damage as a result of the breach. Article 30 refers to the shipper's liability for 'loss or damage' sustained by the carrier, but there is no reference to economic loss sustained as a result of delay. Is delay covered by the words 'loss or damage'? It is likely that it is not. The Convention pointedly does refer to liability for delay, but only in respect of the liability of the carrier and of maritime performing parties.³⁸ An examination of the reports of Working Group III show that the issue of the shipper's liability for delay was subject to much discussion and it was



proposed that references to such liability should be retained subject to the adoption of an appropriate limitation figure. This was not possible and the shipper is not able to limit its liability under the Convention. In these circumstances, the omission of any reference to the shipper's liability for delay must represent a clear intention by the drafters of the Convention that the shipper and the documentary shipper incur no such liability for breach of their obligations under Chapter Seven. The Working Group, at para 237, in recommending deletion of references to delay in this provision, suggested the possible inclusion of text clarifying that the applicable law relating to shipper's delay was not intended to be affected. However, no such clarifying text appears in the final draft of the Convention. The reports of the Working Group on this issue, as the *travaux préparatoires*, do not seem to provide the necessary 'bull's eye'³⁹ on this issue, which will have to be determined *de novo* by national courts.

Chapter Eight – transport documents and electronic transport records

Article 35 specifies the type of documents that the shipper and the documentary shipper are entitled to receive, and is the equivalent provision to Art VI of the Hague and Hague-Visby Rules. The shipper is entitled to obtain from the carrier, at the shipper's option, an appropriate negotiable or non-negotiable transport document or a negotiable or non-negotiable electronic transport record.⁴⁰ If the shipper consents, the documentary shipper is similarly entitled. This is subject to contrary agreement by the shipper and carrier, or to contrary customs, usages or practices in the trade.

Article 36(1) specifies that there must be included in the transport document or electronic transport record the following contract particulars, furnished by the shipper. A far wider range of information must be included in the transport document than is the case under Art III(3) of the Hague and Hague-Visby Rules. There must be included:

- (a) A description of the goods;
- (b) The leading marks necessary for identification of the goods;
- (c) The number of packages or pieces, or the quantity of goods; and
- (d) The weight of the goods, if furnished by the shipper.

Paragraph (2) then requires the inclusion of the following additional particulars:

- (a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;
- (b) The name and address of a person identified as the carrier;
- (c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport

document or electronic transport record was issued; and

(d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.⁴¹ Paragraph (3) then refers to the inclusion of the name and address of the consignee, the name of the ship, and the place of receipt and, if known, of delivery. Paragraph (4) defines 'apparent order and condition of the goods' as:

the order and condition of the goods based on:

(a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and

(b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or the electronic transport record.

Article 37 deals with the identity of the carrier. Paragraph (1) provides for the conclusive effect of any identification of the carrier by name in the contract particulars, notwithstanding 'any other information in the transport document or electronic transport record relating to the identity of the carrier . . .'. Paragraph (2) deals with the situation in which there is no such identification but the contract particulars state that the goods have been loaded onto a named ship, by creating a presumption that the carrier is the registered owner of the ship. The presumption is rebutted by the registered owner if 'it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may defeat any presumption of being the carrier in the same manner.' These provisions do not prevent the claimant from proving that any person other than the registered owner is the carrier.

Article 38 requires transport documents to be signed by the carrier or a person acting on its behalf and that electronic transport records are to include the electronic signature of the carrier or a person acting on its behalf.⁴² Article 39 provides that the legal character or validity of the transport document or electronic transport record is not affected by the absence or inaccuracy of any of the contract particulars referred to in Art 36(1), (2) and (3). Paragraph (2) deals with the situation in which the contract particulars include the date, but fail to indicate its significance. The date is deemed to be:

(a) The date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship, if the contract particulars indicate that the goods have been loaded on board a ship; or

(b) The date on which the carrier or a performing party received the goods, if the contract particulars do not indicate that the goods have been loaded on board a ship.

Paragraph (3) provides that if the contract particulars fail to state the apparent order and condition of the goods at the time that the carrier or a performing party receives them from the consignor, 'the contract particulars are deemed to have stated that the goods were in apparent good order and condition at the time the carrier or a performing party received them'. Article 40(1) obliges the carrier to qualify the information required in Art 36(1) to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper. The carrier *must* do this if:

- (a) The carrier has actual knowledge that any material statement in the transport document or electronic transport record is materially false or misleading; or
- (b) The carrier reasonably believes that a material statement in the transport document or electronic transport record is false or misleading.

Without prejudice to this provision, the carrier *may* qualify the information referred to in Art 36(1) to indicate that it does not accept responsibility for the accuracy of the information provided by the shipper in two situations.

First, paragraph (3) entitles this to be done where the goods are not delivered for carriage to the carrier or a performing party in a closed container (as will be the case where bulk cargo is loaded) or where they actually inspect goods that are received in a closed container, in one of two situations. The first is where the carrier had no physically practicable or commercially reasonable means of checking the information provided by the shipper. In this case, it must indicate which information it was unable to check. This will raise an issue with 'said to weigh' clausings in relation to bulk cargo as to whether the carrier had 'physically practicable or commercially reasonable means' of checking the weight provided by the shipper. The second is where the carrier 'has reasonable grounds to believe the information furnished to be inaccurate'. In this case, it may include a clause providing what it reasonably considers 'accurate information'. Secondly, paragraph (4) permits qualification of the information required in Art 36(1)(a), (b) or (c), where the goods are delivered for carriage to the carrier or performing party in a closed container, subject to the following conditions:

... neither the carrier nor a performing party have actually inspected the goods inside the container; neither party otherwise has actual knowledge of the contents of the container before issuing the transport document or the electronic transport record.

The weight particulars referred to in Art 36(1)(d) may be qualified if:



- neither carrier nor a performing party have weighed the container or vehicle; and
- there was no physically practicable or commercially reasonable means of checking the weight of the container or vehicle.

The right to qualify the weight of a container does not apply where the shipper and the carrier have agreed prior to the shipment that the container or vehicle would be weighed and that the weight would be included in the contract particulars. The Convention does not define 'qualification', but it is likely that more is required than a printed 'said to weigh' or 'said to contain' statement in the transport document.

Subject to their qualification as set out in Art 40, the contract particulars are, by Art 41, stated as constituting prima facie evidence of the carrier's receipt of the goods, as stated in the contract particulars in the transport document or electronic transport record.⁴³ The contract particulars will have conclusive effect when included in:


- (i) a negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith; or
- (ii) a non-negotiable transport document or a non-negotiable electronic transport record that indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith.

Paragraph (c) then provides that certain particulars shall have conclusive effect when a consignee in good faith, under a non-negotiable transport document (such as a sea waybill) or electronic transport record, has acted in reliance on any of them. The particulars in question are: those referred to in Art 36(1) when furnished by the carrier; the number, type and identifying numbers of the containers, but not the identifying numbers of the container seals; and those referred to in Art 36(2).

This chapter concludes with Art 42, which deals with effect of 'freight prepaid' clausing, and is all that remains of a separate chapter, Chapter Nine, which dealt with freight under a previous draft of the Convention. It provides:

If the contract particulars contain the statement 'freight prepaid' or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.

This provision operates in favour of the holder or the consignee, but not in favour of the shipper. This would appear to restate existing law on the operation of such wording by way of estoppel. However, two points need to be made. First, under existing law, there may be situations in which a bill of lading holder that is not the original shipper may be unable to rely on such wording. Suppose that the bill of lading incorporates the terms of a subcharter and is then indorsed to the subcharterer.




The subcharterer would be unable to rely on the estoppel created by the wording because it would know for itself whether or not freight had been paid under the subcharter. In contrast, under Art 42, such a holder would be able to rely on the 'freight prepaid' wording. Secondly, the provision is directed at 'freight prepaid' wording in its estoppel role with its reference to 'the fact that the freight has not been paid'. It says nothing, however, about the impact of such clausing in determining whether the original shipper has undertaken any liability to pay freight in the first place. In *Cho Yang Shipping Co Ltd v Coral (UK) Ltd*,⁴⁴ such clausing was held to be an important part of the factual matrix, which rebutted the presumption that the bill of lading shipper had undertaken to pay freight. This issue will remain to be dealt with according to national laws, as the Convention does not deal with the shipper's liability for freight.

Chapter Nine – delivery of the goods

Chapter Nine deals with delivery of the goods and largely codifies the existing English law on this topic. Article 43 requires the consignee that demands delivery under the contract of carriage to accept delivery of the goods on arrival at their destination. It does not specify what remedy is available to the carrier in the event that such consignee fails to accept delivery of the goods. Article 44 requires the consignee to acknowledge receipt from the carrier or the performing party in the manner that is customary at the place of delivery, on the request of either of these parties. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

There then follow a series of Articles that deal with delivery under three classes of transport documents: non-negotiable transport records/electronic transport records; non-negotiable transport documents under which surrender of the document is required to obtain delivery; and negotiable transport documents/electronic records. These provisions also deal with the carrier's rights and duties when the goods cannot be delivered as specified by the Convention, as when the party entitled to take delivery does not come forward to do so. The first of these three categories is covered by

Art 45, which provides that the carrier shall deliver the goods to the consignee at the time and location referred to in Art 43, and may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier. If the contract particulars do not specify the consignee's name and address, the controlling party must advise the carrier of these details before or upon the arrival of the goods. If the carrier does not know the consignee's name and address or if the consignee, having received notice of arrival, does not claim delivery of the goods from the carrier after their arrival, the carrier must so advise the controlling party. If, after reasonable effort, it is unable to locate the controlling party, it must notify the




shipper.⁴⁵ These parties must then give the carrier delivery instructions. Delivery pursuant to the instructions of these parties then discharges the carrier from its obligations to deliver the goods under the contract of carriage.

The second category, non-negotiable transport documents and electronic transport records that require surrender, falls under Art 46, which provides that the consignee must not only produce proper identification at the carrier's request, but must also surrender the document. If more than one original has been issued, the surrender of only one original will suffice and the other originals will then cease to have any effect. If the consignee cannot be located, the carrier may deliver to the shipper, or documentary shipper if the shipper, too, cannot be located. Such delivery may be made without production of an original document. Delivery pursuant to the instructions of these parties then discharges the carrier from its obligations to deliver the goods under the contract of carriage.

This is a significant change in the law relating to delivery under straight bills of lading. The third category, negotiable transport documents and electronic transport records, falls under Art 47. The holder of such document or record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination. In this event, the carrier shall deliver the goods at the time and location referred to in Art 43, to the holder, as appropriate. This shall be done upon surrender of the negotiable transport document and, additionally, if the holder is one of the persons referred to in Art 1(10)(a)(i),⁴⁶ upon proper identification. Surrender of one original of multiple original documents will suffice.⁴⁷ The others will then cease to have effect or validity.

The holder of a negotiable electronic transport record must demonstrate, in accordance with the procedures referred to in Art 9(1) that it is the holder of that record. The electronic transport record will then cease to have any effect or validity upon delivery to the holder in accordance with the procedures required by Art 9(1). The carrier shall refuse delivery if these conditions are not met.

Paragraph (2) provides rules for delivery under negotiable transport documents/electronic records that expressly state that the goods may be delivered without the surrender of the transport document or electronic transport record. These rules are without prejudice to the rules regarding undelivered goods that are contained in Art 48. The rules under paragraph 2 contemplate the goods not being deliverable due to a failure of the holder to claim delivery at the place of destination after receiving a notice of arrival; or a failure of the holder properly to identify itself as one of the persons referred to in Art 1(10)(a)(i); or the inability of the carrier, after reasonable effort, to locate the holder in order to request delivery instructions. In these circumstances, the carrier may advise the shipper and request delivery instructions from it instead. If, after reasonable effort, the shipper cannot be located, the carrier may




obtain instructions from the documentary shipper. Subparagraph (b) provides that delivery on the instructions of these parties in these circumstances will discharge the carrier from its contractual obligation to deliver to the holder, even if there has been no surrender of the negotiable transport document or compliance with the procedures set out in Art 9(1) regarding delivery to the holder of a negotiable electronic transport record. Subparagraph (c) entitles the carrier to an indemnity, against loss arising from liability from the holder under subparagraph (e), from the shipper/documentary shipper that gives delivery instructions in such circumstances. The carrier is entitled to refuse to follow the instructions of the shipper/documentary shipper if they fail to provide adequate security as the carrier may reasonably request. Subparagraph (d) deals with the problem of 'spent' negotiable transport documents or negotiable electronic records. A person who becomes a holder of either of these after delivery pursuant to paragraph (b), but pursuant to contractual or other arrangements made before such delivery, acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods.⁴⁸ Subparagraph (e) then provides that, notwithstanding subparagraphs (b) and (d), the holder will acquire the rights incorporated in the negotiable transport document or negotiable electronic transport record provided that it did not have, or could not reasonably have had, knowledge of such delivery at the time that it became a holder. This will be presumed 'when the contract particulars state the expected time of arrival of the goods or indicate how to obtain information as to whether the goods have been delivered'.

Article 48 deals with the situation in which goods remain undelivered. Paragraph (1) provides that the goods shall be deemed to have remained undelivered at the place of destination only if:

- (a) the consignee does not accept delivery of the goods pursuant to this chapter at the time and location referred to in Art 43;
- (b) the controlling party or the shipper cannot be found or does not give the carrier adequate instructions pursuant to Arts 45, 46 and 47;
- (c) the carrier is entitled or required to refuse delivery pursuant to Arts 44, 45, 46 and 47;
- (d) the carrier is not allowed to deliver the goods to the consignee pursuant to the law or regulations of the place at which delivery is requested;
- (e) the goods are otherwise undeliverable by the carrier.

Paragraph (2) then entitles the carrier,⁴⁹ at the risk and expense of the person entitled to the goods, to take such action in respect of the goods as circumstances may



reasonably require. This includes: storing the goods at any suitable place; unpacking the goods if they are packed in containers, or to act otherwise in respect of the goods, including by moving the goods or causing them to be destroyed; and causing the goods to be sold in accordance with the practices, or pursuant to the law or regulations of the place where the goods are located at the time. Paragraph (3) states that these rights are subject to giving 'reasonable advance notice of arrival of the goods at the place of destination to the person stated in the contract particulars as the person, if any, to be notified of the arrival of the goods at the place of destination, and to one of the following persons in the order indicated, if known to the carrier: the consignee, the controlling party or the shipper'. Paragraph (4) requires the carrier to hold the proceeds of the sale 'for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred by the carrier and any other amounts that are due to the carrier in connection with the carriage of those goods'. Paragraph (5) provides that the carrier shall not be liable for loss or damage to the goods occurring during the time that they are undelivered.


However, the claimant may claim if it can prove that the loss or damage was the result of the carrier's failure to take reasonable steps to preserve the goods, and that the carrier knew or ought to have known that loss or damage would result from its failure to take such steps. Article 49 preserves any lien that may enure to the carrier or performing party under the contract of carriage or the applicable law.

Chapter Ten – rights of the controlling party

Chapter Ten sets out the rights of the controlling party. At common law, the consignor has the right to change the identity of the consignee up to the point at which the cargo is delivered. Where a negotiable document has been issued, that right will terminate upon transfer of that document.

Under the Convention, the right of control exists during the entire period of responsibility of the carrier, as provided in Art 12. Article 50 provides that it may be exercised only by the controlling party and is limited to three rights: to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage; to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and to replace the consignee by any other person including the controlling party. The second of these rights does not currently exist under English law.

Article 51 then identifies the controlling party. Paragraph (1) sets out the basic rule whereby the shipper is the controlling party 'unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another




person as the controlling party'. The controlling party may transfer the right of control to another person and the transfer will bind the carrier upon its notification of the transfer by the transferor. The transferee then becomes the controlling party. The controlling party must produce proper identification when it exercises the right of control. This provision would appear to permit the consignee designating another party as a controlling party, so transforming a waybill, or its electronic equivalent, into a quasi-negotiable transport document.

There then follow three specific rules to deal with: non-negotiable transport documents that require surrender (straight bills of lading); negotiable transport documents (bills of lading); and negotiable electronic transport records. Paragraph (2) deals with the situation in which a non-negotiable transport document or a non-negotiable electronic transport record has been issued, requiring its surrender in order to obtain delivery of the goods. The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document or the electronic transport record by transferring the document to this person without indorsement, or by transferring the electronic transport record to it in accordance with the procedures referred to in Art 9.⁵⁰ To exercise its right of control, the controlling party must produce all originals of the document, as well as proper identification.⁵¹

Paragraph (3) deals with the situation in which a negotiable transport document is issued. The controlling party is the holder of all of the original negotiable transport documents. The holder may transfer the right of control by transferring all of the original negotiable transport documents to another person in accordance with Art 57. To exercise the right of control, the holder must produce all of the negotiable transport documents to the carrier. If the holder of an order document is one of the persons referred to in Art 1(10h)(a)(i), they must also produce proper identification. Paragraph (4) deals with the situation in which a negotiable electronic transport record is issued. The holder is the controlling party and may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in Art 9. To exercise the right of control, the holder must demonstrate that it is the holder, in accordance with the procedures referred to in Art 9.

Article 52 requires the carrier to execute the instructions referred in Art 50 subject to three conditions. First, the person giving such instructions is entitled to exercise the right of control. Secondly, 'the instructions can reasonably be executed according to their terms at the moment that they reach the carrier'. Thirdly, 'the instructions will not interfere with the normal operations of the carrier, including its delivery practices'. The carrier is entitled to be reimbursed by the controlling party for any expense that it may incur as a result of executing its instructions. It is also entitled to an indemnity 'against any loss or damage that the carrier may suffer as a result of executing any instruction






pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried'. The carrier may also obtain security from the controlling party 'for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article'. If no such security is provided, the carrier is entitled to refuse to carry out the instructions. If the carrier fails to comply with the controlling party's instructions, as required by Art 52(1), its liability for resulting loss of or damage to the goods or for delay in delivery is subject to Arts 17–23. The amount of compensation payable is subject to Arts 59–61. Article 53 provides that goods delivered pursuant to such an instruction are deemed to be delivered at the place of destination, and the provisions of Chapter Nine relating to such delivery apply to such goods. Article 54 deals with variations to the contract of carriage. Only the controlling party may agree with the carrier to variations to the contract of carriage other than those referred to in Art 50(1)(b) and (c). All contractual variations 'shall be stated in a negotiable transport document or incorporated in a negotiable electronic transport record, or, at the option of the controlling party, shall be stated in a non-negotiable transport document or incorporated in a non-negotiable electronic transport record'.⁵² Such variations do not affect the rights and obligations of the parties prior to the date on which they are signed in accordance with Art 38. Article 56 also entitles the parties to the contract of carriage to vary the effect of Arts 50(1)(b) and (c), (2), and 52, and also to restrict or exclude the transferability of the right of control referred to in Art 51(1)(b).

Chapter Eleven – transfer of rights

Article 57 provides that the holder of a negotiable transport document may transfer the rights incorporated in the document as follows. Where the document is an order document, the transfer is through an indorsement to another person, or in blank. Transfer by indorsement is not required where the document is a bearer document or a blank indorsed document, or the document is made out to the order of a named person and the transfer is between the first holder and the named person. When a negotiable electronic transport record is issued, paragraph (2) provides that its holder may 'transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1'. There is no provision defining the point at which a transfer of a negotiable transport document will cease to transfer the rights incorporated in that document. Presumably, the document would continue to be transferable at least until delivery of the goods and transfers of contractual rights would therefore continue to be possible during the final land carriage leg of a multimodal contract of carriage.⁵³ The Convention contains no provision divesting



parties of rights of suit of the sort seen in s 2(5) of the **Carriage of Goods by Sea Act (COGSA) 1992**. The transfer of rights and liabilities under non-negotiable documents, such as straight bills and waybills, will continue to be dealt with under national laws.


Liability of third parties under negotiable transport documents or their electronic equivalents is dealt with under Art 58. The transfer of rights and liabilities under non-negotiable transport documents, or their electronic equivalents, or under delivery orders, falls outside the Convention and is left to be dealt with under national laws. Paragraph (2) sets out, as follows, the circumstances in which a third-party holder of such a document will become subject to liabilities under the contract of carriage:

A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record.

Paragraph (1) provides that a holder that is not the shipper will not be liable if it does not exercise any right under the contract of carriage 'solely by reason of being a holder'. Paragraph (3) then provides two instances in which the holder that is not the shipper will not be taken to have exercised any right under the contract of carriage. The first is where 'It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document.' The second is where it transfers its rights pursuant to Art 57.

These provisions will operate rather differently as regards third parties than is the case under existing law. Under s 3(1) of **COGSA 1992**, the lawful holder who satisfies one of the three triggers for liability becomes 'subject to the same liabilities under that contract as if he had been a party to that contract'. In contrast, Art 58 operates so that the holder 'assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record'.⁵⁴ This would include any express liability for freight imposed by the terms of the bill of lading itself or through the incorporation of charterparty terms. It would not, however, subject the holder to any implied obligation to pay freight that may have been imposed on the original shipper. Article 58 contains no provisions relating to the continuing liability of the original shipper, as is provided for in s 3(3) of **COGSA 1992**, and none relating to the divestment of liability from subsequent parties when they cease to be the holder of a negotiable transport document or negotiable electronic record.

One area of uncertainty that remains is what degree of incorporation or ascertainability is required in the wording of the negotiable transport document, to impose



charterparty liabilities for freight and demurrage on the holder of the negotiable transport document. For example, will an express reference be needed to the relevant freight and demurrage provisions? Will it be necessary to go further and specify the amount of freight unpaid at the date on which the negotiable transport document is signed?

Chapter Twelve – limits of liability

Article 59 sets the limits of liability for the carrier's breaches of its obligations under the Convention at 875 SDRs per package or other shipping unit, or 3 SDRs per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher.⁵⁵ The wording of the gross weight alternative differs from that used in the Hague-Visby Rules and should avoid the result in *The Limnos*,⁵⁶ where the gross weight was held to be limited to that of the cargo that was physically lost or damaged, notwithstanding that other cargo, although physically sound, had been economically damaged. Paragraph (2) adopts the Hague-Visby provision relating to the identification of the package of shipping unit when goods are carried in a container. Article 60 provides a separate limit of liability for economic loss due to delay. This is fixed at an amount equivalent to two-and-a-half times the freight payable on the goods delayed. Article 60 also provides that loss of or damage to the goods due to delay is calculated in accordance with Art 22. The total amount payable under Arts 59 and 60 must not exceed the limit that would apply under Art 59(1) in respect of a total loss of the goods concerned. Article 61 removes the right to limit from the carrier, or any of the parties listed in Art 18, if the claimant proves that 'the loss resulting from the breach of the carrier's obligation under this Convention was attributable to a personal act or 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'. Article 61(2) contains a similar provision as regards the benefit of the limitation of liability for delay contained in Art 60. There are no limitation provisions in respect of the liabilities incurred under Chapter Seven by the shipper and the documentary shipper.

Chapter Thirteen – time for suit

Article 62(1) provides that 'No judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation under this Convention may be instituted after the expiration of a period of two years'.⁵⁷ Accordingly, the time bar may be relied on by the shipper and documentary shipper, and not just by the carrier and any maritime performing party. Article 62(3) provides that, notwithstanding the expiration of the two-year time bar under the Convention, 'one party may rely on its claim as a



defence or for the purpose of set-off against a claim asserted by the other party'. Contrary to the position under *The Aries*,⁵⁸ it is likely that a cargo claim that had become time-barred could now be set off as against the carrier's claim for freight. The provision refers to 'a claim asserted by the other party' and does not limit such a claim to one that arises under the Convention. The time bar may be relied on not only by the carrier and a maritime performing party, but also by a shipper or documentary shipper that incurs a liability to the carrier under Chapter Seven. Article 63 provides for the possibility of extensions being granted by a declaration to the claimant. Article 64 deals with the time limits for indemnity actions. These may be instituted after the expiry of the time limit in Art 62 either within the time allowed by the applicable law of the jurisdiction in which proceedings are instituted, or within 90 days of the claim being settled by the person instituting indemnity proceedings or of that person being served with process in an action against itself. Article 65 contains similar provisions relating to actions against the bareboat charterer or the person identified as the carrier under Art 37(2). The 90 days run from the identification of the carrier or from when the presumption under Art 37(2) is rebutted.

Chapter Fourteen – jurisdiction

This chapter applies only if a Contracting State has opted into it under Art 91. Article 66(a) provides for actions against the carrier to be brought in the following places:

In a competent court within the jurisdiction of which is situated one of the following places:

- (i) The domicile of the carrier;
- (ii) The place of receipt agreed in the contract of carriage;
- (iii) The place of delivery agreed in the contract of carriage; or
- (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.

Alternatively, subparagraph (b) permits proceedings to be brought in a court designated by an agreement between the shipper and the carrier. Article 67 provides that such a court will be exclusive only if the parties so agree and if their agreement:

- (a) Is contained in a volume contract that clearly states the names and addresses of the parties and either (i) is individually negotiated or (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and
- (b) Clearly designates the courts of one Contracting State or one or more specific

courts of one Contracting State.

Third parties to the volume contract are only bound by such an exclusive choice of court agreement if:

- (a) the court is in one of the places designated in Art 66, para (a);
- (b) that agreement is contained in the transport document or electronic transport record;
- (c) that person is given timely and adequate notice of the court in which the action shall be brought and that the jurisdiction of that court is exclusive; and
- (d) the law of the court seized recognises that that person may be bound by the exclusive choice of court agreement.

Article 68 gives the plaintiff the right to sue the maritime performing party under the Convention in a competent court situated in the domicile of the maritime performing party or 'the port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performs its activities with respect to the goods'. Under Art 72, after a dispute has arisen, the parties may agree to resolve it in any competent court. If the defendant appears before a competent court without contesting jurisdiction, that court has jurisdiction. Article 69 provides that there are no other bases of jurisdiction for proceedings under the Convention against either a carrier or a maritime performing party. Article 70 provides that the Convention does not affect jurisdiction with regard to provisional or protective measures, including arrest. However, the court in which such proceedings are taken has no jurisdiction to hear the case on the merits unless it falls with the requirements of Chapter Fifteen or is given such jurisdiction by an international convention that applies in that state.

Article 71 deals with consolidation and removal of actions where a single action is brought against the carrier and the maritime performing party arising out of a single occurrence. The consolidated action must be brought in a court that has jurisdiction under both Arts 66 and 68, and if there is none, then proceedings may be brought in a court falling under Art 68(b). This is subject to an exception where there is an exclusive choice of court agreement that is binding under Arts 67 or 72. Carriers or maritime performing parties that commence proceedings for a declaration of non-liability in a court authorised under this chapter must withdraw the action once the defendant has chosen their court, as permitted under Arts 66 or 68. Article 73 deals with enforcement and recognition of judgments given in Contracting States by other Contracting States, where both states have opted into the provisions of this chapter.

Chapter Fifteen – arbitration

This chapter applies only if a Contracting State has opted into it under Art 91. Article 75 permits the parties to refer disputes relating to the carriage of goods under the Convention to arbitration.

Paragraph (2) provides that the proceedings shall take place, at the option of the person claiming against the carrier at:

- (a) Any place designated for that purpose in the arbitration agreement; or
- (b) Any other place situated in a State where any of the following places is located:
 - (i) The domicile of the carrier;
 - (ii) The place of receipt agreed in the contract of carriage;
 - (iii) The place of delivery agreed in the contract of carriage; or
 - (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.

The agreed arbitration venue binds the parties to the agreement if it is contained in a volume contract that clearly states the names and addresses of the parties and is either individually negotiated or contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the arbitration agreement. Third parties are bound by the designation of the place of arbitration only if: the agreed place is situated in one of the places referred to in Art 75(2)(b); the agreement is contained in the transport document or electronic transport record; the person to be bound is given timely and adequate notice of the place of arbitration; and applicable law permits that person to be bound by the arbitration agreement. Any term of the arbitration agreement is void to the extent of any inconsistency with the provisions of Art 75.

Article 76 deals with arbitration agreements in non-liner transportation. The Convention does not affect the enforceability of such agreements where the Convention applies by reason of Art 7 or the parties' voluntary incorporation of the Convention into a contract of carriage that would otherwise fall outside the Convention. However, Art 76 provides that, where the Convention applies by reason of Art 7, the transport document or electronic record must identify the parties to, and the date of, the charterparty or other contract excluded from the application of this Convention by reason of the application of Art 6. The contract must also incorporate by specific reference the clause in the charterparty or other contract that contains the terms of the arbitration agreement. Article 77 provides that, 'Notwithstanding the provisions of this chapter and chapter 14, after a dispute has arisen the parties to the



dispute may agree to resolve it by arbitration in any place.


Chapter Sixteen – validity of contractual terms

The Convention contains a provision similar to Art III(8) of the Hague and Hague-Visby Rules in Art 79(1), but also applies these principles against the cargo owner in Art 79(2), which provides:

2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:
 - (a) Directly or indirectly excludes, limits, or increases the obligations under this Convention of the shipper, consignee, controlling party, holder, or documentary shipper; or
 - (b) Directly or indirectly excludes, limits, or increases the liability of the shipper, consignee, controlling party, holder, or documentary shipper for breach of any of its obligations under this Convention.

This provision would operate so as to prevent the obligations of the shipper and documentary shipper, which are imposed under Chapter Seven, from being extended to third-party holders of the transport document by reason of an express stipulation to that effect. It would also prevent an express contractual term from relieving the shipper or documentary shipper of their liability under Chapter Seven of the Convention.⁵⁹

Article 80 allows for a limited exemption from the Convention as regards volume contracts. These are defined in Art 1(2) as 'a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range'.⁶⁰ As between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention. However, paragraph (2) sets out the following conditions for a derogation to be binding: the volume contract must contain a prominent statement that it derogates from this Convention; it must be individually negotiated or must prominently specify the sections of the volume contract containing the derogations; and the shipper must be given an opportunity and notice of the opportunity to conclude a contract of carriage on Convention terms without derogation. The derogation must not be incorporated by reference from another document, nor must it be included in a contract of adhesion that is not subject to negotiation. The obligations in Arts 14(a) and (b), 29 and 32 are not susceptible to derogation, and neither is any liability arising from an act or omission referred to in Art 61. Paragraph (5) then sets out the circumstances in which a volume contract that derogates from the



Convention applies as between the carrier and a party other than the shipper. The third party must have received information that prominently states that the volume contract derogates from this Convention and have given its express consent to be bound by such derogations. Such consent must not be 'solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record'. The burden of proof that the conditions for derogation have been fulfilled falls on the party claiming the benefit of the derogation.

Article 81 allows the carrier and the performing party to exclude their liability in two situations: first, where the goods are live animals, although liability will still be imposed where it is proved that the loss, damage or delay arose in circumstances that would lead to the loss of the right to limit; secondly, 'if the character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement'. This is subject to the provisos that 'ordinary commercial shipments made in the ordinary course of trade are not concerned and no negotiable transport document or negotiable electronic record is or is to be issued for the carriage of the goods'.

Chapter Seventeen – matters not covered by this convention

Article 82 attempts to deal with the problems of overlap between the Convention and existing unimodal conventions by providing that 'Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force that regulate the liability of the carrier for loss of or damage to the goods'. Subparagraph (a) refers to any convention dealing with the carriage of goods by air 'to the extent that such convention according to its provisions applies to any part of the contract of carriage'.

Subparagraph (b) deals with road carriage and its wording is rather different. Instead, it refers to 'any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a vehicle carried on board a ship'. The CMR 'regulates the carrier's liability', so its application is unaffected by anything in the Draft Convention 'to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a vehicle carried on board a ship'. If goods remain loaded on the ship, then Art 2 applies the CMR to the entire international contract of carriage by road (it is still such a contract even though another mode of transport is involved), subject to the proviso about maritime-specific loss. It would, therefore, seem as if only such maritime-specific loss will fall within the Convention. This leaves no role for Art 26 as regards multimodal carriage involving road and sea legs. However, Anthony Diamond

QC interprets this provision as saying that the CMR will only apply to the extent that its provisions cover loss or damage occurring *while* the goods remain loaded on the ship – that is, to road-specific loss that happens to occur during the sea transit.⁶¹ That would then give a possible role to Art 26 in relation to what happened before and after the sea leg. This seems to be supported by the *travaux préparatoires* of the Convention, which state that this provision was intended ‘to eliminate only a very narrow and unavoidable conflict of convention between the relevant unimodal transport conventions and the convention’.⁶²

Subparagraph (c) refers to any convention governing carriage of goods by rail ‘to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail’. Similar wording is used in subparagraph (d) as regards conventions governing the carriage of goods by inland waterways.

Article 83 provides that the Convention shall not affect the application of any international convention on global limitation, while Art 84 provides that the Convention shall not affect ‘the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average’. Article 85 excludes the operation of the Convention as regards contracts of carriage for passengers and their luggage, while Art 86 prevents liability arising under the Convention for damage due to a nuclear incident if the operator of the nuclear installation is liable under the specified international conventions or under national law applicable to such damage.

Chapter Eighteen – final clauses

This chapter provides the procedure for the signature, ratification, acceptance or approval of the Convention. Article 94 provides for the Convention to come into effect one year after the deposit of the twentieth instrument of ratification, acceptance, approval or accession. Article 89 requires states that accept, approve or accede to the Convention to denounce existing maritime conventions to which they are a party – namely, the Hague Rules, the Visby Protocol and its 1979 amending Protocol, and the Hamburg Rules.

Notes

1 Even where the contract is subject to English law, the court may, pursuant to the provisions of Art 10(2) of the 1990 Rome Convention, take account of law in force in the country in which the contractual obligation will be performed, so far as it relates to the mode of performance. Thus, in *East West Corp v DKBS 1912* [2002] 2 Lloyd’s Rep 535, QB, Thomas J considered the effect of Art 4(1)(3) of the Hamburg Rules in relation to a misdelivery claim that arose in Chile, which applies the Hamburg Rules.



2 Article 2(3).

3 The shipper's liability in respect of dangerous cargo is covered by Art 13, which is of similar effect to Art IV(6) of the Hague and Hague-Visby Rules.

4 It is doubtful whether the shipowner would be an 'actual carrier' where the vessel is on demise charter, as such a shipowner cannot realistically be said to 'perform' any part of the contract made by the charterer. See Luddecke and Johnson, *The Hamburg Rules*, 2nd edn, 1995, London: LLP, p 24.

5 Article 10(2)(d), by implication, must also extend to the actual carrier the benefit of any protective provisions of the Conventions, such as those contained in Arts 5 and 6.

6 'Package' is defined in similar fashion to the Hague-Visby definition in Art IV(5).

7 This wording makes it unclear whether Art 20 will cover claims for misdelivery.

8 [1957] AC 149, HL.

9 *The Hollandia (sub nom The Morviken)* [1983] 1 AC 565, HL.

10 Article 22 contains similar provisions relating to arbitration.

11 The permissible venues for arbitration proceedings are specified in Art 22(3).

12 If both courts were in States Parties to the Judgments Regulation, the *impasse* would be resolved in favour of the court 'first seised' in accordance with the provisions of Arts 27 and 28.

13 For example, the name of the shipper and the name and principal place of business of the carrier must be included, as well as the number of original bills issued and the freight, if any, to be paid by the consignee.

14 <http://www.un.org/News/Press/docs/2008/gal3359.doc.htm> (accessed 10 December 2008). The English text of the Convention is to be found on the UNCITRAL website: http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/09-85608_Ebook.pdf (accessed 29 April 2014).

15 [1997] 2 Lloyd's Rep 641.

16 The wording 'shall provide for carriage by sea' may lead to different interpretations by national courts, as has been the case with Art 1 of CMR. For example, if the contract of carriage does not specify the transport modes, but does in fact involve an element of sea carriage, will this fall within the scope of the Convention under Art 5?

17 The word 'keeping' was added to this paragraph in an amendment on 25 January 2013 (Depositary Notification C.N.105.2013.TREATIES-XI.D.8, Depositary Notification C.N.563.2012.TREATIES-XI.D.8).

18 [1987] 1 Lloyd's Rep 18.

19 Subparagraph (b) describes the holder of a negotiable electronic transport record as 'the person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1'.

20 Article 1(3) defines liner transportation as 'a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates'. Article 1(4) provides that non-liner transportation means any transportation that is not liner transportation.

21 Anthony Diamond QC, 'The next sea carriage convention?' [2008] LMCLQ 135, 146, observes that the

wording of Art 6(2): '... was intended to bring within the Convention so-called "on-demand" carriage in the bulk trades but it will give rise to some artificial considerations, such as whether the evidence of the contract of carriage is in the same document as, or a different document from, the carrier's receipt for the goods. Quite what the provision will achieve in practice is difficult to predict.'

22 Article 1(26) defines a 'container' as 'any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load'. However, Glass, D, 'A sea regime fit for the 21st century?' (2008) 7(2) Shipping and Transport International 8, 12, observes: 'A problem remains, however, in respect of damage caused by a defective container where this occurs outside the period of the carrier's responsibility. This could arise where the carrier supplies the container but the shipper independently arranges for carriage to the terminal.'

23 *Motis Exports Ltd v Dampskibsselskabet AF 1912 A/S (No 1)* [1999] 1 Lloyd's Rep 837, QB; [2000] 1 Lloyd's Rep 211, CA.

24 This consolidates exceptions in Art IV(2)(e), (f) and (k), and adds in piracy and terrorism.

25 This is a consolidation of Art IV(2)(g) 'Arrest or restraint of princes, rulers or people, or seizure under legal process' and (h) 'Quarantine restrictions'.

26 Cf Art IV(2)(b) of the Hague Rules, 'fire, unless caused by the actual fault or privity of the carrier'.

27 Cf Art IV(2)(1) 'Act or omission of the shipper of the goods, his agent or representatives'.

28 This is an expanded version of 'Inefficiency of packing' under Art IV(2)(n) of the Hague Rules.

29 The words 'and either' prior to heading (ii) were added by amendment on 25 January 2013 (Depositary Notification C.N.105.2013.TREATIES-XI.D.8, Depositary Notification C.N.563.2012.TREATIES-XI.D.8).

30 The presumption is subject to proof to the contrary.

31 In contrast, Art 1(c) of the Hague-Visby Rules merely excludes 'cargo which by the contract of carriage is stated as being carried on deck and is so carried' from its definition of 'goods' and is silent as to when it is permissible to carry cargo on deck.

32 The reference here is to 'instrument' rather than 'convention', which would cover, for example, a EU Regulation covering the carrier's activities.

33 [1923] 1 KB 31. It is, however, uncertain whether economic loss due to delay can be recovered from the shipper under Art 30.

34 (1878) 4 QBD 299.

35 The contract particulars in the transport document or electronic transport record referred to in Art 35 shall include the following information, as furnished by the shipper:

- (a) a description of the goods as appropriate for the transport;
- (b) the leading marks necessary for identification of the goods;
- (c) the number of packages or pieces, or the quantity of goods; and
- (d) the weight of the goods, if furnished by the shipper.

36 The provision is an expanded version of Art III(5) of the Hague and Hague-Visby Rules. However, the shipper must not only guarantee the accuracy of the information, it must also provide it 'in a timely manner'.

37 [1916] 2 KB 610. The restrictions could be imposed by the authorities at the port of discharge or, as in

Mitchell Cotts, by the authorities of the flag state.

38 Specific references to delay, in addition to 'loss' or 'damage', are to be found in Arts 17(1), 20 ('joint and several liability') and 23 ('notice in case of loss, damage or delay'). In contrast, Art 22 ('calculation of compensation') refers only to loss or damage. However, Art 60 provides that its provisions shall apply to compensation for loss or damage due to delay, whereas liability for economic loss due to delay is subject to its own limitation figure of two-and-a-half times freight.

39 These were the words used by Lord Steyn in *The Giannis NK* [1998] AC 605, 623F, to describe when the English courts would resolve an issue of interpretation in an international convention by reference to its *travaux préparatoires*.

40 The latter option is subject to the provisions of Art 8(a).

41 Paragraph (2).

42 'Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier's authorization of the electronic transport record.'

43 Qualifications other than those permitted or required under Art 40 will therefore be ineffective. This deals with the problem that arose in *The Mata K* [1998] 2 Lloyd's Rep 614, regarding qualifications as to the weight of the cargo loaded, which were alleged not to comply with the proviso to Art III(3) of the Hague-Visby Rules. Anthony Diamond QC, *op cit* fn 21, p 169, raises a number of queries about the application of these provisions, in particular, as to who bears the burden of proof when a claimant challenges a qualification by the carrier, and as to how the provisions will work with carriage of bulk cargoes. As regards the latter, he writes: 'At the time of shipment the Convention will not apply if, as is usual, the bills of lading are issued in non-liner transportation. But the bills may subsequently be indorsed to one or more third parties, so that the Convention then applies. Will a clause that is valid on shipment subsequently be invalidated? I suspect that these and other questions will be answered differently in the courts of different countries.'

44 [1997] 2 Lloyd's Rep 641.

45 If neither party can be located by the carrier, after reasonable effort, the documentary shipper is deemed to be the shipper.

46 The shipper, consignee or indorsee, where the document is an order document.

47 The existing common law position is somewhat different in that delivery against one original bill of lading will only provide the carrier with a defence to an action in conversion if it had no actual or constructive knowledge that another party had the immediate right to possession in the goods.

48 The rule is in terms similar to those used with regard to 'spent' bills of lading in s 2(2)(a) of COGSA 1992. The rule, however, applies only to negotiable transport documents that expressly provide for delivery of the goods without surrender of the document.^{50x}

49 'Unless otherwise agreed and without prejudice to any other rights that the carrier may have against the shipper, controlling party or consignee ...'

50 If more than one original of the document was issued, all originals shall be transferred in order to effect a transfer of the right of control.

51 In the case of an electronic transport record, the holder shall demonstrate in accordance with the procedures referred to in Art 9 that it has exclusive control of the electronic transport record.

52 This preserves the existing law, under *Leduc v Ward* (1888) 20 QBD 475, whereby the terms of the



contract between third-party holders of a bill of lading and the carrier are exclusively those contained in the bill of lading, and do not include any variations that may have been agreed between the original contracting parties.

53 The position regarding spent bills is dealt with under Art 47(2)(b) in terms similar to those to be found in s 2(2)(a) of COGSA 1992. This provision, however, applies only where the transport document expressly provides for delivery of cargo without surrender of the document.

54 Where the holder is also the charterer, as was the case in *The Dunelmia* [1970] 1 QB 289, it will fall outside the provisions of the Convention by virtue of Art 6.

55 'Except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.'

56 [2008] EWHC 1036 (Comm); [2008] 2 Lloyd's Rep 166.

57 The time bar operates procedurally rather than substantially, as under Art III(6) of the Hague Rules, which refers to the carrier and the ship being discharged from all liability.

58 [1977] 1 WLR 185.

59 The penultimate draft of the Convention contained a specific provision directed at such cesser clauses, but this was deleted.

60 Article 80(3) provides that: 'A carrier's public schedule of prices and services, transport document, electronic transport record or similar document is not a volume contract pursuant to para 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.'

61 Diamond op cit fn 21, p 143.

62 A/CN.9/642, para 233.

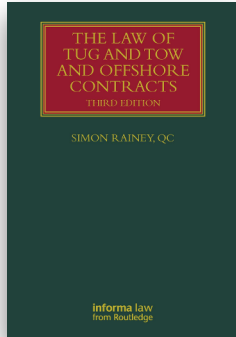


CHAPTER

4

The Contract of Towage

Chapter 4. The Contract of Towage



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PART A. PRELIMINARY CONSIDERATIONS


Defining towage 1.1

The towage of one ship by another as a common maritime operation began with the development of the steam paddle tug in the 1820s and 1830s. The first tug upon the River Thames appears to have been the *Lady Dundas* in 1832 (see F C Bowing, *A Hundred Years of Towing: A History*). Not long afterwards in 1839, in perhaps the most celebrated and certainly the most beautiful depiction of towage, Turner painted the *Téméraire* under tow from Sheerness to Beatson's breakers-yard in Rotherhithe on the evening of 6 September 1838. Soon, steam tugs were assisting the sailing ships in the rivers and ports of England. As they grew more powerful, they were engaged to tow sailing ships on longer voyages to hasten the arrival or departure of the ships. So, by the mid-nineteenth century sailing ships would "take steam" to and from the places where the outward pilot was dropped or the inward pilot was taken on board. The definition of towage given by the courts reflected the limited nature of the service that tugs then performed. A towage service was described in *The Princess Alice* (1849) 3 W Rob 138 at p. 139 by Dr Lushington: "as the employment of one vessel to expedite the voyage of another when nothing more is required than the accelerating [of] her progress". This definition was adopted and endorsed in successive editions of Bucknill, *Tug and Tow* (1st edn, 1913; 2nd edn, 1927).

1.2 By the time of the second edition of Bucknill (above), Dr Lushington's definition of towage had already become too narrow and did not reflect the varied nature of the services which tugs were performing. Today, his definition aptly describes but one aspect of the varied work upon which tugs are commonly engaged. In addition to the towage of ships and other water-borne objects such as oil and gas rigs, tugs frequently render a wide range of services, both in terms of handling and supply, to the offshore industries.

Towage arises *ex contractu* Towage arises from a contract

1.3 However towage is defined and whatever the particular nature of service being



performed by the tug, since towage arises from the engagement or employment of the tug by another vessel to perform a particular service or for a particular purpose, towage arises from a contract concluded between the tug and the tow. As was said by Bucknill (above, 2nd edn), p. 1: “In Admiralty law ‘towage’ expresses the idea of work done under a towage contract as distinguished from towage work done by a salvor”. The contract of towage is merely a species of contract. With the exception of certain special incidents attaching to the formation and content of the mutual relations under that contract, the ordinary principles of the law of contract will apply (for these, see eg *Chitty on Contracts*, 30th edn). It is these special incidents which form the subject-matter of this chapter.

The relationship between towage and salvage

1.4 The contractual nature of towage is of particular significance in considering the relationship between towage and salvage as the passage cited from Bucknill (above) demonstrates. Since the service as a service, whether of pure towing work or of any allied operation, being performed by a tug can be performed by that tug contractually or as a salvage service, the dividing line between contractual towage and towage rendered as salvage will depend on the presence of a towage contract and on the extent of the contractual services to be rendered under and as defined in that contract. The old cases when speaking of contractual towage describe it as “ordinary towage” (see *The Strathnaver* (1875) 1 App Cas 58 at p. 63) or as “mere towage service” (see *The Reward* (1841) 1 W Rob 174 at p. 177 *per* Dr Lushington) in distinguishing those services which a tug renders under contract from those which it renders as salvor.

1.5 Salvage and the entitlement to remuneration or reward arises irrespective of the existence of a contract between the salvor and the vessel or other property being salvaged. Although a form of salvage contract is frequently entered into, the most common form being Lloyd’s Open Form or “LOF” (which has gone through various revisions, the latest form being LOF 2000, recently revised in minor respects as LOF 2011), salvage does not depend on the conclusion of a contract. Thus, in *The Hestia* [1895] P 193, Bruce J stated at p. 199: “But salvage claims do not rest upon contract. Where property has been salvaged from sea perils, and the claimants have effected the salvage, or have contributed to the salvage, the law confers upon them the right to be paid salvage reward out of the proceeds of the property which they have saved or helped to save. No doubt the parties may by contract determine the amount to be paid but the right to salvage is in no way dependent upon contract, and may exist, and frequently does exist, in the absence of any express contract, or of any circumstances to raise an implied contract.”

1.6 Accordingly, where a tug is engaged by a vessel under a towage contract to perform some towage operation, that operation and the work which the tug has to effect to

achieve it will not constitute salvage. It is only where the tug has to perform some service outside the contract, and in circumstances of danger to the vessel, that salvage will arise. The touchstone is the scope and nature of the service contemplated by and provided for in the contract. In the celebrated opinion of the Privy Council in *The THE CONTRACT OF TOWAGE 2Minnehaha* (1861) 15 Moo PC 133, *per* Lord Kingsdown at pp. 152–154, it was put in this way: “But 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 remuneration for additional services if the ship be saved and may claim as salvor instead of being restricted to be paid for mere towage”.

1.7 The settled view is that while the tug is acting as salvor and extra-contractually, the towage contract is “superseded” or “suspended” (see *per* Lord Kingsdown in *The Minnehaha*, *op. cit.*) or as Sir Samuel Evans P put it in *The Leon Blum* [1915] P 90, after an exhaustive review of the authorities, at pp. 101–102: “The right conclusion to draw from the authorities, I think, is that 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 would 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. During the intervening time, the towage contract, insofar as the actual work of towing is concerned, is suspended. I prefer the word ‘suspended’ to some of the other words which have been used, such as ‘superseded’, ‘vacated’, ‘abandoned’, etc.”

1.8 As Sir Samuel Evans P states, it is often difficult to discern the point at which a service being rendered by a tug under a towage contract ceases to be regarded as one rendered under the contract and constitutes salvage. The relationship between contractual towage and salvage is considered in greater detail in Chapter 7 below.

Gratuitous towage

1.9 While not often encountered in practice, especially in the field of commercial towage or the towage of large water-borne objects, instances occasionally arise where the towing vessel agrees to tow another vessel in difficulties without payment. Thus, a friendly tow may be offered and accepted between small boats such as yachts or between sister ships or ships which, although nominally owned by different companies, are in effect sisters. In such a case there is no contract as such. However, the tug is



obliged to exercise reasonable care in the performance of the tow and will be liable to the tow in tort if it executes the tow negligently (see *Skelton v London & North Western Rly* (1867) LR 2 CP 631). In that case, a railway company voluntarily followed the practice of shutting a gate by a railway crossing but on one occasion forgot to do so. Willes J, applying the decision in *Coggs v Bernard* (1703) 2 Ld Raym 909, stated at p. 636: "If a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it." Similarly the tow will owe a duty of care to the tug and will also be obliged to exercise reasonable care in respect of its role in the towage. As it is put by Bucknill (above) (2nd PRELIMINARY CONSIDERATIONS 3edn, p. 1, footnote (b)), where the towage is rendered gratis, "the general duty to take reasonable care governs the mutual relations of each vessel".

1.10 The standard of the reasonable care to be exercised by the "friendly tug" and "friendly tow" will depend on all the circumstances including the type of vessel and nature of the operation proposed; the gratuitous nature of the service will be relevant.

1.11 Thus in the Canadian case of *The West Bay III (Maurice Federation v Stewart)* [1969] 1 Lloyd's Rep 158, a "boom-boat" which was used to push floating logs into position suffered an engine failure. A fisheries patrol vessel agreed to give her a tow; she did so gratuitously. During the towage, she increased speed so as to give herself necessary steerage-way but this capsized the boom-boat, causing loss of life. The court (Exchequer Court, British Columbia Admiralty District) held that the patrol vessel owed those duties as were usually owed by the tug. Sheppard J, however, held that there was no negligence. At p. 163 he stated: "In the case of a gratuitous service, such as that of [the patrol vessel's master] in this instance, there is no liability at law where the fault may be excused as an error in judgement." See also *Karavias v Callinicos* [1917] WN 323 (gratuitous carriage of persons), *Armand v Carr* [1926] SCR 575, Supreme Court of Canada, and the American cases of *The Mifflin* 1931 AMC 326 and *The Warrior* 1929 AMC 41 which are to the same effect.

The contract of towage is a contract for services

1.12 Under a contract of towage, the tug owners agree to provide services for the tow with tug, which they themselves officer, crew and supply, for an agreed or defined service or to attain an agreed defined result or for an agreed or defined period of time in exchange for periodic or lump sum payments.

1.13 However, in towage contracts and, in particular, in many of the common standard form towage contracts, terms are often used which imply or connote a lease of the tug to the tow or the hire by the tow of the tug. The tug owner is often described as "letting" the tug to the tow the tow is usually described as "the hirer" of the tug the contract will commonly refer to the "delivery" to the tow of the tug and of the

“redelivery” by the tow of the tug upon the completion of services. Notwithstanding the use of such terms, a towage contract is not a lease nor a contract for the hire of the tug nor is possession of the tug passed to the tow under the contract. The towage contract is merely a contract for the provision to the tow of services, which services are provided by the tug owners through their tug and tug crew. The position under a towage contract is, therefore, similar to the position under a time charterparty of which Lord Reid said in *The London Explorer* [1971] 1 Lloyd’s Rep 523 at p. 526: “Under such a charter there is no hiring in the true sense. It is not disputed that, throughout, the chartered vessel remains in the possession of the owners, and the master and crew remain the owners’ servants. What the charterer gets is a right to have the use of the vessel.” In *The Madeleine* [1967] 2 Lloyd’s Rep 224 at p. 238, Roskill J commented as follows in relation to the delivery of a vessel under a time charterparty: THE CONTRACT OF TOWAGE 4 “An owner delivers a ship to a time charterer under this form of charterparty by placing her at the charterers’ disposal and by placing the services of her master, officers and crew at the charterers’ disposal, so that the charterers may thenceforth give orders (within the terms of the charterparty) as to the employment of the vessel to the master, officers and crew, which orders the owners contract that their servants shall obey.”

Is the contract of towage one of bailment (or akin thereto)?

1.14 While under a towage contract the tow does not obtain possession of the tug, on the other hand, the tug may often be put in possession of the tow for the period of the service. So, if the tow is unmanned (eg a dumb barge), or is merely an object which is being conveyed by sea (eg a caisson or a part of a rig), or if the tow is manned by a riding crew put on board by the tug, the tug will have physical possession of the tow. Contrast, however, the position where the tow is fully manned and is simply being towed or propelled or assisted by a tug; in such a case there is no physical possession but only a service being rendered to the tow. In former cases, the contract may appear to be analogous to a contract of bailment or to a contract for the carriage of goods rather than a species of contract for services: as has been said, “it might be said to be natural to regard the tow as in the possession of the tug so as to suggest a bailment of the tow to the tug owner, eg where the tow is an unmanned dead ship or an object such as an oil rig”: Palmer, *Bailment* (3rd edn, 2009) at para. 20-037. The principal relevance of the distinction lies in the nature of the obligation upon the tug owner. If he is to be regarded as a bailee, then he is liable for loss of or damage to the tow unless he can exculpate himself; if he is merely a provider of services and obliged to exercise care and skill, if the tow sustains loss or damage, the tow must show a breach of the tug’s obligations of care and skill in order to recover (see Palmer, *op. cit.*, at para. 1.047 *et seq.*).

1.15 It is submitted that the approach of the Privy Council in *The Julia* (1861) 14 Moo PC 210 and in *The Minnehaha* (1861) 15 Moo PC 133 (considered in detail below at pp. 29–30) in analysing and classifying towage contracts as contracts where the tug is to be engaged to render services, and to which specific obligations of due care in and about and performance of those services are attached, is inconsistent with the concept of bailment and that of the bailee's strict responsibility for the subject-matter of the bailment in the event of loss subject to very limited exceptions such as Act of God. In *Harris v Anderson* (1863) 14 CB (NS) 499, the Court of Common Pleas rejected an argument that since a tow had grounded during the towage, the tug was to be liable for the same unless it could explain and excuse it. The court held that the claim was bad since it contained no allegation of fault or neglect on the part of the tug. In *The West Cock* [1911] P 23, Sir Samuel Evans P considered the question of the nature of the obligation upon a tug owner to provide a seaworthy tug. He regarded the obligation as an absolute one like that upon a carrier (which is doubtful—see the discussion below), but it is to be noted that he did not seek to support that conclusion by classifying a towage contract as importing the relationship of bailment but kept the two types of contract quite separate (see eg [1911] P 23). The Court of Appeal in the same case, reported at [1911] P 208, was doubtful as to whether any analogy could be drawn between a towage contract and a contract of affreightment. In *The Kite* [1933] P 154, PRELIMINARY CONSIDERATIONS 5a claim for damage to goods on board a lighter being towed on the River Thames was approached by the parties as not being a claim in bailment. Langton J approved that concession on the basis that the tug did not have custody of the goods but only control over them (see p. 181).

1.16 However, there is a considerable body of American authority which has specifically rejected the application of rules of bailment to a contract for towage. In *Brown v Clegg* (1870) 3 Mar LC 512 (Supreme Court of Pennsylvania), the owners of barges laden with coal which were damaged during their towage on the River Delaware sought to argue that the owners of the tugs which drew them were liable as bailees and common carriers of the tow. The court considered the previous American authorities and the English cases (referring principally to the decisions of the Privy Council in *The Julia* and *The Minnehaha*) and held that it was clear both in American and English law that tugs are not common carriers of the vessels which they tow. Similarly, in *The Margaret*, 94 US 494 (1876), a tow sued a tug for causing her to ground at the entrance of a harbour during the performance of a towage contract. The court stated (at p. 497): “The tug was not a common carrier, and the law of that relation has no application here. She was not an insurer. The highest possible degree of skill and care were not required of her. She was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in everything relating to the work until it was accomplished.”

1.17 See also *Stevens v The White City*, 285 US 195 and *Sun Oil Co v Dalzell Co* (1932)



287 US 291. For a more modern consideration of the question see the decision of the US Court of Appeals (5th Circuit) in *Agrico Chemical Co v MV Ben Martin*, 664 F. 2d. 85 (1981). Generally see Parks & Cattell, *The Law of Tug, Tow, and Pilotage* (4th edn) at pp. 19–23, where a full list of the American cases is set out and considered.

1.18 Until recently, Canadian law has adopted the same approach as American law as to the rejection of strict liability of the tug for damage to the tow as would follow from a bailee-bailor relationship. In *The Tug Champlain* [1939] 1 DLR 384, the Exchequer Court, at p. 389, held, after a review of the American decisions and the English decisions in *The Minnehaha* and *Spaight v Tedcastle*, that: “The obligation to carry out a towage contract requires nothing more than that degree of caution and skill which prudent navigators usually employ in such services. The occurrence of an accident raises no presumption against the tug and the burden is on the complaining party to prove a lack of ordinary care.”

1.19 (See also *Sewell v B.C. Towing and Transport Co* (1884) 9 SCR 527.) The court in *The Tug Champlain* considered more fully the approach suggested by the decision of the Court of Common Pleas in *Harris v Anderson* (1863) 14 CB (NS) 499 and made it clear that a claim by the tow against the tug in the event of damage requires the tow to show fault on the part of the tug the burden of proof is not upon the tug to explain how the damage occurred. However, while the Canadian Courts follow the US approach, the particular issue of whether there is a bailment relationship does not appear to have arisen for decision. Where it has, conflicting dicta have been expressed. In *Fraser River Pile & Dredger Ltd v Empire Tug Boats Ltd* (1995) 92 FTR 26 (FCTD), a crane mounted on a barge which was under tow struck a bridge. The tug was THE CONTRACT OF TOWAGE found liable on the basis of failure to inspect the tow to ensure it was suitable for towage. Reid J considered the distinctions which flow from a tow which was unmanned and a tow which was manned and questioned whether the degree of physical control amounting to possession conferred on the tug over an unmanned tow did not render the tug a bailee of the tow and liable to it for damage on that basis. Cf. *St. Lawrence Cement Inc v Wakeham & Sons Ltd* (1995) 86 OAC 182, in which the Ontario Court of Appeal, considering the stranding of a barge by her tug, expressed the view, relying on US precedent, that the only basis upon which a tug owner could be liable for damage to the tow was in negligence and not as bailee. This view is consistent with *The Minnehaha* line of authority in England.

1.20 In Australia, in a case of an unmanned or “dumb” tow, bailment was accepted as the applicable analysis by the Court of Appeal of New South Wales which considered and rejected the contention that the common law of tug and tow and the basis of responsibility applied in cases such as *The Minnehaha* excluded a bailment relationship: see *Commissioner for Main Roads v Stannard Bros Launch Services* (12 September 1990,


unreported; noted in Palmer, *op. cit.* at para. 20.038.

1.21 In *Lukoil-Kaliningradmorneft plc v Tata Ltd & Global Marine Inc* [1999] 1 Lloyd's Rep 365, the issue of whether or not towage under a contract of towage (on the BIMCO "Towcon" form, now the "Towcon 2008" form, considered below in Chapter 4) was to be characterized bailment or as akin to bailment arose directly for decision. In that case, Lukoil as tug owner contracted on the "Towcon" form with Global as hirer for the towage of two vessels from Canada to India. The contract identified Tata as the owners of the two vessels to be towed. Lukoil exercised a lien over the vessels on mid-passage at Walvis Bay; the "Towcon" form by its clause 21 (now clause 28 of "Towcon 2008") provides for a possessory lien for sums due under the contract (see Chapter 4 below). Tata contended that it was unaffected by the terms of the contract since Global was the contract party and Global had no authority to contract on its behalf notwithstanding Global's warranty of such authority by the terms of clause 22 of the "Towcon" form (now clause 29 of the 2008 revision). Lukoil, in the alternative to its arguments on authority, contended that it was bailee of the tows, and on bailment and sub-bailment principles (eg *Morris v C.W. Martin & Sons Ltd* [1966] 1 QB 716 and *The Pioneer Container* [1994] 2 AC 324), it was entitled to exercise the clause 21 possessory lien over the tows. (The authority and agency aspects under this clause are considered below in Chapter 4.)

1.22 Toulson J, having at p. 374 referred to pp. 4–6 of the first edition of this work ("where the author comments that no English authority suggests or supports an analysis of a contract of towage as one of or akin to bailment, although the point has never been specifically addressed"), went on to find that Lukoil was bailee of the tow because it "did take delivery and possession of the vessels sufficient to put it in the position of a bailee" (p. 374).

1.23 The basis upon which he did so was the particular nature of the physical relationship between tug and tow during the service. The tows were vessels which were being towed by Lukoil from Canada to India for scrapping; they were unmanned and had no use of rudder or main engine; riding crews from the tugs were put on board or PRELIMINARY CONSIDERATIONS 7 were available to board them in case of need. Effectively they were hulks under tow "in the sole charge of Lukoil" (p. 374).

1.24 Lukoil had accepted that bailment was not a necessary incident of every contract of towage because in a particular case the vessel under tow might remain in the possession of the owner of that vessel throughout. They "confessed and avoided" the American decision in *Stevens v The White City*, 285 US 195, cited by Tata, in which Judge Butler had stated: "Decisions of this Court show that under a towage contract the tug is not a bailee of the vessel in tow or its cargo . . . The tug does not have exclusive control over the tow but only so far as is necessary to enable the tug and those in charge of her to fulfil the engagement. They do not have control such as belongs to common carriers



and other bailees. They have no authority over the master or hands of the towed vessel beyond such as is required to govern the movement of the flotilla. In all other respects and for all other purposes the vessel in tow, its cargo and crew, remain under the authority of its master; and, in emergency the duty is upon him to determine what shall be done for the safety of his vessel and her cargo. In all such cases the right of decision belongs to the master of the tow and not to the master of the tug. A contract merely for towage does not require or contemplate such a delivery as is ordinarily deemed essential to bailment.”

1.25 They accepted that in the examples given by Judge Butler, a vessel might remain in the possession of her owner rather than in the possession of the tug, but contested the proposition that as a matter of law under a contract of towage even where possession of the tow does pass to the tug and its crew a contract of towage cannot be characterized as a bailment. (Cf. the clear parallels with the reasoning of the recent decisions of the Canadian court referred to above; Canadian authority does not appear to have been cited to Toulson J; cf. *Marine Blast Ltd v Targe Towing Ltd (The Von Rocks)* [2004] 1 Lloyd’s Rep 721 *per* Mance LJ at 729, para. 28).

1.26 Toulson J accepted Lukoil’s argument in these terms (at p. 374): “I accept Mr. Crookenden’s argument on this issue. It seems to me that Lukoil did take delivery and possession of the vessels, sufficient to put it in the position of a bailee. But, on the basis that Tata was not a party to the towage contract, there was no direct bailment by Tata to Lukoil.” He went on to hold that even if there was no bailment as such, a result akin to bailment would arise which would allow the tug owner to rely on the terms of the towage contract against the owner of the tow. See at p. 375, where he stated: “Lukoil’s position was accordingly that of either a sub-bailee or a quasi-bailee (quasi-bailment being similar to sub-bailment except that the intermediary does not take possession himself, but arranges for possession to pass directly from the owner to a third party). The question is whether Lukoil was entitled, as against Tata, to retain possession of the vessels on termination of the towage contract.”

1.27 The difficulty with the decision in *Lukoil v Tata* is that, while it imparts the relationship of bailor and bailee into that of tow owner and tug owner by simple reference to the transfer of physical possession of an unmanned tow to the tug, it does not address the consequence of that for the circumstances in which the tug will be liable for damage to the tow. If the relationship is one of bailment then an ordinary strict bailee’s liability will be owed by the tug; this has not been the basis of the liability of tug to tow hitherto which, as seen above, has been on the basis of a duty of care with THE CONTRACT OF TOWAGE & the burden of proof, in the case of damage or loss, on the tow owner to show a relevant want of care by the tug. The bailment argument has surfaced in a number of cases since *Lukoil v Tata* in which it was not



necessary for the Court to express any view: see *Marine Blast Ltd v Targe Towing Ltd (The Von Rocks)* [2004] 1 Lloyd's Rep 721 *per* Mance LJ at 729, para. 28 and *A Turtle Offshore SA v Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep 177. In the latter case which turned on the construction of the "Towcon" knock-for-knock clause, claims in bailment, in the alternative to claims for breach of a "Towcon" contract, were made by the owner of a damaged tow; the parties accepted that the clause would apply equally to both types of claim and therefore the Court did not need to consider whether the claims in bailment were, *per se*, well-founded. Both decisions are considered further in Chapter 4 below.

1.28 A possible reconciliation of *Lukoil v Tata* with the line of authority as to the juristic basis of the tug-owners' liability for loss of or damage to the tow (eg *The Julia*, *The Minnehaha*, *The West Cock* and *The Kite*) is the following: (i) Historically towage was the provision of a service to a vessel of expedition or of the acceleration of her progress. (ii) Typically, such service was to manned vessels where no question of dominion and control over the tow sufficient to put the tug in possession of it arose. (iii) The *fons et origo* of the duty of the tug to the tow in cases such as *The Minnehaha* and *The Julia* as one of proper care in the provision of the service concerned only manned tows. (iv) The principles in those cases appear to have been cross-applied to cases of unmanned tows, such as barges, without any analysis save that towage was characterized as the provision of a service to the tow by the tug indifferently of whether the tow was or was not manned. (v) The factual position of a tug *vis-à-vis* an unmanned tow will usually amount to one of possession of the tow, given the degree of control the tug exercises. *A fortiori*, if the tug has a permanent or occasional riding crew in place: see eg Palmer, *Bailment (op. cit.)* para. 1.131 *et seq* and *n.b.* 1.136. (vi) There is no reason in principle why the tug in those circumstances is not a bailee of the tow with the consequences which flow from that characterisation. (vii) Even in potential bailment situations where A has possession of a chattel belonging to B, there are settled exceptions to the bailment classification. The leading example is where a servant (employee or agent) is in possession of his master's or principal's chattels where negligence must be established even though the relationship is one of bailment. See eg Palmer (*op. cit.*) at para. 3.083 *et seq.* and Chapter 7(I). Cf. also the categorisation of contracts of hire of operators and machines, *ibid.*, Chapter 7(IV)(a). (viii) The towage cases are to be treated as such a settled exception at least in so far as the nature of the duty on the tug is concerned and, more particularly, the incidence and content of the burden of proof where the tow is damaged. It is effectively too late to reverse the trend of the cases, at least at first instance level. PRELIMINARY CONSIDERATIONS 9(ix) Other consequences of the possessory relationship established in the law of bailment may apply in the case of unmanned tows, such as that of bailments or quasi-bailments on terms and the effect on sub-bailments to the extent that they are not inconsistent with the settled

law on the implied duties of tug and tow. But these remain to be worked out on a case-by-case basis.

1.29 This reconciliation has been described as “somewhat strained” (by Palmer, para. 20.038), although at least it seeks to square the conflicting lines of authority as they currently stand and to accommodate the particular case of tug and tow within other exceptions to the relationship of bailment. It is suggested (by Palmer), perhaps optimistically in view of the coverage of towage by standard form contracts which usually render the bailment debate unnecessary, that “It would appear to be likely that if the opportunity arises a full-scale attack will be mounted on the decision” in *Lukoil v Tata*. Certainly however, the better view, on the basis of the English case law, as set out above and in previous editions is that the decision in *Lukoil v Tata* is wrong. This view is now endorsed by the leading work on bailment: Palmer, at para. 20.038.


1.30 The position as between tug and tow as separate contractual and contracting entities may be contrasted where the tug and vessel towed are owned or operated by the same person. In such a case, the relationship between the tug and the owner of goods being towed on the vessel will not be one of towage but that of a contract of affreightment. This is the position in American law (eg *Agrico Chemical Co, op. cit.*). It is submitted that the position would be the same in English law. There are various contract forms under which a tug owner will offer both tug and barge to transport an object (eg the BIMCO “Projectcon” form, developed from the “Heavycon 2007” and “Heavyliftvoy” forms for the transportation of heavy or voluminous objects). These are effectively charterparties or contracts for the carriage of goods by sea, rather than contracts of towage.

The role of the standard form contract

1.31 Since the mutual relations of tug and tow are founded upon the existence of a contract of towage between them, the definition of their respective rights and obligations will be defined by the terms of the contract which they have agreed.

1.32 Prior to the development of the use of standard form towage contracts and of contracts on tug owners’ terms and conditions, the content of the obligations of the parties was worked out by the courts. By 1860, the principles were sufficiently well-established for the Privy Council to summarise them in its opinions in *The Minnehaha* (1861) 15 Moo PC 133 and in *The Julia* (1861) 14 Moo PC 210. As a result, it is clear that in the absence of express stipulation, the law implies certain specific terms in a contract of towage which limit the rights and define the obligations of tug and tow (see Bucknill (above) 2nd edn, pp. 16–17). The common law principles are considered in detail in Chapter 2.

1.33 Moreover, with the development of towage came the increasing use by tug owners



of standard form contracts in an attempt to escape from or to dilute their obligations at common law. By the end of the nineteenth century many forms of THE CONTRACT OF TOWAGE 10contract were in use reflecting the wide range of harbour and port authorities, railway and dock companies and tug operators providing towage services. These forms were united by a common purpose: to exclude and restrict to the greatest extent possible the liability of the tug. The Admiralty Court regarded these attempts to “contract out” of the implied obligations of the towage contract, which had been laid down in the line of cases culminating in the opinions of the Privy Council in *The Minnehaha* and *The Julia* in 1860, with considerable hostility and suspicion. Even in 1913 when Butler Aspinall KC wrote his introduction to the first edition of Bucknill, *Tug and Tow* (p. xv) it could be said that “the law relating to towage depends almost entirely, if not entirely, on judicial decisions”. However, where the standard forms or conditions were clearly worded to cover a particular situation, they were given their full effect by the court (see eg the approach of the court in *The President Van Buren* (1924) 19 Ll L Rep 185), even if the court did so in many cases with extreme reluctance (see eg *The Newona* (1920) 4 Ll L Rep 156).


The UK standard conditions

1.34 Today, the standard form of contract most in use for port and harbour but also some offshore work in the United Kingdom is the “UK Standard Conditions for Towage and Other Services”. This form has been revised frequently and the current form in use is the 1986 Revision. This form is produced by the British Tugowners’ Association and is, even today, a good example of a draconian standard form contract heavily favouring the tug owners.

The BIMCO ocean towage and other offshore industry forms

1.35 Other forms are used for ocean towage. While certain tug operators have their own “house” forms, those forms in most common use both in the United Kingdom and internationally have been produced under the auspices of the Baltic and International Maritime Council (BIMCO): these are the “Towhire” and “Towcon” forms which date from 1985 and which have recently been revised as “Towcon 2008” and “Towhire 2008”. These forms were designed specifically for the towage industry and as a standard form of contract for towage, either on a lump sum or a daily rate basis. Reflecting the extensive and increasing provision of services by tugs (and other vessels) in connection with the offshore industry and the inaptness of the use of the “Towcon” and “Towhire” for such wider offshore service supply services, these BIMCO forms are supplemented by the “Supplytime 89” form, the predecessor of which first appeared in 1975 and which has now been revised as “Supplytime 2005”. Further special forms of standard contract have been developed by BIMCO with the needs of the offshore industry in mind. The first was the “Heavycon” form for the transportation of heavy or voluminous





objects, now “Heavycon 2007”. Subsequently, BIMCO, following an approach by trade interests specialised in the offshore business, formulated a special standard bareboat charter for use in connection with chartering of non self-propelled barges for marine-related construction operations for both offshore and civil work: “Bargehire”, now “Bargehire 1994”. The success of the BIMCO forms PRELIMINARY CONSIDERATIONS 11 has meant that they tend to be used as templates for other services within the offshore industry for which perhaps they are not precisely designed, as “Towcon” was used until the better suited “Supplytime” was introduced. Specifically in the tug and barge sector, handling particularly the transportation and positioning of objects and materials in large-scale projects in special combinations of tug and tow, the need to use a combination of BIMCO contracts such as “Towcon”, “Heavycon” and “Bargehire” has led to the new form “Projectcon”, described by BIMCO as “a specially designed charter party for the tug and barge sector. It is designed to provide a single contractual platform to govern the entire commercial adventure involved in the use of a barge and tug to transport special or projects cargoes”.

1.36 Similarly, the provision of tug services to salvors to assist them in the achievement of a salvage operation has attracted the formulation of standard contracts to address the particular problems which arise. Here BIMCO has co-operated with the International Salvage Union (ISU) or the ISU itself has devised forms of sub-contract such as “Salvcon” and “Salvhire” and the ISU Award-sharing sub-contract. The “mop-up” services in which tugs and offshore vessels specialise, such as wreck removal, have been covered by BIMCO-ISU forms, the most recent revisions of which are the 2011 forms “Wreckfixed”, “Wreckstage” and “Wreckhire”.

1.37 It is convenient at this point to comment briefly on the work of BIMCO in this (as in many other maritime) fields. BIMCO has produced standard contracts such as charterparties and bills of lading for more than a century. Some of the industry’s most widely used forms such as Gencon 1994 and Shipman 98 rank among the extensive catalogue of contracts produced by BIMCO. It has led the way in the production of specially designed industry forms, as seen above with special reference to the offshore industry, and in the formulation of stand-alone clauses for use in charterparties, usually responding to special industry needs (see eg the BIMCO ISPS/MTSA Clause and the BIMCO Piracy Clause as well as stevedore damage clauses). Its stated aim is “to raise standards in documentation and to bring about greater harmonisation in trade practice” and to do so by seeking to provide contract forms which provide a balanced solution between the parties, thereby making the forms an attractive and acceptable industry-wide basis for contracting. A feature of BIMCO’s work, which is particularly important in the present context, is BIMCO’s extensive revision work of its forms, carried out in the light of changing developments and the industry’s experience of how the forms and particular clauses within them (especially the BIMCO mutual allocation of

risk or 'knock-for-knock' clauses, present in the majority of BIMCO's forms and enshrining its quest for a balanced contract form). The latest versions of the forms considered in this work, such as "Towcon 2008", "Towhire 2008", "Supplytime 2005" and the "Wreck" forms of 2011 represent the fruit of industry wide consultation and consideration. As stated by BIMCO: "The development of a new standard form or the revision of an existing one is a thorough and detailed process. It can often take two to three years for a specialist sub-committee to gain the approval of Bimco's documentary committee to publish a new document. The sub-committees are made up of industry representatives who freely give their time to these often challenging projects. The common bond is the firm belief that modernising and harmonising shipping documentation is in the best interests of everyone in the industry."

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1.38 (See Hunter, *Mar Risk Int* 1.9.2008). BIMCO publishes explanatory notes to its forms and helpful comparison and concordance documents, highlighting the changes made by a particular revision and the reasons for them. Reference is made to these in this work. BIMCO has now introduced "*idea*", an internet-based charterparty editing system which provides subscribers with online access to a specially customised copy of Microsoft Word and a large library of over 80 BIMCO standard forms such as charterparties, bills of lading and specialist agreements: only the latest revisions of the forms are available (eg "Towcon 2008" or "Supplytime 2005", with no similar access to earlier versions of the forms (eg "Towcon" and "Supplytime 89"). In this way, BIMCO seeks to encourage users to adopt and use only the most current versions of BIMCO forms. However, as practical experience shows, parties continue to contract on older versions of the forms, often in cases where the contract represents "repeat" business and the parties adopt and adapt a previous fixture or series of fixtures. In recognition of this conservatism amongst many users, BIMCO has recently reformulated its "*idea*" by providing a reference folder of the older forms (although not in usable template form). As it explained in its press release of 13 July 2011: "The new 'archive' folder on *idea* has been introduced to provide access to some of BIMCO's older forms that are still used in the industry even though more modern editions are available. BIMCO always recommends that you use the very latest edition of any BIMCO form, but if commercial pressure dictates the use of an earlier edition then these older forms are now available in the 'archive' folder."

Common European towage forms

1.39 Brief mention should also be made of standard conditions adopted by tug owners in other jurisdictions. Given the volume of towage work in certain places, standard

conditions similar to the UK Standard Conditions are commonly found in such places. Good European examples of such other conditions are the Netherlands Tug Owners Conditions 1951 and the Scandinavian Tugowners' Standard Conditions 1959 (1974 Revision). Pursuant to Dutch law, towage within Dutch waters by a Dutch tug owner is subject to the Netherlands Tug Owners Conditions unless expressly excluded. They expressly provide for the application of Dutch law (see Article II). The Scandinavian Conditions are published only in Danish, Norwegian and Swedish. For convenience, the text of these conditions is included in the Appendices 17 and 18 respectively, although, since they are rarely encountered in the context of English law contracts, they are not considered in this work.

The place of implied terms in towage and allied contracts

1.40 In large-scale and commercial towage business the mutual relations of tug and tow in present times are habitually defined by standard form contracts. However, a place, and an important one, remains for those implied terms in contracts of towage “laid down” (*per* Bucknill (above, 2nd edn), p. 17) by the Privy Council in 1860. This is for two reasons. First, the characteristic of many engagements of a tug or tugs to effect a particular service is a rapid exchange of telexes or faxes between the parties via PRELIMINARY CONSIDERATIONS 13brokers in circumstances of urgency or where neither party is concerned with the minutiae of offer and acceptance; such operating conditions can and often do prove problematic for the effective incorporation (usually at the tug owner's behest) of the standard form set of conditions. Absent such incorporation, the terms implied at common law will apply. Secondly, although much less importantly, in the engagement of tugs, or of a vessel which can tow, on the more *ad hoc* basis which may be encountered in small ship work, albeit by yachts or other vessels of significant value, the engagement is often rudimentary as to the terms which are to govern it, and the parties' rights and obligations will often still be those defined by the decisions of the courts as to the terms to be implied into a contract of towage.

1.41 For these reasons, Chapter 2 considers the implied terms and incidents of a towage contract at common law which will pertain where no standard form of contract or standard terms and conditions have been used or have effectively been used by the parties. In Chapters 3 and 4, the standard forms which are commonly used in the realms of towage and allied services and which are encountered in English legal practice are considered separately. Chapters 5 and 6 consider the standard forms used for more general offshore purposes, both in the provision of offshore services and the transportation of specialised cargoes and execution of marine projects. After a consideration of the special relationship between towage and salvage in Chapter 7, the ISU-inspired standard forms for towage and allied services in a salvage context are treated in Chapter 8 with the specialised forms used by the salvage and offshore



industry for wreck removal being considered in

PART B. THE MAKING OF THE CONTRACT

Authority of master to contract to be towed *On behalf of his owners*

1.42 The general position as to the actual and ostensible authority of a ship's master to enter into contracts with third parties on behalf of his owners and so bind his owners has altered considerably with the advent of increased facilities of communication. These mean that in very many cases the master is able to be in constant touch with his owners and that he will be prone to refer to them all but routine navigational and operational decisions. His authority, subject to this limitation, will extend to doing all that is reasonably and ordinarily necessary to effect the usual employment of the vessel (see generally *Scrutton on Charterparties and Bills of Lading* (22nd edn, 2011), pp. 71–72 and 261–263).

1.43 In relation to contracts for towage, the master of a vessel has authority to engage ordinary towage services which, objectively viewed, are reasonably necessary for the due performance of the vessel's voyage or are reasonably necessary for the safe and proper operation of the vessel and for her preservation from loss or damage. For these purposes, the master has authority to enter into a contract for towage provided that the terms of the contract are reasonable terms. As it was put by Sir Baliol Brett MR in *Ocean Steamship Co v Anderson* (1883) 13 QBD 651 at p. 652: THE CONTRACT OF TOWAGE
14“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 make it reasonable to be made, and also where its terms are reasonable.” (See also *per* Baggallay LJ at p. 663.)

1.44 The nature of the master's ordinary authority to engage towage services is properly analysed as implied actual authority. The ability and right to engage towage services in circumstances of proper and reasonable necessity is an incident both of the master's authority from and his duty to his owners to prosecute the voyage and to employ the vessel safely and properly and in an ordinary and reasonable fashion. The *Ocean Steamship* test is consistent with the summary of the law given by Brandon J in *The Unique Mariner* [1978] 1 Lloyd's Rep 438. He stated at p. 449: “The principles of law applicable to this issue can, I think, be stated in three propositions as follows. First, the relevant authority of a master, for the purpose of deciding whether his owners are bound, as against a third party, by an act which he has purported to do on their behalf, is his ostensible, rather than his actual, authority. Secondly, the ostensible authority of a master is the same as his implied actual authority, unless the latter has been restricted by express instructions from his owners or their representatives, and the third party

concerned is, or should be taken to be, aware of such restriction. Thirdly, 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 the safety and preservation of the ship.”

1.45 In that case it was held that the authority of the master extended to making a contract for salvage on the basis of Lloyd’s Open Form with its system of determining salvage remuneration by arbitration. Cf. *The City of Calcutta* (1898) 8 Asp MLC 442, in which the Court of Appeal doubted whether a master had authority to bind his owners to a contract involving a Lloyd’s salvage arbitration, although it did not decide the point; this expression of doubt must now be considered as ill-founded.

1.46 The requirement to establish both the reasonable necessity for the tug and the reasonableness of the terms of the contract under which the tug is employed is illustrated by two cases. In *The Crusader* [1907] P 15; P 196 (CA), a vessel had run aground and required tug assistance to get her off. The ship’s agents were asked by the master to engage a tug and they did so at a rate of £60 per day. The master refused to accept such terms and instead engaged the tug on a lump sum basis of £4,000 if the vessel was refloated “no cure-no pay”. The court held that the agreement with its term for the payment of £4,000 was unreasonable and exorbitant and, accordingly, was outside the master’s authority. The court refused to uphold the contract against his owners. In *The Luna* [1920] P 22, the court considered a contract made on a Humber tug operator’s standard form contract. The skipper of the Dutch fishing-vessel the *Luna* engaged the tug *Kingston* to tow his vessel into dock from the mouth of the River Humber and from the dock to the sea for £15. He spoke very little English but orally negotiated the details of the service and the price. He then signed a form knowing it to be a contract but did not or was unable to read it. The form contained the standard terms which included a typical towage contract indemnity provision under which the tow was to indemnify the tug for all damage even if caused by the tug’s negligence. The *Kingston* towed the *Luna* into another vessel and was solely to blame. Various arguments were advanced by the owners of the *Luna* to escape from the clause THE MAKING OF THE CONTRACT 15 including one that the indemnity clause and standard form were unreasonable and so outside the skipper’s authority. This contention was rejected by Hill J. He stated (at p. 27): “It is said that this clause is unreasonable. It is, and has for many years been, usual for tug owners to protect themselves by such a clause. Nor can I see any ground for saying that it is unreasonable. It is all a question of price ... The less the liability of the tug owner ... the lower the price. There is nothing unreasonable in a bargain which puts the work of towage on the tug and the risks of service on the tow.”

1.47 The decision in *The Luna* might be criticised on the ground that the incorporation

of the standard form at all when signed and agreed to by someone who could not read it is doubtful and might, on this ground, perhaps be decided differently today, at least if it could be shown that the tug owner knew of the skipper's inability to understand the printed conditions (cf. *Geier v Kujawa Weston and Warne Bros* [1970] 1 Lloyd's Rep 364 per Brabin J at pp. 368 and 369), although the normal rule is that inability to read the standard terms is no defence by itself to their effective incorporation (see eg *Chitty on Contracts* (30th edn), Vol. I, para. 12-014, and see also *Watkins v Rymill* (1883) 10 QBD 178). But, in so far as it establishes that terms in common use in standard forms, albeit onerous, will usually pass *The Ocean Steamship* test of reasonableness for deciding whether or not the entry into a contract on such terms is within the master's authority, it is correctly decided. As Bucknill (above) summarised the ratio of the decision, "such a term is usual in forms of contracts of towage, and is reasonable" (2nd edn, p. 8). Compare the situation where onerous terms are agreed which do not form part of an accepted or usual form of contract, where a master's authority is more easily questioned (see eg *The Crusader*, *op. cit.*).

1.48 Outside the master's ordinary implied actual authority to engage ordinary and usual towage services, there will also be authority to engage exceptional towage services for the ship under the master's agency of necessity. The authority of the master in this context derives from the necessity for the engagement of the tug in circumstances where a reasonable person would regard the engagement as likely to be beneficial to the marine adventure on which the vessel is employed and from the master's inability to communicate with his owners (*The Onward* (1874) LR 4 A & E 38). In *The Alfred* (1884) 50 LT 511; 5 Asp MLC 214, the master of a ship in distress off Cape Finisterre concluded a towage contract with a vessel which had previously towed his vessel, without payment, for two days before letting go. That vessel agreed to stand by and tow for a further two days if the master agreed to pay not only for the future towage but also for the gratuitously rendered past towage. The court held that if it was reasonable as a matter of necessity to contract for the future towage, it was not unreasonable to agree to pay for the towage already done. *Per Butt J* at p. 512: "It is clear as a matter of law that the master being the agent *ex necessitate* of his owners was authorised to enter into this agreement . . . The master acted reasonably. It is clear that he thought he was acting reasonably and that there was some chance of saving the valuable property. This he did for the comparatively small sum of £400." In reality, however, the relevance to the position as between a master and his owners of the agency of necessity cases will today be very rare given the modern immediacy THE CONTRACT OF TOWAGE 16 of ship-to-owners communications. The position may be very different in relation to the agency of necessity conferred on a master or ship owners to act on behalf of cargo interests (see below).

On behalf of his vessel's cargo



1.49 Subject to the exception of agency of necessity (see below), the owners of cargo are not bound by any contract of towage or salvage made by the owner or master of the vessel on which the cargo is laden. Neither the owners of the vessel nor the master have authority to bind the cargo carried or the owners of such cargo by any such contract. In *Anderson Tritton & Co v Ocean Steamship Co* (1884) 10 App Cas 107, Lord Blackburn stated at p. 117: “But neither the owners of the ship nor their master have authority to bind the goods or the owners of the goods by any contract.” Similarly, as it was put by Sir Robert Phillimore in *The Onward* (1874) LR 4 A & E 38 at p. 51: “According to the law, the master is always the agent for the ship and in special cases of necessity for the cargo also. He is the appointed agent of the former, the involuntary agent of the latter.” **1.50** The position has been most recently considered in *Industrie Chimiche Italia v Tsavliris Maritime Co (The Choko Star)* [1990] 1 Lloyd’s Rep 516. At first instance, Sheen J had held ([1989] 2 Lloyd’s Rep 42 at pp. 46–47) that as the master had implied actual authority to engage salvage assistance on behalf of his owners, he must also have implied actual authority to do the same on behalf of cargo owners, that implication arising out of the contract of carriage. He was reversed by the Court of Appeal. It held, in what has been described as a “purist decision” (see Kennedy & Rose, *Law of Salvage* (7th edn) at para. 10.054) that, in the context of a contract of salvage, that the only basis upon which a master might be authorised to contract on behalf of cargo owners was as an agent of necessity. Therefore, however, in the case of a true agency of necessity, i.e. if (i) it is necessary for the ship to take towage or salvage assistance to save the cargo; (ii) it is not possible or practical for the ship to communicate with cargo owners; (iii) the master or shipowner act *bona fide* in the cargo’s interests; and (iv) it is reasonable for them to enter into the particular contract in question (see the four-fold formulation of the requirements for such agency summarised by Slade LJ in *The Choko Star* [1990] 1 Lloyd’s Rep 516 at p. 525), the cargo may be bound by a contract of towage or salvage entered into by the ship as agent of necessity on its and the ship’s behalf. However, the position has now been reversed and the “wise and principled judgment of Sheen J” restored (Kennedy & Rose, *ibid.*) by the International Salvage Convention of 1989, enacted by the Merchant THE MAKING OF THE CONTRACT 17 Shipping Act 1995. This provides by Article 6.2 that, unless a contract provides otherwise expressly or impliedly, “The master or the owner of the vessel shall have authority to conclude [contracts for salvage operation] on behalf of the owner of the property on board the vessel.” Commonly, while cargo interests are not bound by a contract of towage entered into by their carrying vessel, such interests will be liable to pay to the owners of the vessel their rateable proportion of the towage costs if the engagement of the tug is properly viewed as a general average measure taken by the vessel to preserve cargo and vessel from loss in time of peril. In such an event, the towage expenses will form part of the general average expenses to which

cargo interests will be liable to contribute. As to this, see below in Chapter 12.

Authority of a master to take a vessel in tow

The master of a tug

1.51 The master of a tug has implied actual authority to make reasonable contracts with regard to the provision by the tug of future towage services. Such authority creates no special difficulties and its extent will depend on the ordinary law of agency. However, in *The Inchmaree* [1899] P 111, it was held that a tug-master did not have authority to agree retrospectively to deem services to be towage services which services had originally constituted salvage and which had already been completed, although he could do so if the deeming contract was entered into while the service, which had started as a salvage service, was still continuing (see *per* Phillimore J at pp. 116–117).

The master of a vessel not a tug

1.52 As has been seen above, the master of an ordinary trading vessel has implied actual authority to do such things as are involved in and necessary for the usual employment of the vessel. Since the implied actual authority of the master to contract on behalf of his owners is limited to such contracts as relate to the usual employment of the vessel, it is extremely doubtful whether the master of a vessel other than a tug has any authority to contract to tow another vessel. It is difficult to conceive of circumstances where towing would relate to the usual employment of an ordinary vessel and towing is unlikely to be necessary for such a vessel's safety or for the prosecution of her voyage.

1.53 The situation is most likely to arise when a vessel agrees to assist or to tow another vessel in distress. The position is complicated by the fact that a vessel will often by its nature be trading pursuant to some contract of affreightment or charterparty in which third parties are interested as cargo owners or charterers and that undertaking the towage of another vessel may well constitute a deviation putting the vessel outside the contract of carriage and with adverse consequences for her insurance. At common law, the position is that a master of a vessel probably has implied actual authority to deviate and to tow a vessel solely for the purpose of saving life, but that he does not have authority to do so for saving property. Any towage other than for saving life will therefore constitute a deviation. The authority of a master to agree to tow a ship in distress was considered in *The Thetis* (1869) LR 2 A & E 365. In that case, a ship whilst trying to tow another ship collided with her and sank her. In an action by the owners of the sunken vessel against the owners of the towing vessel, the defendants pleaded that they were not liable on the ground that their master had no authority to tow. Sir Robert Phillimore held that

the master had an implied authority to tow vessels in distress. He went on to state that he could not assent to the proposition that a deviation for the purpose of rendering salvage services to property would avoid a policy of insurance. However, in *Scaramanga v Stamp* (1880) 5 CPD 295, the Court of Appeal decided that towage for the purpose of saving property was a deviation which avoided the charterparty and rendered the shipowners liable for damage to the cargo caused by the deviation. In that case, Cockburn CJ pointed out that towage of a disabled vessel was in itself a deviation, “seeing that the effect of taking another vessel in tow is necessarily to retard the progress of the towing vessel and thereby to prolong the risk of the voyage”.

1.54 Perhaps because of the uncertainty of the position at common law, the question of the permissibility of deviation for towing vessels has long been the subject of express clauses in charterparties (see *Scrutton on Charterparties*, 22nd edn, p. 270). In *Stuart v British & African Steam Navigation Co* (1875) 32 LT 275, the clause provided “liberty to tow and assist vessels in all situations”. It was argued that the phrase was apt only to extend to towage of vessels in distress which the vessel encountered in her voyage. The court dismissed this construction as too narrow, although it implicitly recognized that some (unspecified) limitation was appropriate. Nevertheless, the court held that the phrase was effective to protect a vessel leaving her berth to tow off a stranded vessel three miles away where no life was in danger and which resulted in the towing vessel being wrecked and her cargo lost. In *John Potter & Co v Burrell & Son* [1897] 1 QB 97, the charterparty clause read: “Steamer to have liberty to tow and be towed and assist vessels in all situations and salvage procured to be for the benefit of owners”. In the Court of Appeal, Lindley LJ stated (at p. 104): “Therefore, towing is contemplated. What amount of towing is contemplated is another question. Of course, an unreasonable towage service is not contemplated, and, I take it, no towing service which would defeat the object of the parties to the contract is contemplated. But any towage which is consistent with the attainment of the object is contemplated. All towage involves delay. You cannot tow ships and go at the pace you can if you are not towing. Therefore you must read these clauses [ie, perils of the sea and arrangements for provision of steamers], and, to my mind, it is most important to ascertain exactly what it is the parties are to do.” In that case, the vessel encountered a disabled vessel on her voyage and took her in tow, adding a further three weeks to the voyage to the load port.

Pre-contractual disclosure: *The Kingalock*

1.55 In the nineteenth century the Court of Admiralty asserted a general equitable jurisdiction in respect of contracts of towage and salvage. In *Akerblom v Price Potter Walker & Co* (1881) 7 QBD 129, Sir Baliol Brett MR referred to “the great fundamental rule” (at p. 132) as being: THE MAKING OF THE CONTRACT 19“ ... Whenever the court is



called upon to decide between contending parties, upon claims arising with regard to the infinite number of marine casualties, which are generally so urgent in character that the parties cannot be truly said to be on equal terms as to any agreement they make with regard to them, the court will try to discover what in the widest sense of the terms is under the particular circumstances of the particular case fair and just between the parties . . . If the parties have made an agreement, the court will enforce it, unless it be manifestly unfair and unjust but if it be manifestly unfair and unjust, the Court will disregard it and decree what is fair and just. This is the great fundamental rule.”

1.56 One aspect of that equitable jurisdiction was the insistence of the court that the parties to a towage contract were entitled to full pre-contractual disclosure of all facts likely to affect the performance of the towage contract and which were within the special knowledge of either party. In the absence of such disclosure, the contract could be treated as void *ab initio* and a salvage contract would be substituted by the court, the remuneration under which the court would itself assess. The leading case is *The Kingalock* (1854) 1 Spinks A & E 263. In this case, a tug contracted to tow a vessel in very bad weather from the mouth of the River Thames to London for £40. After the towage had commenced the tug discovered that the tow had lost an anchor and had damaged her sails and windlass. The tug declared the contract at an end, but continued to tow the vessel, and after some difficulty brought her to London. The tug then claimed salvage, and the defendants, the owners of the tow, pleaded the towage contract and contended that they were liable only to pay £40. The court upheld the claim to salvage and set aside the contract. The tug received an award of £160. Dr Lushington in his judgment stated (at p. 266): “I apprehend that the agreement may be said to be somewhat of a mixed nature at that time (when made) it is hardly to be considered an ordinary towage, not on account of the state and condition of the ship, but on account of the state and condition of the weather, which happened to be exceedingly tempestuous. I think whether the omission to state these facts (that the ship had lost an anchor and some sails) would vitiate this agreement or not will depend upon whether they could, with any reasonable probability, affect the service about to be performed. I am of the opinion that they might have an effect on that service, because I apprehend that coming up the River Thames, particularly during weather so tempestuous as this is represented to have been, the services might have been delayed and rendered much more arduous, much more difficult, in consequence of want of ground tackle, which might be of the last importance to the saving of the vessel, and which might, to a certain extent, have governed the manoeuvres of the steamer. I, therefore, come to the conclusion that as it might affect the performance of the service, the agreement was null and void *ab initio*.” Dr Lushington restated the principle 12 years later in *The Canova* (1866) LR 1 A & E 54. In that case, a tug agreed to tow a vessel into port for a fixed sum. The vessel had not revealed that many of the

vessel's crew were ill. The tug performed the contract but claimed salvage on the ground of non-disclosure when the towage contract was made. However, Dr Lushington rejected the claim on the basis that the tow was not in peril when the contract was made. He nevertheless stated as follows: "If, though unintentionally, there was a concealment of fact so material that it ought to invalidate the agreement, I should not enforce it. We must consider whether the owners of the tug were injured in the performance of their task by the withholding of certain facts, whether, if more time were taken up than should have been, the plaintiffs would be entitled to more than their bargain." THE CONTRACT OF TOWAGE 20

1.57 *The Kingalock* was applied as a case requiring full pre-contractual disclosure in the Canadian case of *Dunsmuir v The Ship Harold* (1894) 3 BCR 128. In that case, when asked by the tug whether any damage on a grounding had occurred, the master, aware that the vessel's hold was 18 inches deep in water, said "I do not know". The Vice-Admiralty Court of British Columbia held that the active concealment by the ship that she was in a leaky and dangerous condition vitiated the contract of towage and entitled the tug to special remuneration (applying *Akerblom's* case).

1.58 *The Kingalock* was considered more recently in *The Unique Mariner* [1978] 1 Lloyd's Rep 438. A vessel had gone aground. Her owners arranged for a tug to go out to her and notified their master of this. The defendant's salvage tug happened to be in the vicinity and came up to the vessel offering her services. The master wrongly believed her to be the tug arranged for by his owners and accepted it, signing the Lloyd's standard form of salvage agreement (LOF) with the tug-master. When he discovered his mistake he ordered the salvage tug away. The owners sought to have the LOF set aside. One ground on which they did so was that *The Kingalock* established that the contract was a contract *uberrimae fidei* and that the tug should have disclosed all material facts, including, on the facts of that case, that the tug there was there by chance and not pursuant to the owners' own special arrangements. Brandon J stated at pp. 454–455 as follows: "... *The Kingalock* is not an authority which establishes that all contracts relating to salvage services are contracts *uberrimae fidei*, and therefore voidable by either party on the ground of non-disclosure of material facts by the other. It is rather just one example of the exercise by the Admiralty Court of its equitable power to treat as invalid, on the ground of serious unfairness to one side or the other, one particular kind of salvage agreement, namely an agreement by which the amount to be paid for services, in respect of which those rendering them would otherwise have a claim for salvage at large, is fixed at a definite sum in advance."

1.59 It is submitted that Brandon J's limited formulation of the type of contract in which the court will intervene as a type of salvage agreement, being towage in salvage conditions or engaged salvage services, correctly reflects the limited cases in which the

equitable jurisdiction of the Admiralty Court over towage contracts has in fact been exercised; in all of such cases perilous conditions prevailed at the time of the engagement (see eg *The Kingalock*). His formulation is also in accordance with the statement of the “fundamental rule” in *Akerblom* (above) where Brett MR emphasised the “urgent character” of the circumstances in which the engagement of the tug took place.

1.60 Following *The Unique Mariner*, it is therefore submitted that the position is as follows: (i) In entering into a towage contract, there is no special obligation on tug or tow to make pre-contractual disclosure. The contract of towage is like any other contract and parties are left to the remedy of rescission or damages for misrepresentation as in other contracts. In particular, there is no obligation to disclose material facts. (ii) However, in the case, in effect, of engaged salvage services where the tug is engaged under a towage contract to render services to a vessel in peril (such as *The Kingalock* was, with no sails or tackle and in very rough weather, but *THE MAKING OF THE CONTRACT 21* such as *The Canova* was not, merely with her crew being ill) and for a stipulated reward or fixed sum in circumstances where, but for the contract, the tug could have claimed salvage, the court will intervene in the event of a clearly inequitable result and of unfairness caused by a party’s non-disclosure at the time the contract was made of matters which had a substantial bearing on the performance of the engaged services under the contract.

PART C. OTHER CONTRACTUAL MATTERS

The application of the Unfair Contract Terms Act 1977 *The scope of application*

1.61 In most cases of large-scale commercial towage, the towage contract will have been concluded between commercial entities dealing with each other with a fair measure of equality of bargaining power. However, the towage of small boats not operated commercially or in connection with a business, such as yachts and pleasure craft, is not infrequent and in such cases the tow is likely to have to agree to such towage contract as the tug proposes, together with a range of exemption and exclusion clauses in the tug’s favour.

1.62 The statutory control of such clauses enacted in the Unfair Contract Terms Act 1977 extends to towage contracts in the following way: (i) By para. 2 of Sched. 1 to the Act, “any contract of marine salvage or towage” will be subject to section 2(1) of the Act, which deals with clauses excluding or restricting liability for death or personal injury. (ii) By the same paragraph, such contracts and their exemption and restriction clauses will not be subject to section 2 (liability for negligence), save for sub-section (1) as to which see (i) above; section 3 (liability in contract); section 4 (unreasonable indemnity clauses); and section 7 (miscellaneous contracts under which goods pass)



except in the case where the clause is relied upon against any person dealing “as a consumer”. (iii) A person deals “as a consumer” for the purposes of the Act if two conditions, laid down by section 12(1)(a) and (b), are satisfied: (a) the person must not enter into the contract in the course of a business nor hold himself out as doing so; (b) the other party must make the contract in the course of a business. In *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 WLR 321, it was held that, for a contract to be made in the course of a business, the contract in question had to be an integral part of the business carried on, or, if only incidental to the business, nevertheless be of a kind regularly entered into.

1.63 In practical terms, parties to most large-scale commercial towage contracts will not be dealing as consumers. However, private boat owners will almost always satisfy THE CONTRACT OF TOWAGE 22 the criteria set out in section 12(1) and owners of water-borne objects operated in the course of a business may nevertheless deal with tug owners as consumers if the towage of that object is not an integral part of their business, or is not a regularly incidental transaction of their business. They will not, therefore, deal “as a consumer”. Thus, the owner of a floating dry-dock or heavy-lift barge will enter into towage contracts either as part of his business or at least as a transaction frequently incidental to his business. The owner of a floating restaurant or of a diving school run from a houseboat, while running a business, will still deal with the tug owner as a consumer if the towage of his premises is not part of that business and is not something which regularly occurs in and as a part of it.

The provisions of the Act

1.64 It is outside the scope of this book to consider the scheme of the provisions of the Act as they affect contracts to which they apply: as to this, see generally eg *Chitty on Contracts* (30th edn), Vol. I, paras. 14.059 *et seq.* In general terms, the Act either strikes down certain exclusion or exemption clauses altogether (eg under section 2(1), which applies to all towage contracts, a contractor cannot exclude or restrict his liability for death or personal injury caused by his negligence) or strikes them down if they do not satisfy a requirement of “reasonableness” (eg clause purporting to exempt the contractor from liability for breach of contract: section 3). The “reasonableness” of a term is a question of fact in all the circumstances but, in section 11(2), the Act sets out some “guidelines” to which regard is to be had in assessing “reasonableness”. These guidelines focus on matters such as the respective bargaining position of the parties and the degree of notice which the other party had of the term in question.

1.65 As an example of the effect of the Act, it may be noted that, following the passing of the Act, the UK Standard Conditions of Towage and Other Services (see Chapter 3 below) in its 1986 Revision abandoned its exclusion clause in respect of death and personal injury resulting from negligence, ie recognising the ineffectiveness of such a

clause by virtue of section 2(1) of the Act.

The Unfair Terms in Consumer Contracts Regulations 1999

1.66 Following the European Communities Council Directive 93/13/EEC on unfair terms in consumer contracts (see Official Journal No. L95, 21.4.1993 at p. 29), the Secretary of State for the Department of Trade and Industry made regulations implementing the Directive. These were the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994 No. 3159). The Regulations came into force on 1 July 1995. They were revoked and replaced by the Unfair Contract Terms in Consumer Contracts Regulations 1999 (SI 1999 No. 2083), which came into force on 1 October 1999. The 1994 Regulations remain relevant for contracts made before this date.

1.67 Pursuant to regulation 3(1) of the 1999 Regulations, they are to apply to: “any term in a contract concluded between a seller or supplier and a consumer where the said term has not been individually negotiated.” OTHER CONTRACTUAL MATTERS 23

1.68 There is no special exception in respect of towage or salvage contracts (cf. the Unfair Contract Terms Act 1977). A “supplier” is defined as a supplier of goods and services acting for purposes relating to his business and a “consumer” is defined as a natural person, ie as distinct from a legal person such as a body corporate or association, who is acting for purposes which are outside his business. It will be seen, therefore, that the potential application of the Regulations to commercial towage is narrower even than that of the Unfair Contract Terms Act 1977. The most likely potential circumstances in which the Regulations might apply is where an individual, such as a yacht owner or a sole trader, enters into a towage contract otherwise than in the course of business with a towage company acting in the course of business and the contract is on a standard form of contract insisted upon by the towage company (ie, as regulation 5(2) of the 1999 Regulations puts it in defining a term which has not been individually negotiated, “a term... drafted in advance and [of which] the consumer has not been able to influence the substance”). For a detailed treatment, see *Chitty on Contracts* (30th edn), Vol. I, para. 15.004 *et seq.*, and the extensive literature cited at footnote 22 thereto.

1.69 The detailed provisions of the 1999 Regulations are outside the scope of this book. Briefly, the scheme of the 1999 Regulations is as follows: (i) So far as such terms are in plain and intelligible language, terms as to the subject-matter of the contract and price are unaffected by the Regulations (see regulation 6(2)). (ii) An unfair term is one “which contrary to the requirement of good faith causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer” (regulation 5(1)). (iii) Such terms do not bind the consumer (regulation 5(1)). (iv) Ambiguities in any written term of the contract shall be construed in the sense most

favourable to the consumer (regulation 7). (v) The 1999 Regulations contain no test for “good faith”. But it is instructive to consider the regime under the 1994 Regulations, Sched. 2 to which set out guidelines for how to assess “good faith”, which were broadly similar to the guidelines for assessing the reasonableness of a term under section 11(2) of the Unfair Contract Terms Act 1977. See also recital 16 of the preamble to the Directive. (vi) Paragraph 1 of Sched. 2 sets out “an indicative and non-exhaustive list of terms which *may* be regarded as unfair” (see regulation 5(5), emphasis supplied).

No special rules of construction for towage contracts

1.70 Although the older cases on towage suggest the existence of a canon of strict construction of towage contracts whenever a contract sought to exclude or to limit the terms of the towage contract which are implied at law (see eg *The Newona* (1920) 4 LL Rep 156 and Bucknill, *Tug and Tow* (2nd edn), p. 13), it is submitted that no special rules of construction apply to towage contracts in respect of exemption or exclusion clauses. The ordinary contract law position accordingly applies (see eg *Chitty on Contracts* (30th edn), Vol. I, Chapter 14).

1.71 Although a full discussion of general contractual principles is outside the scope of this book, it is useful to consider how the present law leaves previous decisions of the court which have sought to restrict common form towage contract exclusion and exemption clauses.

1.72 Since the decision in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, the question of whether or not a particular exemption or exclusion clause is effective to relieve the party in breach from liability is one of construction of the clause in question. This is so even if the breach is of a fundamental obligation in the contract. The concept of a “fundamental breach” of a contract, liability for which, as a matter of law could not be excluded or restricted by contractual provisions, was decisively rejected by the House of Lords in that decision.

1.73 Whilst in *Suisse Atlantique Soc. d'Armement v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, Lord Upjohn spoke (at p. 427) of a strong though rebuttable presumption that exemption clauses were usually not contemplated by the parties as covering breaches of fundamental or critical terms of the contract, it is doubtful whether this presumption or approach has survived *Photo Production*: it certainly received no express support or recognition by the House of Lords in that case. It is submitted that the question remains simply one of construction whatever the clause and whatever the liability and breach to which it is sought to apply that clause (see the valuable and succinct analysis in *Chitty on Contracts* (30th edn), Vol. I, para. 14.024).

1.74 However, dicta in *Suisse Atlantique* were recently relied upon in *A Turtle Offshore SA v Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep 177 in which the Court (Teare J)



held, in relation to the mutual allocation of risk or knock-for-knock clause in the “Towcon form”, that although on its construction it was capable of applying to any breach of contract, nevertheless the clause was to be restrictively construed as applying only so long as the tug owners were actually performing their obligations, albeit not to the required standard. This decision is considered in detail in Chapter 4 below (see the commentary to clause 25 of “Towcon 2008”).

1.75 It may be noted that there has been a recent revisionism of the approach in cases where an exemption clause, even where the clause is of mutual operation, is sought to be applied to a deliberate or wilful breach of contract or, while having an effect which falls short of undermining the substratum of the contract so as to render one party’s (or both parties’) obligations mere declarations of intent, covers an important area of potential liability. While the later class of case has been trammelled in authority previously (see the competing positions in *Tor Line v Alltrans Group* [1984] 1 WLR 48 in *Swiss Bank Corporation v Brink’s-Mat Ltd* [1986] 2 Lloyd’s Rep 79 and depends upon a correct assessment of whether the clause renders the contract essentially nugatory or binding in honour only: cf. *Mitsubishi Corporation v Eastwind Transport Ltd (The Irbenskiy Proliv)* [2005] 1 Lloyd’s Rep 383 and *Alexander G. Tsavlis Ltd v OIL Ltd (The Herdentor)*, 19 January 1996, unreported save for a note in (1996) 3 Int ML 75 (but see Appendix 19 and further below); see generally *Chitty*, (30th edn), Vol. I at para. 14.007, *passim*), the former represents a relatively new OTHER CONTRACTUAL MATTERS 25inroad: see in relation to a mutual exclusion of consequential loss, *Internet Broad-casting Corporation Ltd v Mar LLC* [2009] 2 Lloyd’s Rep 295 and the correction of that approach in *Astrazeneca UK Ltd v Albemarle International Corporation* [2011] EWHC 1574 (Comm). These cases are discussed in more detail in Chapter 4 in relation to clause 25 of “Towcon 2008”.

1.76 Notwithstanding the above, in the light of the “construction” approach which the court now adopts, the old decisions on towage contract exclusions and, in particular, upon the very common form of exemption clause found in towage contracts, namely the indemnity by tow of tug for all loss and damage even if caused by the tug itself, have to be treated with great caution. While some would probably still be decided in the same way today, others would not: (i) In *The West Cock* [1911] P 23, the towage contract contained a clause that the tug owners were “not to be responsible for any damage to the ship they had contracted to tow arising from any perils or accidents of the seas, rivers or navigation, collision or straining or arising from towing gear (including consequence of defect therein or damage thereto)”. It was held that the clause did not cover defects in the towing gear existing before the towage began, in as much as the contract evidenced the intention of the parties to refer to defects arising in the course of the towage, but not prior thereto. It is submitted that the language of the exemption clause would today be found to cover a pre-existing defect in the

towing gear as well as one arising in the course of the towage and that the case would today be decided differently. (ii) In *The Cap Palos* [1925] P 458, an exemption clause provided: "The acts, neglect or default of the masters, pilots or crew of the steam tugs . . . or 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." It was held that the clause was insufficiently clearly worded to exempt the tug owner from negligence on the part of the master during a voyage between Immingham and Hartlepool, which resulted in the tugs losing their hawsers and abandoning the tow in Robin Hood Bay, where she foundered. The clause did not expressly cover an unjustifiable handing over of the obligations of the tug owner to someone else for performance or a failure by the tug owner to tow the vessel in the way in which he had contracted to tow her. It is submitted that the clause, concentrating as it does upon damage to a vessel being or having been towed, would probably be construed in the same way by the court today and as not encompassing, as a matter of construction, an abandonment of the towage. Given the age of this decision and the different context in which this case was decided (ie of the court's hostility to exclusions in towage contracts: eg *The Newona* (1920) 4 LL L Rep 156 and Bucknill, *Tug and Tow* (2nd edn), p. 13), it was perhaps surprising that this decision was heavily relied upon as an aid to construction THE CONTRACT OF TOWAGE 26 of the very different BIMCO "Towcon" mutual allocation of risk clause in *A Turtle Offshore SA v Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep 177 and as supporting the cutting back of the field of application of that clause: see the further discussion of *The A Turtle* in Chapter 4 below. (iii) In *The Refrigerant* [1925] P 130, the towing hawser broke during the performance of a towage contract, and the tug-master left the ship unjustifiably. The tow was subsequently salvaged by a trawler, which received £2,000 salvage. The owners of the tow recovered this sum from the owners of the tug as damages for breach of contract and duty. Bateson J held that the tug committed a breach of contract in leaving the tow, and that the very wide clauses of exception, all of which commenced with the words "during the towage service", did not cover such an act. The same construction would probably be adopted by the court today. (iv) In *The Carlton* [1930] P 18, the towage contract contained an indemnity in favour of the tug in respect of "loss or damage of any kind whatsoever or howsoever or wheresoever arising in the course of and in connection with the towage". An accident happened due to the tug owner's servant giving the tow the signal to enter a cutting between two docks when it was unsafe to do so. As the accident, although happening "in the course of towage", was not also "connected with towage", the claim for an indemnity failed. The two parts of the clause were not to be read disjunctively. Given the use of the word "and", it is submitted that this decision is plainly correct. (v) In *The Forfarshire* [1908] P

339, the tug undertook to tow and, *inter alia*, to find and provide “all items of transportation” such as to include towing gear. Negligently, the tug used the ship’s tackle and due to a defective rope and a thimble eye which was too small for the towing hook, the line parted and the ship was damaged. The tug invoked the words, “All transporting to be at owners’ risk”. The court held that such words did not exempt from liability for negligence and only transferred the risk to the owner where the tug was exercising all reasonable care and skill. This decision is well in line with recent authorities such as *The Raphael* [1982] 2 Lloyd’s Rep 42. (vi) In *The Riverman* [1928] P 33, a tug towed six different barges under separate contracts. Due to negligence by the tug, the tug collided with another vessel. The tug admitted liability and then claimed from one of the towed barges under two clauses. The first provided that the tug’s crew were to be the employees “of the vessel being towed”, and the second that any persons interested “in the vessels being so towed” were to indemnify the tug against all claims. The court held that the first clause was inapplicable in a case where there was more than one vessel being towed, but that the second clause applied in the tug’s favour. This decision would, it is submitted, be decided in the same way today. (vii) In *The Clan Colquhoun* [1936] P 153, a vessel was to be towed by two tugs. The clause provided that the towage, and the exemption regime, was deemed to commence “when the tow rope had been passed to or by the tug”. A collision occurred after a rope had been passed to one tug but before one had OTHER CONTRACTUAL MATTERS 27 been passed to the other tug. Bucknill J held that the clause was to be read as deeming the towage to commence when the rope had been passed to both tugs and that, accordingly, the exemptions did not apply at the time of the collision. This decision seems plainly correct; where two or more tugs are used to provide the pulling power they are for the purposes of such a clause collectively being described as “the tug”. (viii) In *G.W. Rlwy Co v Royal Norwegian Government* [1945] 1 All ER 324, the clause read: “The hirer shall not bear or be liable for any loss or damage done by or to the tug otherwise than whilst towing, or for loss of life or injury to the crew of the tug.” The hirers sought to argue that they were not liable for loss of life; the court held that they were so liable “whilst towing” and that these words governed the whole clause. This decision seems plainly correct on the language of the clause.

1.77 The approach of the Admiralty Court in cases such as *The West Cock* can be contrasted with its upholding of the exemption or exclusion if, as a matter of construction, the language of the contract was clear and unambiguous. As can be seen from the other cases considered above, such cases are likely to be decided in the same way today. Thus in *The President Van Buren* (1924) 19 Ll L Rep 185, the court considered a clause which deemed the tug’s crew to be the employees of the tow for all purposes (as to which type of clause see below). The court, foreshadowing the approach adopted in *Photo Production*, rejected an argument that the clause was unfair and too wide and



upheld its effect in rendering the tow liable for all damage done to tug or tow, even if caused by the acts of the crew of the tug, simply as a pure matter of construction of the clause. In the recent case of *The Borvigilant and Romina G* [2003] 2 Lloyd's Rep 520 (CA), a similar clause in an old version of the UK Standard Towage Conditions was accepted at first instance ([2002] 2 Lloyd's Rep 631, *cor.* David Steel J) as having the effect stated in *The President Van Buren*.

The effect of the general equitable jurisdiction of the Admiralty Court

1.78 As seen above in the discussion on pre-contractual disclosure, the Admiralty Court has long asserted a general equitable jurisdiction to prevent unfairness in towage contracts. To do what was "fair and just" between the parties was described as "the great fundamental rule" by Sir Baliol Brett MR in *Akerblom v Price Potter Walker and Co* (1881) 7 QBD 129 at p. 132.

1.79 The most recent re-statement of this jurisdiction in *The Unique Mariner* [1978] 1 Lloyd's Rep 438 makes it clear that this jurisdiction probably exists only in the context of engaged salvage services, that is to say where a tug is engaged under a towage contract to do a fixed price service in circumstances in which it could, absent the contract, have claimed salvage.

1.80 The jurisdiction has impinged upon contracts of towage in respects other than pre-contractual disclosure. These may be briefly mentioned. THE CONTRACT OF TOWAGE 28(i) The court will not uphold a contract of towage if either party has extorted the agreement by taking advantage of the danger to which the property of the other party is exposed (Bucknill, *Tug and Tow* (2nd edn), p. 11), or where "there is oppression or virtual compulsion arising from inequality in the bargaining position of the two parties concerned" (*per* Brandon J in *The Unique Mariner* [1978] 1 Lloyd's Rep 438 at p. 454). However, whether this aspect of the jurisdiction amounts to more than the application of ordinary contractual principles as to the effect of duress is extremely doubtful. (ii) The court will not uphold a contract of towage if the amount agreed upon is utterly inadequate or grossly excessive in comparison to the real value of the services (*The Phantom* (1866) LR 1 A & E 58). In that case, a towage contract for the towage of a fishing smack worth £700 across Lowestoft harbour in a press of other shipping and in bad weather and with her masts and spars weakened contracted for at 8s. 6d. (4212p) was set aside as inequitable. This aspect of the jurisdiction is sparingly exercised and cannot be invoked merely because subsequent events make the bargain a bad one for one or other party. The fairness or unfairness of the bargain is assessed at the time at which the towage contract was made: "In forming an opinion of the fairness or unfairness of the agreement, I think that the court must regard the position of the parties at the time the agreement was entered into. The agreement cannot become fair or unfair by reason of circumstances which happened afterwards." In *The Strathgarry*

[1895] P 264, a vessel engaged a tug for £500 to tow for half an hour believing that it would in that time be able to restart her engines and avoid salvage; the tug towed for half an hour but the hawser broke killing some of the vessel's crew and causing damage to her. In the event, the vessel's engines would not restart so she required to be salvaged by another tug. Bruce J held that the £500 was a fair price for the service given the parties' expectations and their circumstances at the time it was agreed. In *The Unique Mariner* [1978] 1 Lloyd's Rep 438, Brandon J referred (at p. 454) to this aspect of the jurisdiction without criticism in his account of the context in which *The Kingalock* had to be viewed. While there are no modern cases on this aspect of the jurisdiction, in the light of Brandon J's endorsement of the width of the jurisdiction in *The Unique Mariner* (*op. cit.*), where salvage service is performed under a towage contract, the jurisdiction can, potentially, be invoked. However, it is submitted that a very strong case will be required to put the case within the degree of inequity found in *The Phantom* (*op. cit.*). In Brandon J's words in *The Unique Mariner*, the party seeking to avoid the contract would have to show: "the gross inadequacy or exorbitancy of the sum agreed, which renders an agreement . . . so inequitable to one side or the other that it should not be allowed to stand" (or as Dr Lushington put it in *The Phantom* (*op. cit.*) at p. 61, that the level or amount of the contract price was "utterly futile"). OTHER CONTRACTUAL MATTERS 29(iii) The court will not uphold a contract of towage in the event of "the existence of some collusion of one kind or another" (*per* Brandon J in *The Unique Mariner* [1978] 1 Lloyd's Rep 438 at p. 454). While this is vague, it appears to reflect the old cases on fraud or deceit by the tug, ie in bribing or colluding with the tow's master to persuade him to enter into a towage contract on his owner's behalf. See eg *The Crus V* (1862) Lush 583 and *The Generous* (1868) LR 2 A & E 57. Similarly, if there has been active deceit on the part of the tow, as there was in *Dunsmuir v The Ship Harold* (1894) 3 BCR 128 (the facts of which are set out above), the contract will be avoided. THE CONTRACT OF TOWAGE 30

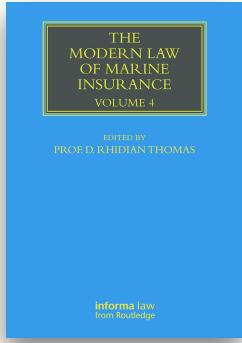


CHAPTER

5

Co-Insurance and Leading Underwriter Clauses

Chapter 5. Co-Insurance and Leading Underwriter Clauses



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Introduction

4.1 A key tenet in the underwriting of marine risks is prudence, with a significant emphasis on the wisdom of spreading insured risk among underwriters within and, if necessary, across different insurance markets¹. The prudent underwriter is not prepared to place all his eggs in one basket and underwrite a risk which, if it materialises, may mortally wound his business. Consequently, an assured seeking cover for a substantial risk may contract with multiple underwriters, each assuming a distinct proportion of the risk, customarily expressed as a percentage or monetary sum.

The cover is thereby provided by a scheme of co-insurance, established by multiple individual contracts, each underwriting a part of the risk, and collectively providing full cover². It is also highly probable that each primary co-insurer will further secure its position by acquiring reinsurance, which again may be provided by multiple co-reinsurers³.

4.2 An assured to primary insurance may therefore find himself in one of two general positions. First, that he has entered into a number of separate contracts with individual underwriters, and in respect of each contract associated insurance documents have been issued. The individual insurances may participate in the entire risk on an agreed basis or be layered vertically, in the nature of a tower, with each layer above the primary participating only when the ceiling of the preceding layer has been exceeded and subject to its own limit. This latter structure is sometimes alluded to as horizontal cover⁴.

4.3 Second, and in the alternative, that he has entered into a subscription policy, with multiple underwriters subscribing to a single slip and marine policy. A subscription is effected by each underwriter scratching the policy, which is effected by signing and stamping the policy, and at the same time indicating the percentage of the risk accepted. Subscription policies are prevalent in the London market, of administrative efficacy and savings in costs, for only a single slip and policy is issued⁵, but otherwise the legal position is similar to the first method described. By subscribing to the slip each underwriter enters into a separate contract with the assured, with no further legal interrelationship inter se relating to the cover⁶.

4.4 The legal consequences of both schemes of co-insurance are that an assured when making a claim must seek to recover under each of the contracts according to the proportion of the risk assumed. In the case of a subscription policy this position will prevail for all claims; in the case of layered cover it will be the case only to the extent that the claim extends vertically beyond the primary layer. But under both schemes, in the event of default, no alternative right exists against any other co-insurer. The liability of each co-insurer is several, not joint and several⁷, and limited to the proportion or layer of risk underwritten.

4.5 The practice of co-insurance offers material advantages to assureds, for it broadens the availability and capacity of insurance, particularly for substantial risks. There are, however, attendant risks and disadvantages. It is important that all the contracts work in parallel so that in the event of a claim they all pay. It would be disastrous to an assured if only one or some responded, but not all. This risk may be avoided, or at least minimised, by ensuring that all the contracts are drafted on the same terms and conditions, including the risk insured, exceptions and claims provisions, governing law and jurisdiction or other dispute resolution provisions. There is always the risk that such perfect contractual harmony may not, or cannot, be achieved⁸. But even when it is, there continues to be the risk that individual underwriters may manage their positions differently. Particular differences might relate to whether the claim is within the insurance, if a warranty or condition has been broken, the proper discharge of the obligation to sue and labour, has the claim been properly made and within time, should the claim be settled and, if so, for how much, or should an ex gratia or without liability payment be agreed. Inconsistent responses to such issues may significantly prejudice the interests of an assured.

4.6 In an attempt to avoid or minimise these potential difficulties, parties may enter into a leading underwriter agreement, under which the management of the insurance is delegated to one or more leading underwriters, who are thereupon the interface between the assured on the one hand and the co-underwriters on the other.⁹

These agreements offer potential advantages to assureds and co-underwriters, but there are also potential attendant problems which will become evident in the course of this contribution. At this stage it is sufficient to highlight that the assured's prospects are wholly in the hands of the leading underwriter(s), and an assured who disagrees with a decision made has no right of recourse against the following underwriters. As for the following underwriters, they must abide by the decision of the leading underwriter(s) even if they consider it to be wrong or misjudged or contrary to market practice, unless they are protected by an appropriate exclusion.

4.7 It follows that leading underwriter agreements are capable of being the source of discord and the manner in which they function has attracted the attention and

intervention of market regulators. This is particularly true of the London market¹⁰. Where they are employed, questions may also arise about the competitiveness of the market. Concern has been expressed by the European Commission that the practice adopted in the London market may be anti-competitive, and the response of the market to these concerns will be considered later in the text.¹¹

Leading underwriter clauses

4.8 Leading underwriter clauses¹² are essentially a question of contract, to be agreed by the parties. The following example is taken from *The Leegas*¹³: Any amendments additions deletions including new or managed and or chartered notice of assignment ratings and alterations of any description to be agreed with Leading Underwriter and to be binding on all others hereon.

4.9 In general terms their object is to channel the administration of co-insurance cover to the leading underwriter(s), who acts on behalf of the other underwriters¹⁴. They serve to establish a coordinated and uniform management of the insurance cover provided by the multiple contracts¹⁵. They offer potential advantages to both assureds and co-insurers. From the assureds' perspective the claims process and the making of post-placement applications with regard to the cover is simplified, and the risk of disparate responses avoided¹⁶. From the perspective of underwriters, the system saves time and cost, and probably also serves to make co-insurance a more attractive package to purchasers of insurance.

4.10 The clauses are viewed favourably by the commercial judiciary who consider them to be founded on sound commercial reasons. In *Roadworks (1952) Ltd v J R Charman and Others*¹⁷ HHJ Kershaw QC observed¹⁸: In the London insurance market a risk is often underwritten by several insurers – Lloyd's syndicates, several companies or a combination of both. It is the interest of both underwriters and brokers that time should not be spent in obtaining the express agreement of every underwriter to every change, even such as a change in the spelling of the name of the insured. Hence, the leading underwriter system has evolved.

In *Roar Marine Ltd and Others v Bimeh Iran Insurance (The Daylam)*¹⁹, Mance J said²⁰: The commercial reasons why both the insured and the following market should find advantage in such an arrangement are obvious. From insurers' viewpoint, it is bound not only to save time and cost, but must also make such a co-insurance more marketable and attractive to those seeking insurance.

In *The St Efrem*²¹, Teare J said²²: The commercial purpose of a follow settlements clause is that from the insurers' point of view it saves time and costs and also makes co-insurance more marketable which is attractive to those seeking insurance. It simplifies claims settlement.



4.11 The source, nature and contractual effect of a leading underwriter clause may vary with the structure of the insurance.

4.12 With respect to subscription insurance, it is probable that the clause will appear on the slip²³ (it may also appear in the policy or other document) and be the basis of a contract between the leading underwriter(s) and each co-underwriter, and also possibly the broker²⁴. This contract is distinct and separate from the insurance contracts between the assured and each co-underwriter, with its own express and implied terms, and even choice of law and jurisdiction provisions²⁵. The degree of express detail may also vary, but in its fullest form it may name or provide for the nomination of a leading underwriter(s), specify the capacity of the leader and identify exceptions, define the legal relationship between leader and followers, and also the binding obligation to follow²⁶. The assured is generally regarded as not being party to the agreement²⁷.

4.13 By contrast, where the insurance is constructed by multiple independent contracts (not on a subscription basis) there is no pressing necessity for a contractual nexus between the leading underwriter(s) and followers, whether each underwriter takes a proportion of the risk or the insurance is layered. In these situations the clauses may properly be described as simple follows clauses, establishing the obligation to follow and the circumstances in which the obligation arises. The obligation to follow arises from an independent obligation in the contract of insurance to which the assured and follower are party²⁸. In effect, the following underwriter is surrendering the right to make underwriting decisions to the leading underwriter(s).

4.14 Precisely how leading underwriter or follow clauses function will depend on the terms of the agreement. There has never existed a universal standard clause and practice²⁹; in the result the terms of individual clauses may vary significantly and, consequently, also the capacity of leaders and the obligation to follow³⁰. Clauses may be drafted very broadly, covering all or most of the matters that are likely to arise between leading underwriter and the following market, or they may be limited to a single or small number of particular matters³¹. The variety of contractual clauses that may be encountered in practice will emerge from the later discussion of the authorities; it is also a factor which contributes to the proliferation of questions of construction.

4.15 Besides ad hoc clauses, standard leading underwriter clauses may be recommended by broking organisations and individual markets. This has long been the case in the London market³², with the current recommendation contained in The General Underwriters Agreement (GUA) (February 2014), intended for use with the MRC slip³³. The GUA sets out core clauses and Class of Business Schedules (including Marine Cargo, Marine Hull, Marine Liability and Marine Energy) for agreements between subscribing underwriters relating to delegated authority in respect of post-placement


alterations to cover³⁴. In keeping with the Contract Certainty Code of Practice³⁵, the GUA assumes that all the terms of the agreement have been settled before the contract was entered into, and it only applies when expressly referred to in the slip or endorsement or in connection with electronic means of agreement³⁶. The provisions may yield to the contrary agreement of the parties, provided that the terms are known and agreed to by the subscribing underwriters³⁷. It follows that the GUA may not be universally adopted. Its overriding objective is to define with particularity the authority delegated to slip leaders and Agreement Parties³⁸, so contributing to contractual certainty and the avoidance of disputes³⁹. The Introduction to the GUA 2014 makes it clear that it is intended to form the basis of an agreement between the subscribing underwriters and its separateness from the insurance contract is reinforced by a distinct choice of law provision, which identifies English law as the governing law, notwithstanding that some other system of law may be the governing law of the insurance or reinsurance⁴⁰.

4.16 When a leading underwriter clause is agreed, it is desirable that the other provisions of the cover give recognition to this fact by expressly providing that claims, notices and any other matter relating to the management of the cover within the clause be made to the leading underwriter(s). But even in the absence of such an express provision, it is probable that the terms of the insurance will be construed together with the leading underwriter clause. In *The Daylam*⁴¹, Mance J (as he then was) held that clause 10.1 (Notice of Claims and Tenders) of the ITCH 1/10/83⁴² was to be construed in association with the leader clause which provided “It is agreed with or without previous notice to follow leading British Underwriters in regard to . . . settlements in respect of claims . . .”. Mance J held that the phrase “with or without previous notice” served to emphasise that the leader was to receive notice of and handle claims arising under the cover. There needed to be only a single notice given to the leader, one decision made about the firm of surveyors to be engaged, one decision as to the port the vessel was to proceed to and one process of receiving and accepting tenders. This avoided “the impossible situations and delays which could arise if different co-insurers proved to have different views on such matters”⁴³.

4.17 A final point: agreement to a leading underwriter clause does not in any way impinge upon or detract from the several liability of each co-underwriter. It does not render their liability joint, or establish any kind of guarantee or indemnity⁴⁴.

Leading underwriter(s)

4.18 Where provision is made for a leading underwriter it is not also necessary for the underwriter to be named in the slip. The slip at that stage may not even have been scratched, and it may do no more than identify the prospective leader generically, for example, as a member of the Lloyd’s market or, more generally, the London market.



Where this is the case, the leader will subsequently be identified by express or implied agreement on his part and that of the followers. By virtue of the practice surrounding a subscription slip, the identity of the leader will often be known to or ascertainable by the followers at the time they scratch the slip. It might also be expected that the placing broker would disseminate this information as the slip circulates or otherwise be in a position to answer enquires. Where the GUA⁴⁵ applies, the slip leader is required to be identified in the MRC slip⁴⁶.

4.19 There is no further requirement that the leader must be the first subscriber or independent insurer, or take the largest or even a significant participation in the risk. In *Unum Life Insurance Co of America v Israel Phoenix Assurance Co Ltd*⁴⁷, a subscription of only 5% did not prevent the reinsurer from being nominated the lead reinsurer. Nonetheless, in the case of a subscription policy, it appears to be customary in contemporary practice for the leader to write the first and a not insignificant line⁴⁸.

4.20 In most instances the leader will be identified in the slip or policy⁴⁹, or subsequently during the placement process or even after the inception of the risk. Where provision is made for a leading underwriter but no clear agreement is made as to which underwriter is to be the leader, the court may be required to resolve the matter, which it will do by reference to implications derived from the facts and circumstances of individual cases.

4.21 In *The Daylam*⁵⁰, the insurance had been placed in London and four overseas markets. The leader clause referred to “leading British Underwriters”, without further identification, with the slip and policy unavailable (possibly lost). It was common ground that the words referred to a co-insurer in the London market, and also that there was no suggestion that the reference to underwriters in the plural conveyed an intention to nominate more than one leading underwriter. Nonetheless, the defendants disputed that it was a reference to Lloyd’s Syndicate 724, as had been asserted by the claimants.

4.22 The defendant’s contention was rejected by the court, which took note of the available underlying documentation which pointed compellingly in the direction of the claimants’ submission. The brokers acting for the co-insurers, other than the defendants, had identified Syndicate 724 as leading underwriter in a fax message; and in a cover note produced by the brokers with respect to the London insurers, Lloyd’s underwriters appeared first on the list. And in another list of London underwriters prepared by the brokers, Syndicate 724 appeared first. This syndicate had also scratched the endorsement which added the vessel *Daylam* to the insurance, and also a later claims endorsement, in the capacity of leading underwriter. The fact that Syndicate 724 had not taken the largest participation in the insurance provided by the London market, though it had taken one of the larger participations, was not a reason for disturbing the



conclusion of the court⁵¹. Where the leading underwriter puts down the first line, as may be usual, he has no means of knowing how the following underwriters will respond to the risk, whether they will be more or less enthusiastic⁵².

4.23 In *Unum Life Insurance Co of America v Israel Phoenix Assurance Co Ltd*⁵³, the reinsurance slip indicated “wording to be agreed by leading reinsurer only”, and as such it contemplated that there would be a leading reinsurer. At first instance Andrew Smith J confirmed that Liberty, a London reinsurer, had acted in that capacity. On the evidence it was the first to subscribe in terms of chronology; it had signed an indorsement as leading reinsurer, and in the cover note it was the only reinsurer identified in the schedule with an asterisk against its name, indicating that it was the lead reinsurer.

4.24 The capacity of a leading underwriter properly appointed to act in a manner which binds the followers derives primarily from the terms of the leading underwriter clause. It may therefore vary considerably from case to case⁵⁴. It is in all cases a matter to be determined by agreement and the proper construction of the adopted words⁵⁵. Stated broadly, the capacity conferred may relate to policy wording and/ or post-placement matters, such as endorsements, extensions, amendments, alterations, terminations, waivers and claims settlements. The practice of conferring a capacity to agree policy wording⁵⁶ would appear now to be in conflict with the Contract Certainty Code of Practice applicable to the London market⁵⁷, and for that reason the practice may be on the decline⁵⁸. It has been suggested that the practice may still be followed provided the leader has agreed the wording prior to the contract being entered into⁵⁹. It is, of course, the case that should a leading underwriter act without or beyond his capacity, the following market is not obliged to follow⁶⁰.

4.25 In discharging his authority a leading underwriter may legitimately incur reasonable costs and charges which may be recoverable from the other co-insurers under the terms of the leading underwriter agreement or as an implied right of indemnity where an agency relationship exists⁶¹. Such matters may also be governed by market practice.

4.26 It is frequently the case that two or more subscribing underwriters may be appointed as leading underwriters. This is probably viewed as one possible device to ensure that decisions are made which are consistent with market practice and, therefore, unlikely to be controversial, objected to or disputed by followers. The practice also tends to be adopted where cover is provided by different sectors of a single market, or by different markets, particularly when there is an international dimension. Again it may be supposed that the object is to ensure that each sector or market is properly represented in the management of the insurance.


4.27 Where multiple leaders are nominated, some obvious questions arise relating to

the manner in which decisions are made. Are the nominated leading underwriters to act collectively or may each act on an individual basis? Is there a requirement of unanimity or, where there is an uneven number, may a majority decision be binding?

And in the event of an even number, there is always the danger of a split decision. It seems that these questions have received little attention: the assumption appears to be that multiple leading underwriters must act collectively and with unanimity. This position would also appear to be consistent with the fundamental purpose underpinning multiple nominations and is analogous to the position adopted by the law where co-agents are appointed⁶². Nonetheless, it remains possible for the position to be governed by express agreement, as, for example, IHC (01//11/03)⁶³ clause 42.1, which provides that any one of the leading underwriters may require any one or more of the matters specified in the sub-clause to be referred to the subscribing co-underwriters.

4.28 There is little or no authority on questions relating to the removal and replacement of leading underwriters or the termination of their authority, and therefore it is probable that questions of principle may be resolved by reference to the established law of agency. In *Unum Life Insurance Co of America v Israel Phoenix Assurance Co Ltd*⁶⁴, Andrew Smith J inclined to the view that the capacity of a leading underwriter was irrevocable, but at the same time recognised the vulnerability of that position when the conferred capacity was very broad, in which case it was at least arguable that capacity was revocable upon the giving of notice. The judge also declined to recognise an implied term to the effect the conferred capacity expires by effluxion of time. It is difficult to reconcile these observations with the established principles of agency, which recognise that authority is revocable unless the parties have contracted on contrary terms or the authority is coupled with an interest or there are other special circumstances⁶⁵. But even after the termination of the leader's actual authority, he may continue to possess ostensible/apparent authority, in circumstances where the assured or broker is unaware of the termination⁶⁶. The position is clearer where the insurance contract is terminated, as when a follower avoids his contracted participation for material non-disclosure: in this circumstance the leader's capacity is terminated⁶⁷.

4.29 In the London market, where the GUA (2014) has been adopted in relation to subscription policies⁶⁸, a different language and practice prevails. The underlying objective of the Agreement is to establish a clear, codified and unified approach to contract alterations⁶⁹. It provides for the appointment of a single slip leader and two or more Agreement Parties, all to be so identified on the slip⁷⁰. The slip leader is identified in the "Subscription Agreement" section of the MRC slip, which also specifies the basis of agreement for contract changes (with reference made to GUA (2014)), if



adopted), the identity of the Agreement Parties and also the co-insurers who are to agree changes for their own proportion of the risk. The capacity to make binding decisions is divided into three categories which are specified in the relevant Class of Business Schedule. Some decisions are capable of being made by the slip leader alone, others by the agreement of the slip leader and Agreement Parties, and the remainder by all the subscribing underwriters⁷¹. In the event no Agreement Parties are appointed, all the co-insurers, apart for the slip leader, act as Agreement Parties⁷². Although the question is not expressly addressed, the implications are that collective decisions must be joint and unanimous. There is, for example, reference to the slip leader and Agreement Parties “acting together on behalf of Other Underwriters”⁷³ and to agreement “by all Underwriters”⁷⁴. On the question of capacity, the GUA (2014) only applies to post-placement alterations⁷⁵, not, therefore, to matters such as the settlement of policy wording and claims settlement, but adopts a wide view of “alterations”⁷⁶. In connection with alterations agreed, it imposes an obligation to notify the following market⁷⁷. An underwriter who does not wish to become a party to the GUA must so indicate when scratching the slip⁷⁸.

4.30 In other regards the GUA (2014) provides for some matters which touch upon the interrelation between co-insurers. It specifies the circumstances when the authority of a slip leader or Agreed Party is terminated or may be withdrawn⁷⁹, and it provides for the appointment of replacements⁸⁰. The delegated authority may be terminated by an underwriter at any time by giving an appropriate notice to the broker, but without prejudice to rights accrued under a preceding agreement⁸¹. The delegated authority is also automatically terminated where an underwriter is subject to insolvency or a similar process, or where regulatory permission has been withdrawn for the class of business in question⁸². In these regards the Agreement addresses many issues relating to leading underwriters which are otherwise not widely considered and thereby assist in constructing a more comprehensive picture.

4.31 However, the Agreement is not mandatory and may be displaced by contrary express terms in the slip, subject to conditions⁸³. Its use, therefore, is not universal and many less detailed and comprehensive agreements may continue to be used.

Construction of leading underwriter clauses

4.32 The construction of a leading underwriter clause will more often than not be the first step in the resolution of any dispute arising in connection with the application of the clause. It is the process which determines the ambit of the clause, the capacity and rights of the leading underwriter(s), and the nature of the obligation to follow. The manner in which these clauses are construed by courts and arbitrator is, therefore, both relevant and significant⁸⁴.



4.33 In the first place, leading underwriter clauses are ordinary commercial agreements which are to be construed in the same way as commercial agreements generally⁸⁵. The core principle, therefore, is that the words agreed by the parties are to be construed in the context of the wider contractual words and provisions, and also in the context of the factual and legal matrix of the agreement. The factual matrix may include a wide range of matters⁸⁶, such as the commercial positions of the parties and the *raison d'être* of the agreement⁸⁷, in particular the mischief it seeks to cure⁸⁸, and relevant commercial customs, usages and market practices⁸⁹, but not pre-contract negotiations, preliminary drafts⁹⁰ and subsequent conduct⁹¹. The obligation to examine the matrix as an aid to construction is a natural emanation from the maxim that “courts will never construe words in a vacuum”⁹².

4.34 The starting position, therefore, is to have regard to the precise words adopted by the parties and to construe them in their context⁹³. The court will attribute to the adopted words a meaning which a reasonable person, having all the background knowledge which was reasonably available to the parties (the factual matrix) in the situation which they occupied at the time of entering into the contract, would have understood the contracting parties to have meant⁹⁴. The relevance of the context is not dependent on the existence of ambiguity⁹⁵, and the weight it exerts will of course be influenced by the facts and circumstances of individual cases. The precise words adopted by the parties cannot be ignored, but the context may justify a departure from what might be described as their natural and ordinary meaning. Mance J has neatly summarised the subtle synthesis in the following terms:

Even if the most generous examination of surrounding circumstances is permitted, any decision on interpretation must pay due regard to the explicitness of particular wording and the nature and strength of any circumstances suggested as putting a different complexion upon it⁹⁶.

When construing leading underwriter clauses, it follows that beyond the express words, reference may be made to the factual matrix, which includes the commercial purpose and mischief the clause seeks to address. On the facts in *The Daylam*⁹⁷, Mance J was of the opinion [t]hat the only matrix of any real relevance in the material before me is, in my view, to be found in the obvious commercial purpose of the clause in simplifying the administration and claims settlement⁹⁸. The court, therefore, must be reluctant to adopt a construction which runs counter to or undermines the fundamental purpose of the clause, unless compelled to do so by express and unambiguous wording.


4.35 The same approach was adopted by Teare J in *The Buana Dua*⁹⁹, where the follows clause was drafted in the following terms: It is agreed to follow AXA HK in respect of all decisions, surveys and settlements regarding claims within the terms of the policy, unless these settlements are to be made on an ex gratia or without prejudice basis.

Teare J indicated that the clause should be given that meaning which it would be reasonably understood to have. In deciding on that meaning, it was necessary to bear in mind the commercial purpose of follow clauses in marine insurance policies, which was part of the background the assured and underwriters would be aware of. The words “all decisions, surveys and settlements” suggested that there were no exceptions to those settlements which must be followed, save for those expressly stated, namely, settlements on an ex gratia or without prejudice basis¹⁰⁰. These words also suggested that the whole process of claims investigation and settlements by the leader, AXA, which necessarily included both issues of liability and quantum, were to be followed. Contrary to the contentions of counsel, the obligation to follow was not limited to questions of quantum: such a limitation would be inconsistent with the commercial purpose of the clause and could only be achieved by the use of clear and unambiguous language. The further words “regarding claims within the terms of the policy” encompassed decisions or settlements in the context of issues whether a claim was within the terms of the policy¹⁰¹.

4.36 The matrix may also include customs, usages and practices, which may be particularly prevalent in insurance markets, and which may exert an influence upon the proper construction of leading underwriter clauses. This was confirmed in *Roadworks (1952) Ltd v J R Charman and Others*¹⁰², by HHJ Kershaw QC, who observed, “Evidence of market practice can be admissible on construction either to show a particular meaning of a word or phrase or to show the matrix of fact in which a contract was made . . .”¹⁰³.

4.37 The legal recognition of commercial customs and usages is preconditioned by strict conditions which are not readily satisfied¹⁰⁴. The position with regard to commercial practices is less demanding, but again there are difficulties of definition and proof. Their existence may be readily raised in argument, but many such contentions (if not most) fail for want of sufficient proof¹⁰⁵. This is particularly true of market practices, which in the present context are frequently alleged to be a part of the matrix. In all instances, a custom, usage or practice is incapable of contradicting the precise words adopted.

4.38 The potential influence of something short of a legally recognised market practice, such as market behaviour or attitudes, was considered by Mance J in *The Daylam*¹⁰⁶. This variant was styled the “weaker conception of custom and practice”¹⁰⁷. The facts related to the London market where there could be recognised group behaviour and/or attitudes, which were not universally shared, and with it also possible to identify a majority group position. The question was whether the majority group position could exert the same influence as a properly established market practice. The contention failed for want of sufficient proof, but even if it had been properly established Mance J indicated that he would have rejected the contention because “the proper



interpretation cannot be determined by majority vote. The mere fact that the behaviour or attitude of one group of market practitioners may have been tolerated does not mean that it is right, particularly when there is a significant, even though a minority, group viewing the position and acting differently”¹⁰⁸.

4.39 Although the precise contention was rejected, interestingly Mance J did not appear to reject the category out of hand, leaving open the possibility that where behaviour and/or attitudes are followed by a significant group within a market, which are not in significant disharmony with other patterns of behaviour and/or understandings and/or attitudes in the remainder of the market, the position adopted by the group may be recognised as part of the factual matrix, notwithstanding that it would not amount to a market practice in the eyes of the law.

Implication of terms

4.40 It has already been noted that the drafting of leading underwriter agreements may vary greatly. The more compendious the terms, the more likely it is that questions may arise about the possible existence of implied terms, always bearing in mind that leading underwriter clauses in subscription insurance function as distinct contracts. The implication of contractual terms is primarily a question of construction¹⁰⁹, and in principle a term might be implied in fact by any of the methods recognised currently by the law¹¹⁰.

4.41 The potential influence of customs, usages and practices on the construction of leading underwriter clauses has been previously noted¹¹¹, and it is the case that they may also be the foundation of implied terms, with their substance consequently transmuted to contractual obligations¹¹².

4.42 There is a general presumption that contracting parties intend that their agreements are to be capable of being performed, and, if necessary, a term may be implied to give effect to that intention or, possibly wider, the reasonable expectations of the parties¹¹³. This is sometimes expressed in terms of giving business efficacy to the contract or by asking the question whether the suggested term would be recognised by the officious bystander.¹¹⁴ On the other hand, a term will not be implied simply because it is reasonable, as where it would improve the performance of the agreement¹¹⁵ or if it would conflict with an express term¹¹⁶. Ultimately all implied terms are an expression of the implied intention of the parties, as divined from a proper construction of the contract¹¹⁷.

4.43 Just as the courts will resist the adoption of a construction which defeats the commercial purpose of a leading underwriter clause, so also a term will not be implied which is to the same effect. In *The Daylam*¹¹⁸, the follow clause read as follows: It is agreed with or without previous notice to follow leading British Underwriters in regard



to agreements, alterations, extensions, additions, endorsements and cancellations and attaching and expiry dates, and also in regard to all decisions, surveys, the providing of bail and settlements in respect of claims and returns, but excluding ex gratia and without prejudice settlements. It was contended that the authority of the lead underwriter was subject to a proviso that any settlement had to be concluded in a proper and businesslike way. This was a novel argument and clearly derived by analogy from the construction of “follow the settlement” clauses in reinsurance¹¹⁹. Mance J resisted the analogy, seeing a clear distinction between the two categories. In reinsurance the insurer administers and settles incoming claims, on which he then seeks to rely against his own reinsurer.

By contrast, under a leading underwriter clause there is a mutuality of interest between insurers, with followers agreeing to be bound by settlements and other decisions made by the leader. There was, therefore, no basis for qualifying a “follow the leader” clause in the way suggested. If allowed, the qualification would in reality undermine the purpose and operation of the clauses¹²⁰.

4.44 Where the leading underwriter clause forms the basis of an agency contract between the leader and the following market, implied terms may arise from the status of the leader as agent¹²¹, such as a duty of care¹²² and a right of indemnity in respect of reasonably incurred expenses¹²³. In *Unum Life Insurance Co of America v Israel Phoenix Assurance Co Ltd*¹²⁴, the contention that there was an implied term to the effect that the capacity of the leader was extinguished by the effluxion of time was rejected.

Status of leading underwriters

Introduction

4.45 The legal status of a leading underwriter has long been the topic of debate and the question continues to be not free of difficulty¹²⁵. It is a question of material importance because the answer will determine the legal relation between a leading underwriter and the following market. In particular it will define the legal obligations of leaders. There are two possibilities. A leading underwriter may act not only on his own behalf but also as agent on behalf of the following market: or he may act independently on his own behalf, with his actions serving to trigger the obligations of the following underwriters under the individual contracts of insurance to which they are party¹²⁶.

Agency

4.46 Whether an agency exists raises a conclusion of fact, determined on the facts and circumstances of individual cases. It is always possible that an agency may be expressly

declared, but rarely will this be the case in the realm of co-insurance¹²⁷, with the issue determined by implication following an examination of the facts and circumstances of individual cases. As a matter of principle, it cannot be said that a leading underwriter, as a consequence of his status as such, is necessarily an agent on behalf of the following market. He may or may not be an agent, with further enquiry necessary to ascertain the precise intention of the parties. The crucial question is whether it is intended that the leading underwriter, in addition to his own participation as principal, is to act as agent on behalf of the following underwriters, who are consequently obliged to follow the leader's decisions and determinations. The analysis also has implications for the legal duties of leading underwriters, which doubtlessly will be a factor borne in mind when addressing the question of status.

4.47 The authorities are notoriously ambiguous on the issue and consequently provide uncertain assistance.

4.48 In *Roadworks (1952) Ltd v J R Charman and Others*¹²⁸, a case dealing with a facultative subscription slip, the leading underwriter was held to be the agent of the following underwriters with capacity to waive a contingent condition. The slip wording was as follows: All alterations, additions, deletions, extensions, agreements, rates and changes in conditions to be agreed by the Leading Lloyd's Underwriter and Leading Company Underwriter only. Such agreements to be binding on all Underwriters subscribing hereon.

HHJ Kershaw QC said¹²⁹: I agree with [counsel] that a leading underwriter is the agent of the following market. By taking a leading line he knows that there will be following underwriters and he sees the terms of the L/U clause on the slip. He may require the L/U clause to be altered if he is to take a line. The following underwriters see from the slip the identity of the leader or leaders. They see the terms of the L/U clause. By taking a line they not only make a contract with the insured but also make those leader or leaders their agent or agents for the purpose shown on the L/U clause. The leader can ascertain the identity of the following underwriters from the broker at any time and in particular if he is asked for an endorsement. The policy itself, which will identify all the underwriters, is prepared later – perhaps much later – by the Lloyd's Policy Signing Office¹³⁰. That fact is no more than the way in which Lloyd's operates, and does not show or help to show that a leader is not an agent of the following underwriters. Though it has not played any part in my reasoning, I gain some comfort that my reasoning is correct from the way in which underwriters in the marine market have sought to regulate, as between themselves, what a leader should and should not do – a way which is consistent with a relationship of principal and agent.

The reasoning is closely aligned to the fact that the leader and followers were subscribers to the risk. The leading underwriter clause appeared on the slip, giving all

the subscribers notice of its existence and terms. The associated London market practice in relation to subscription policies is now to be found in the GUA 2014¹³¹, which appears to accept clearly that where the agreement is included on the slip the leader acts as agent on behalf of the following market¹³². The judge attached no weight to the final sentence in the clause, which had it stood alone would not necessarily have been conclusive, but coupled with the preceding sentence it surely represented a useful makeweight.

4.49 In *Barlee Marine Corporation v Trevor Rex Mountain (The Leegas)*¹³³, the issue was whether the leading underwriter had authority to enter into a settlement which also bound the followers. The followers contested the authority of the leader because they did not wish to be bound by the settlement. This raised a question as to the proper construction of the leading underwriter clause¹³⁴. After determining that such an authority existed, Hirst J further considered that the risk of the authority being abused was protected against by the leader's duty of care. In Hirst J's precise words, "Underlying the whole relationship between the leading underwriter and the following underwriters . . . is the former's manifest duty of care"¹³⁵. The reasoning is probably obiter but otherwise consistent with the concept of agency, with the duty of care arising by implication from the agency relationship. But at no stage does the judge expressly recognise agency to be the source of the duty.

4.50 In *Youell v Bland Welch & Co Ltd (No 1)*¹³⁶, the follow clause stated "wording to be agreed by Leading London Reinsurer". Philips J (as he then was) interpreted these words in the following way:

Where . . . the slip provides for the formal wording to be agreed by the leading underwriter the other subscribers to the risk anticipate and agree that the leading underwriter will, on their behalf, agree the formal wording that will spell out their rights and obligations¹³⁷. The words "on their behalf" coupled with the statement that the acts of the leader will spell out the "rights and obligations" of the followers are strongly indicative of agency, though again the judge does not say so expressly.

4.51 In *Unum Life Insurance Co of America v Israel Phoenix Assurance Co Ltd*¹³⁸, in the context of an application for permission to appeal, Mance LJ considered the agency analysis as "thoroughly arguable"¹³⁹, which in the circumstances of the case is not necessarily a full legal endorsement of the analysis.

4.52 Where the leader is agent, the agency is based on a contract between the leader and each following underwriter, with there being as many agency contracts as there are followers and with each made on similar terms. The leader as agent will bind the following market only to the extent his acts are within his actual or ostensible authority, frequently described as the capacity of the leader. Actual authority derives



from the express and implied terms of the leading underwriter agreement, and its scope will turn on the proper construction of the terms of the agreement. By contrast, ostensible authority is not contractual but founded on an authority which is represented by the principal to exist and which is relied upon by the third party¹⁴⁰. Its particular significance is that ostensible authority may coincide with actual authority and provide protection to third parties when undeclared limitations are placed on the actual authority of agents¹⁴¹.

4.53 The agency analysis carries significant legal implications for leaders. As agent the leading underwriter owes a duty of care to the following market, and also fiduciary duties, including a duty to act bona fide in the best interests of the followers and to avoid a conflict of interest¹⁴². It was the prospect of the latter that motivated Rix J (as he then was) in *Mander v Commercial Union Assurance Co Plc*¹⁴³ to be disinclined to support the agency analysis in the context of declarations made under an open cover, because it carried the “danger of imposing upon a leading underwriter the unrealistic fiduciary obligations of an agent, e.g. to avoid any conflict of interest”¹⁴⁴. In *The St Efrem*¹⁴⁵, it is probable that one of the reasons for contending that an agency existed was to establish a foundation for an argument based on breach of duty, which if established would bolster the position of the following underwriter who was seeking to reject a claim under the policy¹⁴⁶.

4.54 There is no inherent reason why a leading underwriter should not occupy the position of agent, but at the same time it is not the case that an underwriter who accepts the position of leader automatically assumes the status of agent. The duties and responsibilities which attach to agents may provide a reason why underwriters may not wish to assume that status, and also why there may be a judicial disposition to hesitate to accept the agency analysis unless the factual evidence clearly points to that conclusion¹⁴⁷. The nature of the co-insurance will also probably be a significant factor. The case for agency is substantially strong in relation to subscription insurance provided by a single market, where there exists a close community of commercial interest, compared to co-insurance constructed across markets or on a non-subscription basis. In the latter case the agency analysis is very improbable. Finally, there can be no question of agency when the status of agent has been expressly disavowed.

4.55 When the leading underwriter(s) clause in the IHC 03 cl 42.1 is scrutinised, it suggests an intention to create an express agency. The relevant words are “all subscribing Underwriters agree that the Leading Underwriter(s) designated in the slip or policy may act on their behalves so as to bind them for their respective proportions. . .”. The adoption of the word “may” probably indicates that the leader(s) is not obliged to exercise the functions and powers specified in the clause on behalf of the followers, but where there is agreement to contrary effect, the action is done “on their behalves

so as to bind them”, which are words carrying a clear indication of agency.

Trigger analysis

4.56 Under the trigger analysis, the leading underwriter is not recognised as an agent acting on behalf of the following market, but as a party whose decisions trigger the independent obligations to follow of the following market. In other words, each following underwriter agrees with his assured to follow the decisions and actions of the leading underwriter, who is underwriter under a distinct and separate contract. Under this analysis there does not exist a direct contractual nexus between the leading underwriter and the other co-insurers; in each case the contractual obligation to follow arises under the individual contracts of co-insurance.

4.57 This mode of analysis appears to be particularly apt in the case co-insurance not based on subscription policies, and it has also been favoured judicially in the case of open covers.

4.58 *The Tiburon*¹⁴⁸ is a case which related to an irrevocable open cover and the acceptance of risks declared to the leading underwriter within the terms of the cover. Steyn J (as he then was) said of the position of the leader, “The acceptance by a leading underwriter is, of course, by market practice merely an acceptance that the risk is prima facie declarable”¹⁴⁹. In other words the acceptance by the leader did not bind the followers as a matter of agency.

4.59 In *Mander v Commercial Union Assurance Co Plc*¹⁵⁰, Rix J, obiter dictum, was of the same opinion, which he expressed in the following terms: I would tentatively suggest that a leading underwriter at any rate under an open cover is not constituted the agent of the following market by reason merely of a leading under- writer clause . . . Rather the following market agree by subscribing to the cover, that they will be bound by a declaration falling within the scope of the cover and agreed by the leading underwriter: i.e. the agreement of the leading underwriter works as a “trigger” rather than act of agency . . .¹⁵¹

It seems to me that the trigger analysis also has the virtue of avoiding the danger of imposing upon a leading underwriter the unrealistic fiduciary obligations of an agent, e.g. to avoid any conflict of interest¹⁵².

In principle there appears to be no justification to restrict the significance of the trigger analysis to open covers; the analysis has a wider potential. In the final analysis all depends on the intention of the co-insurers.

4.60 In *The St Efrem*¹⁵³, the vessel of that name was insured for 50% of her insured value under a Lloyd’s policy to which three syndicates, Catlin, Ark and Brit, had subscribed; and a further 30% was insured under a separate policy issued by Aigaion, a

Greek insurance company. The vessel was insured up to 80% of her value only.

Under the Lloyd's policy the slip leader was Catlin and the "Claims Agreement Parties" were the slip leader and Xchanging Claims Services, which acted on behalf of the other two syndicates¹⁵⁴. The Greek policy, which was not on similar terms, contained a follows clause in the following terms: Agreed to follow London's Catlin and Brit Syndicate in claims excluding ex-gratia payments.

4.61 The Lloyd's syndicates settled the claim without admitting liability, and a preliminary issue arose whether this settlement was also binding on Aigaion, which it disputed. One question raised was whether Catlin and Ark in negotiating the settlement had also been acting as agents of Aigaion. The resulting judicial analysis is probably obiter dictum because the agency analysis was not crucial to the eventual outcome. Nonetheless, the approach adopted by the judge is helpful¹⁵⁵. There was no express agreement to this effect and there was nothing in the drafting of the follows clause to indicate agency. A contrary conclusion could only be arrived at by ignoring or adding to the words used. Moreover, to introduce the concept of agency would "unnecessarily complicate the operations of the clause", which amounted to a straightforward agreement between the assured and Aigaion to follow any settlement by Catlin and Brit, and this obligation was triggered by the settlement¹⁵⁶.

4.62 It is clear that the judge favoured the "trigger" analysis. Aigaion was not a subscriber to the Lloyd's policy; it had entered into a distinct insurance in a different market. Apart from being co-insurers of the same risk, there was no significant link between Aigaion and the Lloyd's syndicates. Nonetheless, for commercial reasons, Aigaion had agreed under its insurance to follow the decisions of two of the Lloyd's syndicates. This was an independent obligation assumed under its contract with the assured. There was little in the facts to suggest an agency.

Tortious duty of care

4.63 Beyond a duty of care arising as an incident of agency, there is the wider question whether a leader may owe a duty of care to the following market in tort. Such a duty may exist concurrently with the duty arising out of contractual agency, in which case it is probable that the nature of the duties will run in parallel¹⁵⁷. The more challenging question is whether a duty of care may exist in tort when no contractual agency exists.

4.64 In the context of agency there is a duty of care, but, as it has been seen, its recognition has been accompanied by a failure or reluctance to be precise about the source of the duty. At the same time there has been no attempt made to expressly restrict the duty to contractual agency. The judicial language has been unrestrictive and wide ranging, sufficiently so, it may be contemplated, to leave open the possible recognition of a duty of care in tort.



4.65 It has been previously observed that in *The Leegas*¹⁵⁸ Hirst J expressed the opinion, obiter dictum, that “Underlying the whole relationship between underwriter and the following underwriters . . . is the former’s manifest duty of care”¹⁵⁹. This statement was made in response to concern that if the leader’s authority to grant extensions on behalf of the followers was affirmed it might be exercised excessively and uncontrollably. The recognition of the duty of care was seen as a way of controlling the conduct of the leader, in addition to any protection provided by a contractual cancellation clause.

4.66 In *Roadworks (1952) Ltd v J R Charman and Others*¹⁶⁰, HHJ Kershaw QC speculated (obiter dictum) that even if followers were bound by the decision of a leader to waive a contingent condition, the leader might nevertheless be “in breach of a duty of care (whether a duty created by an implied term of a contract of agency between the leader(s) and the following market or a duty existing independently of contract) to following underwriters”¹⁶¹. This rhetorical dictum begs without expressly answering the precise issue in question: it does, however, overtly identify the possibility of a contractual and tortious duty of care.

4.67 In *The Daylam*¹⁶², Mance J, on an application for summary judgment, doubted if the facts of the case before him were sufficiently different from *The Leegas* to be distinguished, and considered the existence of a duty of care as a probability, without being specific about the nature of the duty, and further refrained from expressing any concluded opinion. Mance J highlighted the likelihood that the leader was well aware of its leading role for all the markets involved and in the management of the insurance had acted in that capacity. This led the judge to observe ¹⁶³: If a following insurer has any recourse in the event that he considers that the trust which he has placed in the leader has been misused, it is likely to be found in the assumption by, or the imposition, the leader and/or others acting on his instructions, of a duty of care towards the following market. This dictum recognises that a duty of care may “be assumed” by or “be imposed” upon a leader. The former is open to being interpreted as alluding to the contractual assumption of a duty of care, the latter to the imposition of such a duty as a matter of law, as under the law of tort.

4.68 At the same time, Mance J, perhaps significantly, does not appear to accept that the recognition of a duty of care would necessarily be in the interests of justice.

He observed¹⁶⁴:

Even if there was no such duty, it would mean simply that the following market trusted in the leader, without legal recourse. If such trust was not justified, or was abused, it would not be extended or last. The law does not have to afford a legal remedy for every conceivable failure to behave properly or professionally, still less one which affects a


third party to the relationship of trust, the insured.

This dictum appears to suggest that the question of the existence of a tortious duty of care might be judged in accordance with the perceptions of the market. If a leader fails to discharge his duties and responsibilities in accordance with the expectations of the market, commercial penalties may follow, without prejudice to the insured, which are a sufficient response and render unnecessary the intervention of the law.

4.69 On the core question of the existence of a duty of care in tort, the authorities are at best indecisive and inconclusive. Should the question arise as a real issue it will probably be responded to by reference to principle, in the context of the developing common law. The essence of the tort of negligence is breach of a duty of care owed to the claimant¹⁶⁵. The initial and fundamental question is to determine whether a duty of care exists. To this question there has been developed an incremental approach composed of three elements. First, was the loss caused foreseeable; second, was the relationship between the parties capable of being characterised as one of “proximity” or “neighbourhood”; and third, was the situation one in which it might be considered fair, just and reasonable that the law should recognise a duty of care of a given scope?¹⁶⁶ Each element is of equal standing and part of a unified process which is further embraced by practical and policy issues¹⁶⁷. It is probably also true to observe that the ambient judicial culture is cautious, determined to control the application of the tort of negligence and hesitant to avoid leaps in the dark. When, therefore, a novel situation is confronted the courts seek positive reasons why a duty of care should be recognised¹⁶⁸.

4.70 When the framework of the law is applied to leading underwriters it is probably necessary initially to draw a distinction between subscription and other forms of co-insurance. In the case of subscription co-insurance, the first two criteria would appear to be readily satisfied. In the context of market practice the leader must be aware that there are or will be followers and that his actions or inactions may have consequences for any one or all of the followers. Also, there exists a relation between the leader and following market which must be sufficiently close and connected to qualify as one of “proximity” or “neighbourhood”. They are all associated with the co-insurance of an identified risk, and will have subscribed in designated proportions to a common slip and (possibly) policy. The issue, if any, is likely to revolve around the third element, namely whether it would be fair, just and reasonable to recognise a duty of care.

4.71 This would probably be regarded as a novel situation, in light of the absence of definitive authority, and the court is likely to look for positive reasons in support of the duty. The law in its development is also capable of being influenced by categories¹⁶⁹ and by market practice and expectations. The fact that, to date, a tortious duty of care



has not been expressly and unambiguously acknowledged to exist in an insurance market of long-standing maturity and sophistication may be some evidence of an absence of market support. In this regard the cautious dicta of Rix J must be borne in mind¹⁷⁰, and also the dicta of Mance J hinting at leaving matters to the market¹⁷¹. On the other hand, an express or implied duty of care may exist when there is a contractual agency, so the concept and reality of a duty of care is far from being absent and unfamiliar. The market also takes steps to protect against the consequences of such a duty¹⁷², thereby suggesting a recognition that such a duty may exist. It is also possible to regard a leader as a co-insurer who has voluntarily assumed responsibility within his capacity for the conduct of the insurance, which might place the matter within the category of negligent professional services¹⁷³.


4.72 The nature of the law makes it difficult and probably unwise to attempt to predict the judicial outcome of any future case where the question of a tortious duty of care is in issue. Ultimately it will be for the court to decide whether in the circumstances it is appropriate for a duty of care to be recognised. There is in this process a readily identifiable balancing act to be discharged. On the one hand the leader acts not only on his own behalf, but also, within the terms of his capacity, on behalf of the followers. The leader is aware of his role and the responsibilities it imposes, and the followers place their trust, confidence and reliance in him. This factual platform would appear to make a strong case in support of the existence of a duty of care. On the other hand, the potential impact on the markets must be assessed, how the duty and the associated obligations would be received and relate to market practice. It is hard to believe that the recognition of a tortious duty of care would not provoke some kind of market response, whether in the nature of changes to practice or legal attempts to counter or limit the potential consequences¹⁷⁴.

4.73 The position appears to be different where the co-insurance is not on a subscription basis. In this situation the contracts of insurance are more distinct and evidenced by different documents. There may also exist a spread of markets. The relationship between leader and followers is consequently more distant, and the leader is unlikely to be acting as agent, his actions and decisions serving only as a trigger to the obligation of the followers. There is no contractual nexus between the individual contracts or layers, but the leader might be aware of the consequences of his actions and decisions. Nonetheless, any claims in support of a duty of care in tort are less weighty, and there also appears to be a market assumption that no duty of care exists as between individual contracts or layers, but this assumption is not supported by authority¹⁷⁵.

Protecting against liabilities for breach of duty

4.74 The uncertainty in the law as to whether a leader owes a duty of care and possibly





fiduciary duties to the following market has led to developments the object of which are to exclude or minimise the risk of potential liabilities. Where the leader stands in an agency relation with the following market it is always possible that the agency contract may contain protective provisions, in the nature of exclusion and limitation clauses¹⁷⁶. More widely, the authorities suggest that leaders, when making decisions or exercising powers, may “step out of his capacity” as leading underwriters, thereby making it clear that he is, with regard to the particular matter in question, acting solely on his own behalf and not in the capacity of a leading underwriter.

This serves to suspend the legal implications of agency, and also, presumably, to negate the assumption of a tortious duty of care. This device has been accepted by the courts to be effective, but not closely analysed.

4.75 In *Roadworks (1952) Ltd v J R Charman and Others*¹⁷⁷, HHJ Kershaw QC accepted that a leading underwriter may make it clear that in respect of a particular matter he is acting for himself and not on behalf of the following underwriters.

A term in the slip indicated that any alteration to the conditions of the cover were to be agreed by the leading underwriter, with such agreement binding upon all the subscribing underwriters. The leading underwriter when agreeing an alteration declared that he was acting “only for his own syndicate”, and this was held to be an effective protection of his position¹⁷⁸.

4.76 In *The St Efrem*¹⁷⁹, three Lloyd’s syndicates entered into a Settlement Agreement with the assured and the question in issue was whether a co-insurer in the Greek market, whose policy contained a “follow clause”, was bound by this Agreement. The Agreement contained the following clause 7:

The settlement and release pursuant to the terms of this Agreement is made by each Underwriter for their respective participations in the Policy only and none of the Underwriters that are party to this Agreement participate in the capacity of a Leading Underwriter under the Policy and do not bind any other insurer providing hull and machinery cover in respect of the *St Efrem*.

The reference in the final sentence to “any other insurer” was held to include Aigaion, the Greek co-insurer, and Teare J explained the relevance of the clause, in the context of the case, in the following words: . . . the purpose of the parties, in particular the Lloyd’s syndicates, in agreeing cl 7 was to protect those syndicates from any possible liability to Aigaion in circumstances where, as they knew, the Aigaion Policy contained the Follow Clause¹⁸⁰. Teare J concurred with the proposition that a leading underwriter may protect his position by “stepping out” of his leading role and dealing with an assured on his own behalf solely and not on behalf of the following market. He said: In the light of the suggestion in the authorities that a lead underwriter may owe a duty of care to the

following underwriter, a lead underwriter may wish to make it clear that in settling a claim he is doing so on his own behalf only and is not purporting or intending to bind the following underwriter. However, the purpose of so doing is to protect the lead underwriter from any claim by the following underwriter. The lead underwriter is, in my judgment, unable to countermand the effect of the Follow Clause if . . . the effect of such clause is to oblige the following underwriter to follow any settlement made by the lead underwriter, whether or not the lead underwriter purported to act as agent [for] the following underwriter¹⁸¹.

In the opinion of Teare J the act of “stepping out” was legitimate and achieved its direct purpose, but the agreement and release continue to be a decision made which triggered the obligation to follow under the Aigaion policy¹⁸².

4.77 When the leader does not stand in the position of agent the strategy is readily comprehensible; its successful purpose is to negate the existence of a duty of care in tort¹⁸³. But where there is an agency, the ability to “step out” would appear to be governed by the nature of the agency and only possible if permitted by the terms of the agency contract. If the leader is contractually committed in absolute and unconditional terms to perform all matters falling within his authority on behalf of followers, with no power to suspend his capacity, to act contrariwise amounts to breach of contract. “Stepping out” is possible only if expressly or impliedly permitted by the terms of the agency contract. There remains the possibility that “stepping out” might be sanctioned by market practice, in which case the agency contract might be construed in a manner consistent with the practice, or an implied term to similar effect might be recognised, provided it was not inconsistent with the express terms.

A recap of the position of assureds and followers

Assureds

4.78 In the case of subscription policies, the conventional understanding is that a leading underwriter clause is a contract between the subscribing underwriters, to which the broker may also be a party, but to which the assured is not. It is, therefore, a distinct and separate contract from the multiple co-insurance contracts to which the assured is a party.

4.79 It is, nonetheless, the case that the clause will govern in one way or another the way the assured is obliged to make claims and applications under the insurance, which are required to be channelled to the leading underwriter(s) as anticipated by the leading underwriter agreement. This may be done in accordance with market practice or as an express or implied obligation in the co-insurance contracts. An example is provided by the International Hull Clauses 2003 where the obligation to give notice of possible future claims¹⁸⁴, the making of a claims¹⁸⁵, and the disclosure of any

supporting and other relevant information and documents¹⁸⁶ are required to be made to the leading underwriter(s). In the absence of an express obligation to this effect, the existing provisions in the insurance contract may be construed in the context of the leading underwriter clause¹⁸⁷.

4.80 If the leading underwriter agreement is to function as intended, it is clear that the assured, though not a party to the agreement, must nonetheless be obliged to conduct the insurance according to its terms. This is also the commercial reality of the situation, which may in turn be the basis for supporting the existence of a relevant implied term, as also may market practice.

4.81 The same considerations do not apply where the co-insurance is on a non-subscription basis. In this circumstance the contractual obligation to follow is contained in each contract of co-insurance, to which the assured and co-insurers are party. All claims and applications are made by the assured to each co-insurer, with the latter agreeing to follow the decisions of the leading underwriter, who is party to a separate contract of co-insurance.


Following market

4.82 The broad understanding of a leading underwriter clause is that the following market is bound by and obliged to follow the acts, settlements and decisions of the leader. This is both the legal and commercial perception, and pertains whatever the legal status of the leader. As it has been observed, the agreement offers potential advantages to both assureds and insurers, but the degree of concord among co-insurers which the practice may suggest is not always present. Disputes may arise about whether the leader possessed capacity or if capacity conferred has been properly exercised, or if a judgment or decision has been made bona fide, with the follower(s) refusing to follow. In this kind of situation the question is whether the refusal is justified.

4.83 The obligation of followers is established by the express and implied terms of the leading underwriter or follows clause, which sets out the capacity of the leading underwriter(s) and the obligation of the followers. Absent terms to the contrary, followers are bound by any settlement, act or decision which is within the capacity of the leader, whether or not they agree with it. Mance J has expressed the position in the following uncompromising terms¹⁸⁸:

For better or worse following insurers trust and follow their leader. The insured does not control the way in which the leading underwriters handle or settle the claim. Following underwriters accept both the advantages and any risks of the leading underwriters' handling of settlements and of other matters affecting them . . . There is no basis for further qualifying the operation of the "follow the leader" clause as





between the following market and the insured . . . This principle is applied firmly because it reflects the core commercial purpose of leading underwriter clauses. Providing the leading underwriter has conducted himself within the terms of the clause, the following underwriters are obliged to follow, save for matters which are expressly excluded by contract or at law.

4.84 The firmness with which the primary principle is applied is illustrated by the decision in *The Buana Dua*¹⁸⁹. Followers had agreed “to follow . . . all decisions . . . and settlements” and it was held that they were obliged to follow a settlement agreed by the leading underwriter notwithstanding that they contended that the assured had breached a towage warranty which had occurred before the settlement. Whether the claim could be rejected on the ground of breach of warranty fell within the authority of the leading underwriter to make decisions and settlements in the claims process. In the words of Teare J, “Were it otherwise the efficacy of the follow clause would be greatly reduced and its commercial purpose frustrated. I do not consider that the follow clause is reasonably to be understood as being inapplicable where a breach of warranty has occurred before the date of the decision or settlement”¹⁹⁰. Whether or not there had been a breach of the towage warranty was not resolved by the court, that question was left to be resolved at any future trial.

4.85 The parties may expressly agree exceptions to the obligation to follow. It is customary for the clause to contain a limited number of exceptions, the most frequently encountered in practice being *ex gratia* payments (payment made without obligation) and without prejudice or without acceptance of liability settlements (payments made without the acceptance of liability)¹⁹¹. The parties may, of course, agree further exceptions.

4.86 But otherwise, exclusions will not be admitted by implication, particularly if its recognition would serve to undermine the primary purpose of a leading underwriter or follows clause. It has been previously observed that Mance J rejected argument that a follows clause was subject to an implied condition that the settlement had been made in a proper and businesslike way¹⁹².

4.87 The making of a fraudulent claim against a follower represents a legal exception. This question was raised in *The Buana Dua*¹⁹³ where the essential relevant facts were that the insured tug *Buana Dua* was despatched together with the tug *Buana Satu* to assist a tanker in difficulties. Both proceeded independently and *en route* the *Buana Dua* grounded and was replaced by the tug *Ena Emperor*. The leader settled the claim under the insurance of the *Buana Dua* but the defendant follower refused to pay its proportion of the loss. The assured commenced proceedings against the defendants and applied for summary judgment. The defendants, in support of their refusal, alleged that the assured was in breach of a towage warranty in the policy.

4.88 Following the settlement, in furtherance of the claim against the defendants, statements were made on behalf of the claimants that it was never intended that the *Buana Dua* should undertake the towage of the tanker, it had always been intended that the towage would be undertaken by the *Ena Emperor*. The defendants alleged that this statement was fraudulent, which the claimants disputed. The claimants also contended that since the alleged fraudulent misrepresentation had been made after the settlement to the leading underwriter it did not provide the defendants with a defence.

4.89 Teare J was of the opinion that the defendants had a real prospect of succeeding on the defence that the claimant had employed a fraudulent device and that the claim was forfeit. Accordingly an order for summary judgment was refused, with the defence based on alleged fraudulent misrepresentation to be determined at trial.

4.90 As a matter of principle, there appears no reason to doubt that the law applicable to fraudulent claims applies to claims against leading underwriters and followers under subscription and non-subscription co-insurance. *The Buana Dua* falls into the former category.

Other perspectives

4.91 The emphasis in this contribution has been on questions of private law, and it cannot for a moment be claimed that in this regard every possible aspect has been explored. There are, however, other dimensions to the subject, which merit at least some comment.

4.92 The formulation of the London Market Principles 2001 (LMP 2001)¹⁹⁴ took place against a background of concern relating to the way business was done on the London market, which often resulted in uncertainty relating to the existence and terms of the underlying insurance contract. A particular concern related to the appointment of leading underwriters and the manner in which the insurance terms might be established and thereafter managed by them, which were the source of frequent disputes with the following market. These issues also contributed to the broader problem of contractual uncertainty. From the platform established by the LMP 2001 there emerged a new General Underwriters Agreement (GUA), the most recent version of which was published in 2014¹⁹⁵. Its avowed purpose is to render certain the appointment of the “slip leader” and also the capacity of the leader to act in a way which bound followers. Matters that may be decided by the slip leader alone, or with the agreement of Agreement Parties, or with the agreement of all the insurers, are defined with precision, as also are requirements to give notice. This development is to be viewed as part of a broader strategy to ensure that all the terms of the insurance contract are agreed before the inception of cover. Under the former practice, a leader might have capacity to determine the terms of the insurance, which might not be

finalised until after the slip had filled out and the inception of the risk. The risks inherent in this practice are self-evident, and the practice is inconsistent with the prevailing market principles.

4.93 In 2007 the Director-General Competition of the European Commission published a report on the business insurance sector, which while recognising the benefits of co-insurance also questioned whether the practice might be anti-competitive and ran the risk of unlawful price-fixing, in so far as it might result in a factual alignment of premiums and conditions¹⁹⁶. Under market practice, as it then prevailed, followers might, as a condition of their participation, be obliged to follow the leader's decisions as to rates and other conditions. Alternatively, price information might be shared with followers who were thereby influenced by the leader's premium rating. In layered co-insurance there was a firm practice of the premium rating of the lead underwriter being followed by the other underwriters. There were also questionable contract provisions which had a widespread application. Leaders might require an upward adjustment of their premium in the event of a follower securing a higher premium – the highest premium condition. Under a “best terms and conditions clause” all the underwriters of a risk underwrote their portion at the highest price agreed by any of the other underwriters.

4.94 The European insurance industry responded by adopting the BIPAR principles for the placement of a risk with multiple insurers¹⁹⁷. These, inter alia, prohibit intermediaries from accepting a provision for an increase in the premium in the event of a higher premium being agreed with a follower. They have also led, in the London and other markets, to an increased focus on properly advising clients and on ensuring and documenting competition in the placement of multiple insurances.

Notes

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1. See generally Merkin and Steele, *Insurance and the Law of Obligations* (OUP 2013) Chs 2 and 6.
2. Most placements in the London market are written on a co-insurance basis.
3. Although this contribution is directed predominantly to primary insurance, the analysis and discussion is equally applicable to reinsurance.
4. Compared to subscription insurance, this form of insurance has not been extensively considered in the authorities; for a fairly recent case of some interest, see *Teal Assurance Co Ltd v W R Berkley Insurance (Europe) Ltd* [2011] EWCA Civ 1570, [2012] Lloyd's Rep IR 315 (CA).
5. In the London market it appears that under current practice a policy is not issued unless it is specifically requested by an assured.



6. Marine Insurance Act 1906 s. 24(2). See also, *General Reinsurance Corp v Fenna Patria* [1983] 2 Lloyd's Rep 287; *Bonner v Cox Dedicated Corporate Member Ltd* [2006] Lloyd's Rep IR 385.
7. Lloyd's Act 1982, s. 8(1). This point is also emphasised in insurance documentation, particularly in the slip and policy; see also *Roadworks (1952) Ltd v J R Charman and Others* [1994] 2 Lloyd's Rep 99, 106.
8. For inconsistency between layers of cover, see *Friends Provident v Sirius* [2004] EWHC 1799 (Comm), [2005] Lloyd's Rep IR 135, [2005] EWCA Civ 601, [2006] Lloyd's Rep 45; *Dunlop Haywards v Barbon* [2009] EWHC 2900 (Comm), [2010] Lloyd's Rep IR 149, *Teal v W R Berkley* [2011] EWCA Civ 1572, [2012] Lloyd's Rep 315 (CA).
9. This is the language of the Lloyd's market; when the London companies market is involved, the reference is to a "lead company".
10. See *infra* for relevant aspects of the London market.
11. See *infra* under the title "Other Perspectives".
12. These clauses attract different descriptions, sometimes they are also described as "follow the leader clauses" and "follow clauses", and there may well be further descriptions.
13. *Barlee Marine Corporation v Trevor Rex Mountain (The Leegas)* [1987] 1 Lloyds Rep 471.
14. The precise status of leading underwriters and the nature of the "obligation to follow" is analysed later in the text.
15. See generally Burling, Ashenden, Castle, "London Market Issues: Leaders, Followers and Layers" (2012) 124 BILAJ 18.
16. See also under "Introduction" earlier in this chapter.
17. [1994] 2 Lloyd's Rep 99.
18. *Ibid* p. 104.
19. [1998] 1 Lloyd's Rep 423.
20. *Ibid* p. 427.
21. *San Evans Maritime Inc. and Others v Aigaion Insurance Co SA (The St Efrem)* [2014] EWHC 163 (Comm), [2014] 2 Lloyd's Rep 265.
22. *Ibid* p. 268 [14].
23. Under current London market practice it is the general requirement that a leading underwriter clause appear on the slip; see *infra* n. 33.
24. See *infra* under title "Status of leading underwriters".
25. In the case of subscription insurance the existence of a contract between the assured and each subscribing
26. For example, the Institute "Three Leaders" Clause (Cargo) 15/2/66; International Hull Clauses (01/1/03) clause 42 (reproducing International Hull Clauses (01/11/02) clause 45).
27. See, *infra*, under the title "A recap of the position of assureds and followers".
28. With regard to the Greek policy, this appears to have been the situation in *The St Efrem*, *supra* n. 21.
29. *Roadworks (1952) Ltd v J R Charman and Others* [1994] 2 Lloyd's Rep 99, 104.

30. *The St Efreem*, supra n. 21, pp. 267–268 [11], per Teare J, “Follow clauses come in different forms. Some oblige the following underwriter to follow the lead underwriter in relation to a large number of matters including alteration of the terms of the policy, surveys and settlement of claims ... and others oblige the following underwriters to follow the lead underwriter in relation to a smaller range of matters, for example decisions, survey and settlement of claims ... Since the subject matter and terms of follow clauses may differ the manner in which they are intended to work must depend, ultimately, upon an examination of the terms of the follow clause in question.” See also *Roadworks (1952) Ltd v J R Charman and Others* [1994] 2 Lloyd’s Rep 99, 104.

31. *Ibid.*

32. Prior to January 1971 the Lloyd’s Underwriters Association (LUA) and Institute of London Underwriters (ILU) had published standard clauses, e.g., Leading Underwriter Agreement General Marine (LUAGM). After that date the LUA and ILU were joined by the Lloyd’s Brokers Association in promoting standard wording embodied in the General Marine Agreement 1983. It appears that these initiatives were not widely followed and they have since been superseded by the General Underwriters Agreement (2014), considered *infra*; see also *Roadworks (1952) Ltd v J R Charman and Others*, supra n. 29, 104.

33. Market Reform Contract slip. This is now compulsory for most Lloyd’s business except where the client indicates to the contrary; see Lloyd’s Underwriting Requirements, para. 3A.

34. The GUA 2014 is considered further later in the text. It supersedes the revised GUA of October 2001, which emerged in response to the London Market Principles 2001 and was intended for use with the LMP slip. In aviation insurance the standard underwriter clause AVS 100B is to be replaced by GUA 2014 and an Aviation Schedule, thereby bringing aviation insurance in line with other sectors of the London market.

35. Promoted by the London Market group, the most recent edition is dated October 2012.

36. Such a reference might read “GUA (version 2.0) February 2014 with Marine Cargo Schedule April 2013”. In the case of an open cover, the GUA only applies if it is incorporated in the lineslip, cover or other contract and identifies the Class of Business Schedule; see clause 1.2.

37. Clause 10. There is an ambiguity in this provision, with it unclear whether the agreement of all the underwriters is required for any of them to be bound, or the agreement only relates to the underwriter’s personal proportion. It would be surprising if the latter construction did not prevail.

38. This concept is explained later in the text, see n. 70 et seq.

39. As is emphasised in the Introduction, clause 2 2.3 to the GUA 2014.

40. Clause 11.1.

41. *Roar Marine Ltd and Others v Bimeh Iran Insurance Co (The Daylam)* [1998] 1 Lloyd’s Rep 423.

42. Institute Time Clauses Hulls 1/10/83.

43. *Ibid* p. 432.

44. In the GUA 2014, this principle is set out as a “Condition Paramount”.

45. See n. 33.

46. See n. 70.

47. [2002] Lloyd’s Rep IR 374, 377.

48. *Roar Marine Ltd and Others v Bimeh Iran Insurance Co (The Daylam)*, supra n. 41, p. 429.

49. *Roadworks (1952) Ltd v J R Charman and Others*, supra n. 29, p. 104.
50. *Roar Marine Ltd and Others v Bimeh Iran Insurance Co (The Daylam)*, supra n. 41.
51. Supra n. 47.
52. *Roar Marine Ltd and Others v Bimeh Iran Insurance Co (The Daylam)*, supra n. 41, pp. 425–426.
53. [2002] Lloyd's Rep IR 374 (CA).
54. See n. 31
55. See n. 30.
56. For example, “wording tba L/U”.
57. See n. 35.
58. The MRC slip requires “the complete and final agreement of all terms between the insured and insurer by the time they enter into the contract, with contract documentation provided promptly thereafter”.
59. O'Neill and Woloniecki, *The Law of Reinsurance* (3rd edn, Sweet & Maxwell 2010) para. 3–059, n. 182.
60. See infra.
61. See infra.
62. *Bowstead & Reynolds on Agency* (18th edn, Sweet & Maxwell 2006) Ch. 2, Art. 11.
63. International Hull Clauses.
64. [2002] Lloyd's Rep IR 374.
65. *Bowstead & Reynolds on Agency*, supra n. 62, Ch. 10, Art. 120.
66. *Ibid.*, Art. 121.
67. Supra n. 64. The Court of Appeal, on an application for leave to appeal, agreed with Andrew Smith J on this particular issue.
68. See supra n. 33.
69. See GUA Introduction, clause 2.5.
70. GUA clause 2.
71. GUA clause 3.
72. GUA clauses 2.2. and 2.3.
73. GUA clause 3.2.
74. GUA clause 3.4.
75. This is made clear by the Class of Business Schedules.
76. *Ibid.*
77. GUA clause 6.
78. GUA clause 1.3.
79. GUA clauses 7 and 8.



80. GUA clause 7.
81. GUA clause 8.1.
82. GUA clause 8.2.
83. GUA clause 10; see also n. 37.
84. *The St Efrem*, supra n. 21, p. 268 [11], per Teare J, "Since the subject matter and terms of follow clauses may differ the manner in which they are intended to work must depend, ultimately, upon an examination of the terms of the follow clause in question."
85. *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–913, per Lord Hoffmann; *Bank of Credit and Commerce International SA (in liq) v Ali* [2001] UKHL 8, [2002] 1 AC 251; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101; *Rainy Skye SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Oceanbulk Shipping & Trading SA v TMT Asia Ltd and Others* [2010] UKSC 44, [2011] 1 Lloyd's Rep 96.
86. *Bank of Credit and Commerce International SA (in liq) v Ali*, ibid at [39], per Lord Hoffmann.
87. *Investec Bank (Channel Islands) Ltd v Retail Group plc* [2009] EWHC 476 (Ch), [2009] All ER (D) 162 (Mar).
88. *Reardon Smith Line Ltd v Yngvar Hansen-Tangen and Sank Steamship Co* [1976] 1 WLR 989, 995, per Lord Wilberforce.
89. *The New York Star* [1980] 2 Lloyd's Rep 317.
90. *Prenn v Simmonds* [1971] 1 WLR 1381, p. 1385, per Lord Wilberforce.
91. *Wickman Machine Tool Sales v L Schuler AG* [1974] AC 235.
92. *Arbuthnott v Fagan* [1996] L.R.L.R. 135, per Sir Thomas Bingham (as he then was).
93. *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002], 1 WLR 2956, [5], per Lord Steyn.
94. *Barclays Bank plc v Landgraf* [2014] EWHC 503 (Comm), [2015] 1 All ER (Comm) 720, 730.
95. Ibid.
96. *Roar Marine Ltd and Others v Bimeh Iran Insurance Co (The Daylam)*, supra n. 41, p. 429.
97. Supra n. 41.
98. Ibid p. 430.
99. *PT Buana Samudra Pratama v Marine Mutual Insurance Association (NZ) Ltd (The Buana Dua)* [2011] EWHC 2413 (Comm), [2012] Lloyd's Rep IR 52, p. 56 [23].
100. The meaning of "without prejudice" is considered by Mance J in *Roar Marine Ltd and Others v Bimeh Iran Insurance Co (The Daylam)*, supra n. 41, p. 430.
101. Supra n. 99.
102. Supra n. 29.
103. Ibid p. 105.
104. Stated broadly, a custom or usage must be universal, certain and reasonable. The literature on this subject is extensive, but for a compendious analysis, see *Nelson v Dahl* (1879) 12 Ch D. 568, 594, per Sir George Jessel MR.

105. As was the case in *Roar Marine Ltd and Others v Bimeh Iran Insurance Co (The Daylam)*, supra n. 41.
106. *Roar Marine Ltd and Others v Bimeh Iran Insurance Co (The Daylam)*, supra n. 41, p. 429.
107. Ibid p. 430.
108. Ibid.
109. *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988.
110. See generally Peel, Treitel: *The Law of Contract* (13th edn, Sweet & Maxwell 2011) Ch. 6, pp. 222–235.
111. Supra under the title “Construction of leading underwriter clauses”.
112. *Roadworks (1952) Ltd v J R Charman and Others*, supra n. 29, p. 105, per HHJ Kershaw QC: “Evidence of market practice . . . might be admissible to show an implied term of a contract.” See also *Turner v Royal Bank of Scotland* [1999] 2 All ER (Comm) 664.
113. *The Reborn* [2009] EWCA Civ 531, [2009] 2 Lloyd’s Rep 639.
114. *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988.
115. *Vogel v Kohnstamm Ltd* [1973] QB 133,134; *Liverpool CC v Irwin* [1977] AC 239.
116. *Port of Tilbury (London) Ltd v Stora Enso Transport & Distribution Ltd* [2009] EWCA Civ 16, [2009] Lloyd’s Rep 391.
117. *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988.
118. *Roar Marine Ltd and Others v Bimeh Iran Insurance Co (The Daylam)*, supra n. 41.
119. *Insurance Co of Africa v Scor (UK) Reinsurance Co Ltd* [1985] 1 Lloyd’s Rep 312; *Baker v Black Sea and Baltic Insurance Co Ltd* [1995] L.R.L.R. 261, 293.
120. But even if the proviso had existed, on the facts of the case the leading underwriter had acted in a proper and businesslike way.
121. See infra under the title “Status of leading underwriters”.
122. *Bowstead & Reynolds on Agency*, supra n. 62, Art. 40.
123. Ibid Art. 62.
124. [2002] Lloyd’s Rep IR 374.
125. The leading texts do little more than emphasise the uncertainty in the law: see Arnould: *Law of Marine Insurance and Average* (18th edn, Sweet & Maxwell 2013) paras 2–18; *Colinvaux’s Law of Insurance* (9th edn, Sweet & Maxwell 2010) para. 1–040; *Reinsurance Practice and the Law* (Informa) paras 31.7–31.18.
126. *Unum Life Insurance Co of America v Israel Phoenix Assurance Co Ltd* [2002] Lloyd’s Rep IR 374, 380, per Mance LJ, who said that the capacity of a leading underwriter “is either to be defined in terms of agency . . . or in terms of a trigger mechanism whereby the leading underwriter, although not an agent in legal terms, acts as a trigger in a way which has the effect that the following market is bound to follow his action”.
127. With regard to the London market, the General Underwriters Agreement (2014) is a significant exception to the statement in the text.
128. Supra n. 29.
129. Ibid pp. 105–106.

130. Since replaced by the centralised Lloyd's office, Xchanging Services.

131. See supra n. 33.

132. The GUA (2014) Preamble states "The GUA determines the basis upon which the specified slip leader and agreement parties for insurance and reinsurance risks to which this GUA is applied may act as agents of the other Underwriters subscribing to those risks ...".

133. [1987] 1 Lloyd's Rep 471.

134. Supra n. 13.

135. Ibid p. 475.

136. [1990] 2 Lloyd's Rep 423.

137. Ibid p. 429.

138. [2002] Lloyd's Rep IR 374.

139. Ibid p. 380.

140. *Bowstead & Reynolds on Agency*, supra n. 62, Art. 3–005 and Ch. 8.

141. *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480.

142. *Bowstead & Reynolds on Agency*, supra n. 62, Ch. 6.

143. [1998] Lloyd's Rep IR 93.

144. Ibid p. 144.

145. *The St Efreem*, supra n. 21.

146. This precise point did not arise in argument and was not commented upon by the judge.

147. Supra n. 144.

148. *Seavision Investment S.A. v Norman Thomas Evennett and Clarkson Puckle Ltd (The Tiburon)* [1990] 2 Lloyd's Rep 418. See also *Citadel Insurance Co Ltd v Atlantic Union Insurance Co* [1982] 2 Lloyd's Rep 543, pp. 547–548.

149. Ibid p. 422.

150. [1998] Lloyd's Rep IR 93.

151. Ibid p. 143.

152. Ibid p. 144.

153. *The St Efreem*, supra n. 21.

154. See n. 70 for the concept of "Agreement Parties".

155. Mr Justice Teare.

156. Ibid pp. 268–269 [16] and [21].

157. *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

158. *Barlee Marine Corporation v Trevor Rex Mountain (The Leegas)* [1987] 1 Lloyd's Rep 471.

159. Ibid p. 475.



160. *Supra* n. 29.
161. *Ibid* p. 106.
162. *Supra* n. 41.
163. *Ibid* p. 430.
164. *Ibid*.
165. *M'Alister (or Donoghue) v Stevenson* [1932] AC 562; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465. Nolan, "Deconstructing the Duty of Care" (2013) 128 LQR 559.
166. *Caparo Insurances plc v Dickman & Others* [1990] 2 AC 605 (HL).
167. Robertson, "Policy-Based Reasoning in Negligence" (2013) 33 LS 11.
168. *Smith v Ministry of Defence* [2013] UKCS 41, [2014] 1 AC 52; *Woodland v Essex CC* [2013] UKSC 66, [2013] 3 WLR 1227.
169. *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, pp. 43–44, Brennan J (HC of Australia).
170. *Supra* nn. 144 and 152.
171. *Supra* n. 164.
172. See *infra* under the title "Protecting against liabilities for breach of duty".
173. *Henderson v Marrett* [1995] 2 AC 145.
174. See n. 172.
175. *Supra* n. 15.
176. There is the possibility that such clauses may be regulated by the governing law, in the case of English law the Unfair Contract Terms Act 1977.
177. *Supra* n. 29.
178. *Ibid* p. 106.
179. *San Evans Maritime Inc and Others v Aigaion Insurance Co SA (The St Efre)* [2014] EWHC 163 (Comm), [2014] 2 Lloyd's Rep 265.
180. *Ibid* p. 272 [40].
181. *Ibid* p. 273 [46].
182. *Ibid* p. 273.
183. Whether the provisions of the Unfair Contract Terms Act 1977 would be applicable raises an interesting question. Contracts of insurance are wholly exempted from the provisions of the Act, but whether a leading underwriter agreement falls within the general category of "insurance contract" is open to argument.
184. Clause 43.
185. Clause 42.
186. Clause 45.
187. See n. 41.

188. *Roar Marine Ltd and Others v Bimeh Iran Insurance Co (The Daylam)*, supra n. 41, 430.

189. *The Buana Dua*, supra n. 99.

190. Ibid pp. 56–57.

191. See, e.g., IHC 1/11/03 cl.42.1.4.

192. Supra n. 120.

193. Supra n. 99.

194. Supra n. 34.

195. Supra n. 33.

196. Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions: Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on Business Insurance, s. 2.2, par 14, COM(2007) 556 Final (25 September 2007).

197. BIPAR – European Federation of Insurance Intermediaries – published on 28 April 2008 (Brussels), see <http://www.bipar.eu/en/key-issues-positions/principles>.