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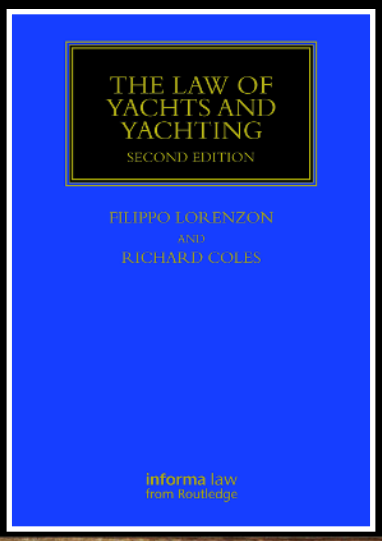

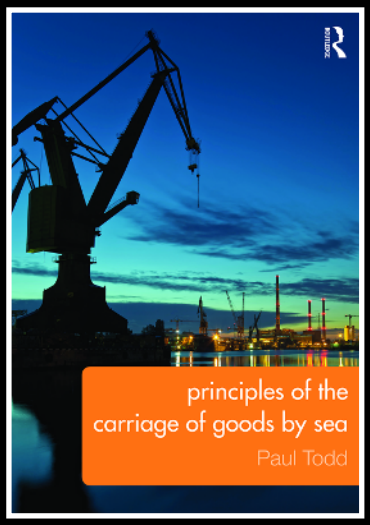

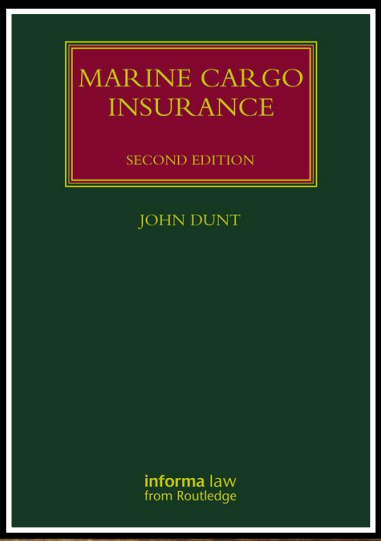

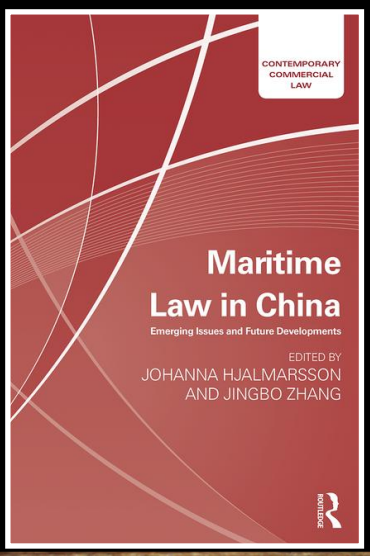

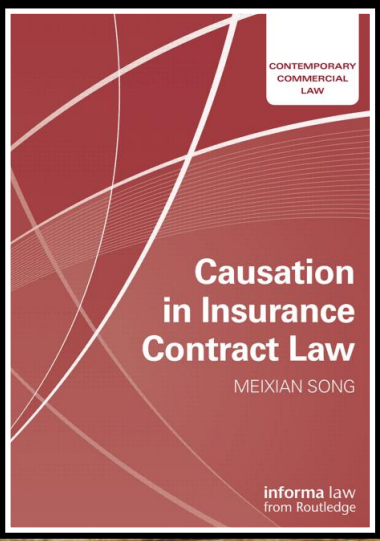

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Introduction

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Informa Law from Routledge is proud of its long-standing relationship with the Institute of Maritime Law (IML) at the University of Southampton and the many exceptional contributions to the shipping law literature its members have made through one of our publications. The most notable of these is, of course, *Maritime Law*, now in its fourth edition, and featuring contributions from a wealth of IML staff.

Outside of that seminal textbook, members of the IML publish regularly in books and journals, a small selection of which is presented here, and all of which are available to purchase online. With a reputation stretching across the world, this collection of chapters from recent IML-authored books should prove attractive to maritime lawyers, academics, students, law associations, and many other international organisations dealing with maritime matters.

We look forward to many more in the future

Amy Jones
Commissioning Editor, Informa Law from Routledge

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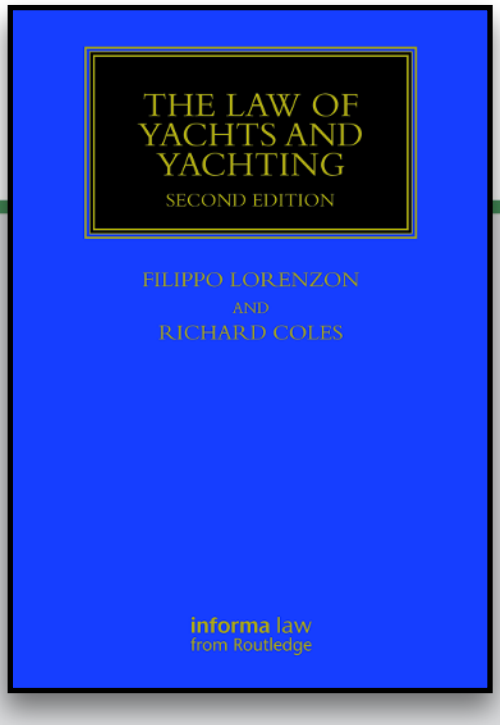
CHAPTER

1

THE LAW OF YACHTS AND YACHTING

BY RICHARD COLES AND FILIPPO LORENZON



This chapter is excerpted from

The Law of Yachts & Yachting , 2nd edition

Edited by Richard Coles and Filippo Lorenzon.

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THE LAW OF YACHTS AND YACHTING

Excerpted from *The Law of Yachts & Yachting , 2nd edition*

The Law of Yachts and Yachting is the first comprehensive and detailed monograph entirely dedicated to the study of the English law relating to the ownership and operation of yachts. It does not focus on the leisure market or competitive yacht racing, but is primarily intended for use by lawyers, yacht-brokers, yacht-builders, researchers and others concerned with the legal aspects of the construction, operation and use of professionally crewed motor and sailing yachts: the specialist world of superyachts. The law in this niche area is complex and fragmented, very much like a cubist painting which may only be thoroughly understood when looked at in its entirety and in a proper context by an expert eye. This is what this books aims to do.

The "proper context" of yachting and the law. In the preface of the first edition of this book,[1] it was suggested that yachting law should be regarded as a unique and well- defined area of the law with some degree of independence from the remaining body of maritime and commercial law. It was suggested that its level of uniqueness, as a market, an industry and a hobby, may well justify regarding it as a separate subject with its own general principles, its own connectors and its own business sense. In the second edition of this work, after having tested the uniqueness of this industry across different disciplines and reviewed the way in which some general principles of law have produced or may produce results which are out of sync with the overarching cultural and philosophical background of this industry, it has been decided to further develop this suggestion in a small introductory chapter on the uniqueness of the law of superyachts.

Uniqueness of the sector a matter of fact. There is no doubt that the superyacht industry is very different from that of commercial shipping: owning a yacht could hardly be defined as a lucrative investment. Even if a superyacht is used exclusively for commercial chartering, the limited charter seasons in the West Mediterranean, the most popular cruising area for charter yachts,[2] coupled with the short duration of most charters, means that the level of income of a superyacht in full employment for commercial use cannot be compared with that of a bulk carrier, a tanker, a tug or an exploration and drilling unit. Superyachts, very much like cruise ships, are not

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used solely as a means of transport and are designed for the private use and enjoyment of the owner, or alternatively to work as a luxury charter vessel at the top end of the leisure industry. However, unlike cruise ships, their employment is not expected to make a profit but rather to offset the cost of ownership. Crew members are expected to provide a more comprehensive and personal service and will generally command higher rates of pay than in mainstream shipping; yacht-brokers may act and behave more like friends than agents when dealing with their clients; insurance brokers in the yacht market tend to have a less corporate attitude than their colleagues would normally adopt in the mainstream marine insurance markets; and specialist superyacht marinas cannot be compared with commercial jetties in cruise terminals. Whoever approaches this industry from a commercial shipping background will realise very quickly that all parties involved, from the naval architects and interiors designers to the managers of the specialist yards that build and refit superyachts, work and live in a different context, if not a different world altogether. The uniqueness of the design, the quality of the build and the interior fit-out, in particular, and the overall impression created by a superyacht, may be of greater importance to a yacht-owner than the actual cost of the vessel; a very different world indeed.

Uniqueness in the enforcement of conventional and statutory provisions. Whether a superyacht is used as a private pleasure vessel or operated for commercial charter purposes, international and domestic law demand her to comply with all safety and pollution prevention requirements set by the body of legislation which would apply to a vessel of her size. However, the design constrains of large yachts, the particular environment in which they are used and the manner in which they are commercially operated would make the full application of IMO Conventions impractical and certainly inconvenient for what is in essence a leisure industry. For this reason, the Maritime and Coastguard Agency, and more recently Cayman Maritime, on behalf of all members the Red Ensign Group of registries,[3] in consultation with all key stakeholders in the commercial yachting sector, have developed two codes of practice[4] to establish standards of safety and pollution prevention appropriate to the size and use of vessels in commercial usage for sport and pleasure. For private or commercial yachts intended to carry between 13 and

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36 passengers the more recent code contains alternative standards to those required for passenger ships. The purpose of these codes, therefore, is not that of lowering the well-known and tested IMO safety standards, but rather that of adapting them to this very special sector of the shipping industry. This substitution of alternative standards to those set at international level by Conventions with the force of law in the United Kingdom is expressly allowed by the text of the safety Conventions, which permit state administrations to set "equivalents", provided that the administration concerned is satisfied that they are as satisfactory as those required by the Conventions.[5]

In the words of the draftsmen of one of these codes, the Passenger Yacht Code:[6]

"The development of the Code is therefore based on the consideration that full compliance with some of the provisions of the conventions referred [above] as they apply to commercial merchant passenger ships is unreasonable and in some instances disproportionately onerous in terms of design and cost compared to the incremental increase in safety levels achieved for yachts, given that pleasure yachts have a very different operating pattern (for the most part occasional voyages in defined weather conditions or operating areas) when compared to a typical commercial passenger ship which usually operates 24/7 on a tight schedule."

Uniqueness and the rule of precedent. Superyacht owners and charterers are not keen on litigation; privacy is often a much more important consideration. But when cases reach arbitrators and judges the question arises as to whether the socio- economic environment of what is after all a simple claim in contract or tort should affect the decision of the tribunal or court and, if so, in which way. The courts, especially at the highest level, have been traditionally reluctant to depart from well- settled precedent, even in cases where the learned judges suggest that such precedent is manifestly wrong.[7] Lord Reid, in Knuller v DPP reiterated the requirement of the 1966 Practice Statement,[8] by requiring that there needs to be a "very good reason" to depart from precedent. In that Practice Statement their Lordships nevertheless recognised that:

too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore, [...], to

depart from a previous decision when it appears right to do so."

Similarly in Austin v Southwark[9] the Supreme Court stated:

"So the question which we must consider is not whether the Court has power to depart from the previous decisions of the House of Lords which have been referred to, but whether in the circumstances of this case it would be right for it to do so."

The policy considerations which could warrant a departure from precedent due to the peculiar context in which superyachts are used seem obvious: a pleasure yacht having on-board jet skis is not a profit-making machine, and the rationale behind its ownership or chartering has nothing in common with those behind the use of commercial ships. Similarly, the working conditions on board such vessels hardly resemble those on board a merchant ship. Should these considerations be enough to justify a consistent enough departure from commercial precedent and establish a separate branch of the law?

All time warranties in yacht insurance: an example of consistent departure?
An important example in which the courts were prepared to depart from precedent on the basis of the type of ship at stake comes from the all important subject of marine insurance.[10] On three different occasions the courts had to interpret the specific wording of similar policies of insurance. In *The Milasan*[11] the policy contained a warranty worded as follows: "warranted professional skippers and crew in charge at all times." Aikens J, who was called to interpret the meaning of these words in the context of a yacht policy, held that it was clear that the insurers had an interest in ensuring that the yacht was properly looked after all the time, both winter and summer and wherever she was. He thus held that the words "at all times" were to be given their literal meaning. It is clear from the judgment that this was because *The Milasan* was a yacht.

The *Newfoundland Explorer*[12] is another yacht insurance case where the policy contained a warranty that the vessel should be fully manned "at all times". When the court was asked to decide what was the meaning of the expression "at all times", the judge opted again for a literal approach, although the court allowed a small degree of flexibility and introduced some

exceptions to the strict interpretation.[13] Part of the consideration for such strict interpretation of the clause was certainly the fact that the *Newfoundland Explorer* was a yacht:

"This was a valuable yacht. It can readily be understood that the presence of a crew member on board affords some protection or safeguard against such risks as vandalism, fire, pollution, the onset of bad weather or theft."

But how far did the fact that both the *Milasan* and *Newfoundland Explorer* were expensive yachts have affected the courts' finding becomes fully apparent in *The Resolute*.[14] This is another marine insurance case where the matter for decision turned yet again on an "at all times" clause. The specific wording in that case was: "Warranted Owner and/or Owner's experienced skipper on board and in charge at all times and one experienced crew member." *The Resolute*, however, was not an expensive yacht but a fishing vessel and this was the determining factor to distinguish the two previous authorities and interpret the clause differently. According to the Mackie QC, delivering the judgment for the court:

"The phrase 'at all times' could not be given its literal meaning, so the question was, how far it should be qualified? In those circumstances, it was to be construed contra proferentem, against the insurer. As I see it, the principal time when at least two members of the crew including the skipper would be required was when the vessel was being navigated."

Thus, the very same rules of construction have produced different results in cases where similar wording was applied to similar policies covering different types of vessel. In both *The Newfoundland Explorer* and *The Milasan*—the yacht cases—to fulfil the warranty someone had to be on board the vessel all the time, due to the very type of the vessel, as yachts involve different risks. This was not the case for a fishing vessel. And is the type of ship and the socio-economic context in which she is used not part of the "factual matrix" which should be used to interpret contractual clauses?

A "law of yachts and yachting". The argument that yachting in general and superyachts in particular should be treated differently from commercial vessels in the eye of the law and its interpreters may seem controversial or at least daring. But both lawmakers and judges have shown a great deal of

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attention to the special context of yachting. It is suggested that this keenness to treat yachts differently is correct and should be encouraged across the entire yacht-service industry. The lack of reported decisions and the deep proneness to privacy which is typical of this sector makes it hard for a sufficient separate body of case law to be easily identifiable as yachting related. For this reason this book draws from the large and settled body of reported commercial shipping cases. Arbitrators and judges do exactly the same. However, when deciding on yacht-related matters it seems crucial to retain the flexibility to distinguish and depart from precedents—no matter how well established—which would not produce satisfactory results in this environment. This is particularly important now that MYBA, the leading association of yacht brokers, has decided to amend its standard form Charter Agreement[15] to adopt LMAA Rules and appoint LMAA arbitrators rather than its own pool of specialists. Arbitrators with decades of experience in the commercial shipping sector will need to take a step back and remind themselves that cases referred through the new MYBA dispute resolution clause belong in a different context requiring a different approach to precedent. Different, however, does not necessarily mean more lenient, as the cases on insurance warranties stated above clearly prove.

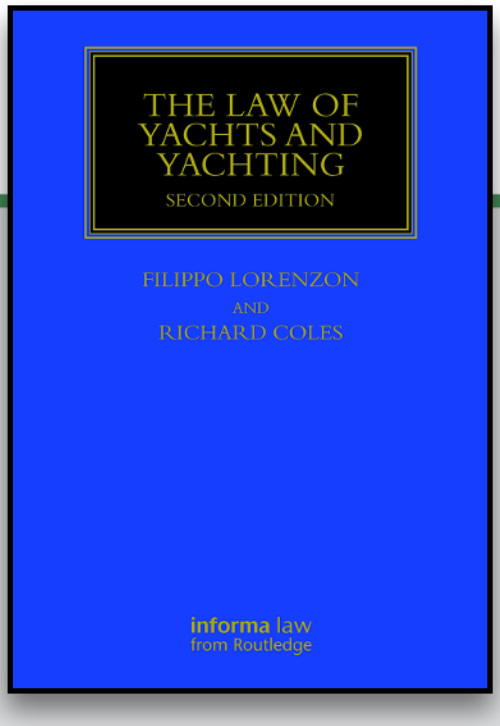
This work follows the life of a commercial superyacht from her conceptual inception and realization in the yard to her scrapping and recycling. Issues of registration and financing, VAT and employment, brokering and chartering are all looked at from a unique yachting perspective with the intent of giving the reader an all-round view of the difficult law of a very special industry.

CHAPTER

2

YACHT REGISTRATION

BY RICHARD COLES AND FILIPPO LORENZON



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YACHT REGISTRATION

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1. HISTORICAL INTRODUCTION

The origin of ship registration. Ship registration in England has its origins in the first of the seventeenth-century Navigation Acts,[1] described in its preamble as "An Act for the Encouraging and Increasing of Shipping and Navigation".[2] It is hardly surprising that the 1660 Act makes no mention of yachts, firstly because the Navigation Acts were concerned with the protection of trade and, secondly, because recreational sailing was then in its very early infancy.[3] The sport is believed to have originated in The Netherlands, and it was from that country that the Dutch East India Company made a gift of the first Royal Yacht, *Mary*,[4] to King Charles II on his restoration to the throne in 1660.

The Merchant Shipping Act 1894. By the nineteenth century the Navigation Acts had been repealed and ship registration law was by then embodied in a series of Merchant Shipping Acts, the most significant of which was the Merchant Shipping Act 1894.[5] The 1894 Act consolidated a number of earlier statutes dealing with many aspects of merchant shipping. It is important for two reasons. First, the Act set out in detail the law governing the registration of British ships, which remained in force, largely unchanged, for over 90 years. These provisions dealt not only with the public law functions of registration, in particular the conferment of nationality, but also with the private law aspects, namely ownership title, mortgages and other security interests. Secondly, because it applied to the whole of the British Empire rather than to the United Kingdom alone, the 1894 Act provided the legal framework for ship registration in many other countries, a number of which have, since independence, acquired some of the largest fleets in the world measured by registered tonnage. The Bahamas, Cyprus and Malta are three notable examples.

Yachts and the 1894 Act. The 1894 Act required every British ship to be registered, unless exempted under the Act.[6] The British character of a ship depended on the nationality of the owner. A "ship" was defined as "every

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description of vessel used in navigation not propelled by oars".[7] It is therefore clear that for registration purposes a yacht fell within that definition, even though, in an appeal from a First World War Prize Court case, the Privy Council held that a racing schooner yacht was not a merchant ship within the meaning of the 1907 Hague Convention (VI).[8] British-owned yachts were exempt from registration if they did not exceed 15 tons net register tonnage, and were employed solely on the rivers or coasts of the United Kingdom or on the rivers or coasts of some British possessions within which the managing owners were resident.[9] As a result of this exemption, there was no need to register the large number of small pleasure yachts as long as they remained in UK waters. However, if an owner wished to create a legal mortgage over a yacht, it was necessary first to register her as a British ship even if she was exempt from compulsory registration,[10] as an unregistered mortgage created only an equitable interest that did not give a mortgagee the benefit of a statutory power of sale[11] and certain other benefits enjoyed by the holder of a registered mortgage.[12]

The post-war era. During the second half of the twentieth century there was a steady decline in the number of merchant ships registered under the British flag. This occurred for a variety of reasons, some of which were peculiar to the United Kingdom fleet, and other factors equally applicable to other European countries. The growth of flags of convenience, or open registers, was a twentieth-century phenomenon that enabled shipowners in the developed world to register their vessels in other jurisdictions in order to reduce operating costs or obtain tax or fiscal advantages.[13]

With the gradual decline in the number of registered merchant ships, pleasure yachts formed an increasing proportion of the vessels registered under the 1894 Act. By the mid-1980s, approximately 80 per cent of the total number of vessels registered were pleasure yachts rather than merchant ships. Despite the dominance of yachts, such vessels were for registration purposes treated in exactly the same way as other types of vessel. Registration details were recorded by means of handwritten entries in leather-bound register books kept by Assistant Registrars of Ships based in local offices of what was then HM Customs & Excise. These offices were

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found in most- ports in the United Kingdom. Prior to 1983, it was necessary for a tonnage survey to be carried out to establish the registered tonnage of any yacht prior to registration under Part 1 of the 1894 Act. Owners of small yachts frequently found this requirement to be onerous and, from a cost point of view, a disincentive to registration under Part 1. However, owners of unregistered cruising yachts increasingly encountered Customs difficulties when visiting foreign ports, particularly in France.

The Merchant Shipping Act 1983 and the Small Ships Register. To overcome these difficulties, the Merchant Shipping Act 1983 introduced several changes in the law of particular relevance to yacht owners. A simplified method of tonnage measurement was introduced that enabled small vessels of under 24 metres (79 feet) in length to be measured by length, rather than by tonnage calculated under the tonnage regulations.[14] In addition, and of greater significance, was the establishment of a separate Small Ships Register,[15] which made it possible for qualified owners of vessels other than fishing vessels to obtain a simple form of registration as an alternative to registration under Part 1 of the 1894 Act. Because the new register was incompatible with Part 1 registration, the operation of the new register was put out to private tender by the Secretary of State. The SSR, as it became known, was for a time administered by the Driver and Vehicle Licensing Agency, until it became part of the centralised Register that was established in Cardiff by the Registrar of Shipping and Seamen in 1994.[16] Although the SSR was not intended to be used exclusively by yacht owners, a large proportion of the vessels registered on the SSR were yachts or other pleasure craft. Because the SSR was not a "title" register, there was no facility to register ship mortgages. For that reason, any yacht owner who wished to take out a loan secured over a yacht of less than 24 metres in length was still obliged to register the vessel with full registration on Part 1 of the Register in order to provide a lender with the same means of obtaining a legal ship mortgage as is available for vessels of greater length. This required the submission of title and other relevant documents to the Registrar of Ships in the chosen port of registry. As there was, at that time, no means of obtaining mortgage priority in advance, personal attendance was usually necessary to register a mortgage at the port of registry.

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Excerpted from *The Law of Yachts & Yachting , 2nd edition*

While the introduction of the Small Ships Register was a significant step forward for all those concerned with small leisure craft, full registration on Part 1 was largely unchanged. By the 1980s there arose a call for a complete overhaul of the registration system that was becoming increasingly anachronistic. Under the old law, vessels could be registered as "British ships" not only in the United Kingdom but also in the few remaining Dependent Territories,[17] even though local maritime administrations often had no effective means of enforcing the international maritime Conventions that were applicable to those vessels.[18] Because registration was a right rather than a privilege, Registrars in Dependent Territories were unable to refuse to register vessels that they considered to be unsafe or substandard. To avoid the development of a two-tier system of British registers, there was a clear need for the devolvement of a Maritime Administration for certain of the Dependent Territories to enable those countries to take responsibility for the British ships registered locally. In March 1984, the Department of Transport issued a consultative document entitled "Proposals for legislation on ship registration and other matters". This paper drew attention to the need to modernise the law relating to ship registration, to improve jurisdiction over United Kingdom-registered vessels and to improve the safety standards on board those vessels registered in the Dependent Territories. After consultations by the Department, the legislation introduced in 1988 brought about the most fundamental change in ship registration law since 1894.

The Merchant Shipping Act 1988. The pivotal change was the redefinition of the term "British ship". Instead of defining this term by reference to the nationality of the owner,[19] resulting in an obligation to register,[20] s.2(1) of the 1988 Act provided that, for the purposes of the Merchant Shipping Acts, a British ship was one that was registered,[21] or, in the case of certain vessels under 24 metres in length owned by a qualified owner, unregistered.[22] Registration became a voluntary entitlement, rather than a compulsory requirement for vessels not exempted from registration. Furthermore, the 1988 Act created, for the first time, a United Kingdom shipping register, rather than one designed to serve the whole of the former British Empire. Commonwealth citizens were no longer permitted to be registered as owners as of right, although citizens of the Dependent Territories or Crown

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Dependencies could still be so registered, provided that a representative person in the UK was appointed for Merchant Shipping Act purposes if the owner was not a UK resident. In addition to creating a new shipping register for the United Kingdom itself, the 1988 Act provided a means of regulating the registration of ships in the various Overseas British Possessions by assigning to such territories different categories of shipping registry, based on tonnage, type of ship or any other specified matter.[23] Such allocation is made by Order in Council, based on the willingness of the local government to assume responsibility for providing an appropriate level of maritime administration to support a local registry.[24] While the history of the Red Ensign Group registers[25] fall outside the scope of the present work, it should be noted that the growth and subsequent popularity of the non-UK Red Ensign Registers within the international yachting community dates back to, and was to a large extent made possible by, the changes in the law introduced by the Merchant Shipping Act 1988.

The Merchant Shipping (Registration, etc.) Act 1993. Although the 1988 Act set up a new United Kingdom Shipping Register, the day-to-day operation of the register continued to be delegated to Assistant Registrars of Ships based in local Customs & Excise offices in ports around the United Kingdom. Yacht owners who wished to register a yacht were obliged to submit an application to the port of registry of their choice. While the 1988 Act authorised the use of computers, no central register was created. Because of a lack of parliamentary time, the next major change in the law started life as a Private Members Bill introduced in 1993 by Richard Page MP. The Merchant Shipping (Registration, etc.) Act 1993 created a centralised public register of British ships in the United Kingdom to be maintained by the Registrar-General of Shipping and Seamen. The establishment of the new Register in Cardiff brought to an end the registration of vessels and the issue of certificates of registry at individual ports of registry. Computer-generated certificates of registry replaced the previous handwritten certificates of registry, commonly known as “blue books”, that are now issued only in certain of the British Overseas Territories. Since 1993, yacht owners have been required to nominate a “port of choice” at the time of registration, but in reality there is no longer any administrative connection between a yacht and its port of

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choice.

The Merchant Shipping (Registration of Ships) Regulations 1993. Whereas the 1894 and 1988 Acts contained the detailed statutory provisions relating to ship registration, the 1993 Act set out only the essential framework and delegated[26] to the Secretary of State for Transport the power to introduce registration regulations containing the substantive law. The Merchant Shipping (Registration of Ships) Regulations 1993 came into force on 21 March 1994 and remain largely unchanged to this day. The 1993 Act itself was relatively short-lived. As well as the amendment to ship registration law that has been discussed and the introduction of bareboat charter registration that was of less interest to yacht owners, the Act contained various amendments and repeals which were the precursor to the long awaited consolidation of UK merchant shipping law that finally reached the statute book a year too late for the anniversary of the 1894 Act.

2. THE MODERN LAW

The Merchant Shipping Act 1995. The current law relating to the registration of ships and yachts in the United Kingdom can be found in the Merchant Shipping Act 1995[27] (the "Act") which came into force on 1 January 1996 and the Merchant Shipping (Registration of Ships) Regulations 1993,[28] as amended[29] (the "Regulations"). Since the Act was a major consolidation of the previous Merchant Shipping legislation, it will come as no surprise to the reader that the ship registration provisions contained in Parts I and II of the Act are a restatement of the provisions introduced in 1988 and 1993.[30] Because the substantive law is contained in the Regulations, it is the Regulations rather than the Act to which the busy practitioner will most often refer.

The Registry of Shipping and Seamen. The Act provides that there shall continue to be a central register for all registration of British ships in the United Kingdom, maintained by the Registrar General of Shipping and

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Seamen.[31] The Registry of Shipping and Seamen is part of the Maritime and Coastguard Agency and together with certain other MCA departments is now known for marketing purposes as the UK Ship Register. There is no separate register for yachts. The Register is divided into four parts,[32] two of which are relevant to yachts. A yacht may be registered on Part I of the Register provided that the owner is qualified and certain other requirements are satisfied. Alternatively, a qualified private individual who does not require full title registration can opt to register a yacht as a small ship on Part III of the Register, provided the vessel is less than 24 metres in length. The Registry of Shipping and Seamen is situated in Cardiff, where applications for transcripts of the Register can be obtained and register entries inspected.[33] Searches can be requested by email or fax and fees paid by credit card or debited to an imprest account set up by a regular user at the Registry. Information on technical or crew issues can be obtained from the Maritime and Coastguard Agency in Southampton, or in the case of large commercial yachts from the MCA Large Yacht Unit, known as ENSIGN, in South Shields. Full contact details of the UK Ship Register can be found on the MCA website.[34]

Registration of shares. For registration purposes the property in a ship is divided into 64 shares, and not more than 64 persons are entitled to be registered as owners of any one ship. While it is not permissible for an individual to be registered as a part owner of a share, it is permissible for up to five persons to be registered as joint owners of a ship or any share or shares in a ship.[35] While merchant ships are invariably registered in the name of a single corporate owner, it is not uncommon for pleasure yachts to be registered in the name of multiple, or joint, owners. In that situation, two individuals will have the option of being registered as jointly owning all 64 shares, or of each of them being registered as the sole owner of 32 shares. In the latter case, any subsequent transfer of ownership of the vessel would require the production of two bills of sale rather than one, with a separate fee payable for each upon registration at the UK Ship Registry.

Beneficial interests. As there is no provision to record on the Register details of any beneficial interest in a ship that a third party may have as a result of a trust, either express, implied or constructive,[36] anyone seeking to enforce such

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a claim will be obliged to obtain a declaration from an Admiralty judge as to beneficial ownership. In the case of the *Up Yaws*,[37] Mr Justice Aikens considered the competing claims to the ownership of a motor yacht registered in the name of one party where 55 per cent of the purchase money was provided by the other. It was held that the registered owner was the legal owner of the vessel, but that the claimant had a beneficial interest in the vessel proportionate to the total purchase price, which would have to be translated into the equivalent number of the 64 shares in the vessel.

3. REGISTRATION UNDER PART I OF THE REGISTER

Introductory. Before any application is made to register a yacht, the applicant should first ascertain whether the owner or proposed owner is eligible to be registered as the owner of a United Kingdom ship, having regard to the extensive list of qualified persons set out in the Regulations. While small pleasure yachts will often be registered in the names of individuals, larger vessels will usually be registered in company names, particularly when used for commercial purposes. Where the purchase of a yacht is contemplated by a business entity, acquisition by a limited liability partnership may be preferable to a company purchase to avoid the possibility of an assessment for taxation of benefits in kind, which may arise if the company directors are resident in the United Kingdom. Finally, if a yacht is to be operated commercially, an applicant should first establish that the vessel will satisfy the safety requirements of the Large Commercial Yacht Code ("LY3"),[38] or the equivalent codes[39] for small commercial vessels, and the proposed crew hold the required qualifications..[40]

Eligibility for registration. The following persons are qualified to be the owners of ships registered on Part I of the United Kingdom Register.[41]

(a) (i) British citizens, or

(ii) non-United Kingdom nationals exercising their right of freedom of movement of workers[42] or right of establishment;

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(b) British Overseas Territories citizens;

(c) British Overseas citizens;

(d) persons who under the British Nationality Act 1981 are British subjects;

(e) persons who under the Hong Kong (British Nationality) Order 1986 are British Nationals (Overseas);[43]

(f) bodies corporate[44] incorporated in an EEA State;

(g) bodies corporate incorporated in any relevant British possession and having their principal place of business in the United Kingdom or in any such possession;[45] and

(h) European Economic Interest Groupings being groupings formed in pursuance of Article 1 of Council Regulation (EEC) No 2137/85[46] and registered in the United Kingdom.

On 29 March 2017 the United Kingdom Government gave notice of its intention to leave the European Union following the outcome of the Referendum on 23 June 2016 in which there was a majority vote in favour of Brexit.[47] The United Kingdom will remain a Member until March 2019. It is likely that Regs 7(1)(a)(ii), 7(1)(f) and 7(1)(h) will be amended, or deleted, after the United Kingdom has left the European Union.

Non-qualified persons. A person who does not fall within any of the categories set out above may still be entitled to become one of the owners if the majority interest (i.e. 33 or more shares) in the vessel is owned by a person or persons who are qualified to be the owner of a British ship.[48] Where an entitlement to register arises as a result of the majority interest in the vessel falling into categories (a), (b), (e), (f) or (h), then such a vessel may be registered only if that person or any of those persons is resident in the United Kingdom.[49] If this residence requirement cannot be satisfied, then the vessel may not be registered unless a representative person is appointed under Part V of the Regulations. A representative person may be either an individual resident in the United Kingdom, or a body corporate incorporated in a Member State and having a place of business in the United Kingdom.[50] The role of a representative person is to receive, on behalf of a non-resident

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vessel owner, formal documents served under the Merchant Shipping Acts or in connection with proceedings relating to an offence under the Merchant Shipping Acts. Appointment of a representative person must be on a form prescribed by the Secretary of State, and is currently one of the matters that a vessel owner may include in a Declaration of Eligibility.[51] There is no requirement for a representative person to give prior written consent to such appointment.

Application for initial registration on the United Kingdom Register. An application for registry may be made to the Registry of Shipping and Seamen in person or by post using an application form approved by the Secretary of State,[52] currently Form MSF 4740.[53] Applications may be made, in the case of individuals, by one or more persons seeking to be registered as the owner, or alternatively by an agent. In the case of applications to register a body corporate as owner, an application must be made by a duly authorised officer of the body corporate, or by an agent.[54] The Registry offers a two- tier fee tariff.[55] For postal applications a basic fee is payable. For personal applications at the Registry there is an additional Counter Service fee.

An Application to Register a British Ship must be accompanied by the following documents:

(a) a declaration of eligibility[56] using the prescribed printed form. The declaration will include brief details of the vessel, the full name and address of the owner, the registered office and place of business in the case of a company, the owner's nationality or place of incorporation, the eligibility of the owner to register, the number of shares held, and details of the representative person (if the owner is not resident in the UK) or the managing owner (if there is more than one owner resident in the UK);

(b) a copy of the certificate of incorporation and of any change of company name if the owner of a yacht is a company registered in the United Kingdom.[57] If the company is incorporated in another Member State or a relevant British possession, proof of incorporation must be provided in accordance with the laws of the relevant country.[58] Finally, if the company is incorporated outside the United Kingdom but has a place of business in the

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United Kingdom, then a certificate must be provided from the Registrar of Companies in England and Wales, Scotland or Northern Ireland, stating that the company is registered with him as an overseas company.[59]

(c) evidence of title:

(i) in the case of a new vessel, a builder's certificate in form MSF 4743 or in another acceptable form;

(ii) in the case of a vessel which is not new, the previous bill or bills of sale showing the ownership for at least five years before the application is made, or if the vessel has been registered with full title registration at any time during the previous five years, then a bill or bills of sale evidencing all transfers of ownership during the period since she was so registered;

(iii) such other evidence satisfactory to the Registrar if the evidence of title falls short of (c), (i) and (ii). For example, if an original builder's certificate or a previous bill of sale has been lost or destroyed, a photocopy or a certified copy may be acceptable to the Registrar.

Certificate of survey and tonnage measurement. In addition, a yacht owner or his representative must before registration employ a surveyor of ships to survey the vessel and ascertain her tonnage in accordance with the tonnage regulations.[60] If the vessel is 24 metres or more in length, the survey must be carried out by a surveyor from an approved classification society. In the case of a pleasure yacht under 24 metres in length, a Royal Yachting Association tonnage measurer or a surveyor member of the Yacht Brokers, Designers and Surveyors Association may be used. Both of these organisations are based in England but have worldwide membership. After survey or measurement, the surveyor or measurer will issue a certificate of survey stating the vessel's tonnage, build and such other particulars describing the identity of the ship as may be prescribed by the Secretary of State. This certificate must be delivered to the Registrar before registration can be completed.[61] If a vessel is 24 metres or more in length, then an International Tonnage Certificate (ITC 1969) will also be required and a copy must be sent to the Registrar.

Name of vessel and home port. Every registration application requires an

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applicant to specify the proposed name of the vessel[62] and the required "port of choice",[63] or home port, to be shown on the stern. Schedules 1 and 2 of the Regulations set out the criteria governing the approval of vessel names and the list of UK ports of choice available to vessels registered on Part 1 of the Register. A proposed name will not be approved if it is already the name of a registered British ship, is so similar to that of a registered British ship as to be calculated to deceive or likely to confuse, is likely to be confused with a distress signal,[64] or where the name has a prefix or suffix that might be taken to indicate a type of ship, or cause confusion as to the name of the ship.[65]

Carving and marking. When the Registrar has received an application for registration as well as a certificate of survey and satisfied himself that a vessel is eligible to be registered, the yacht owner will be issued with a carving and marking note.[66] This document will specify the official number allocated to the vessel, her name, port of choice and registered tonnage. The note will require the name and port of choice to be marked on the stern. The official number and registered tonnage are to be cut on the main beam or, if that is not possible in the case of a pleasure yacht under 24 metres in length, on an engraved plate fixed to the main beam or on a suitable visible part of the internal structure. The carving and marking note will be accompanied by full instructions as to the manner in which the yacht must be marked.[67] As soon as the yacht has been marked, a classification society surveyor, or another approved inspector of marks,[68] should inspect the yacht in order to complete and sign the carving and marking note, which will normally be stamped with the official stamp of the surveyor's organisation. In the case of a pleasure yacht under 24 metres in length, an owner is permitted to certify personally that the yacht has been correctly carved and marked in accordance with Sch.3.[69] In either case, a Certificate of British Registry will not be issued until the completed carving and marking note has been returned to the Registrar. If the Registrar is not satisfied as to the correctness of the measurement and tonnage, or the manner in which the yacht has been carved and marked, then he may direct an owner to have the measurement and/or carving and marking verified by an authorised measurer or inspector.[70]

Refusal of registration. It should be noted that even if a yacht is otherwise

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entitled to be registered, the Registrar may refuse to register it if there are safety issues or a risk of pollution relating to the vessel itself, or health or safety issues affecting persons employed or engaged on board and he considers it would be inappropriate for it to be registered.[71] While it would seem unlikely that the Registrar would exercise such discretion when dealing with an application to register a pleasure yacht, that situation could well arise if a yacht intended for commercial use was found not to comply with the LY3,[72] or, in the case of a yacht for which a keel was laid before August 2013 (being the date of entry into force of the Maritime Labour Convention 2006), with LY1 or LY2.[73]

Issue and validity of certificate of registry. Upon completion of registration, the Registrar will send to the owner or his authorised representative a laminated Certificate of British Registry for retention on board the yacht. Unless the Registrar prematurely terminates the yacht's registration in any of the circumstances described in Regulation 56, a certificate of registry will be valid for five years and will expire at the end of that period unless renewed.[74] The Registry will send a renewal notice to the registered owner three months before the expiry of the registration period and also notify any registered mortgagee that the vessel's registration will shortly expire. The validity of a mortgage will not be affected by the expiry of registration, but the failure of a yacht owner to renew registration may well constitute an event of default under a deed of covenant collateral to the mortgage. The Registrar may exercise discretion allowing an owner to renew registration a short while after the expiry date, but, if more than a few weeks have elapsed, the Registry will insist upon the yacht owner submitting an application for first registration, supported by an up-to-date survey and measurement.

Change of ownership. In the event of the transfer of ownership of shares in a registered vessel, a bill, or bills, of sale must be produced to the Registrar in a prescribed form.[75] The current forms can be found on the United Kingdom Ship Register section of the Maritime and Coastguard Agency website. Every application to register a change of ownership of a vessel or share must be supported by a declaration of eligibility, payment of the appropriate fee and, in the case of an application on behalf of a body corporate, a copy of the

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certificate of incorporation. If the Registrar accepts the application, the bill of sale will be registered, the date and time of registration endorsed at the foot of that document and a new certificate of registry issued to the new owner, valid for five years.[76] Where title passes by transmission consequent on death, bankruptcy or as a result of a court order, a bill of sale will not be appropriate. The Registrar will, however, require evidence of transmission to be produced to him in the form of the grant of representation or an office copy, appropriate evidence of proof of title following bankruptcy, or a copy of the court order or judgment.[77]

Change of name or port of choice. An owner of a registered vessel may at any time apply to the Registrar to change the name of the vessel,[78] or change the port of choice.[79] A prescribed form must be used for such applications.[80] The original certificate of registry must be returned with the application unless the Registrar dispenses with that requirement, if for example the vessel is currently at a port outside the United Kingdom or about to commence an imminent voyage.[81] If the Registrar is satisfied that any change of name satisfies Sch.1 (Approval of names), a marking note will be issued showing the new name and/or port of choice. The new name and/or port of choice will need to be marked and, in the case of a vessel over 24 metres in length, the vessel inspected, the carving and marking note signed and returned to the Registrar in the same manner as in the case of initial registration. Upon receipt of the signed carving and marking note, the Registrar will cancel the original certificate or registry and issue the owner with a new one, expiring on the same date as the original one.[82]

Removal from the Register. The Registrar may, subject to giving notice to the owner, managing owner or any charterer, manager or operator, terminate the registration of any vessel (other than a fishing vessel) in the following circumstances:[83]

(a) on application by the owner;

(b) on the vessel no longer being eligible to be registered;

(c) on the vessel being destroyed, including, but not limited to, shipwreck, demolition, fire and sinking;

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(d) if taking into account the requirements of applicable Merchant Shipping legislation relating to the condition or equipment of ships there are safety or pollution risks, or safety, health or welfare considerations affecting persons employed or engaged in any capacity on board as a result of which the Registrar considers it inappropriate for the vessel to remain registered;

(e) when any penalty imposed on the owner of a vessel in respect of a contravention of the Merchant Shipping Acts, or any instrument in force under those Acts, has remained unpaid for more than three months (and no appeal against that penalty is pending);

(f) when any summons for any such contravention has been duly served on the owner of a vessel but the owner has failed to appear at the time and place appointed and a period of not less than three months has elapsed since that time.

Regulation 101 provides that, unless a vessel is removed from the Register at the request of the owner, the Registrar shall be obliged to give notice requiring that evidence be produced to him within 30 days to satisfy him that the vessel is eligible to remain on the Register. If, on the expiry of that period of 30 days, he is not so satisfied, he may either extend the notice and require further information or evidence to be provided, or serve a final notice closing the registration seven days after service of that notice. Where the Registrar terminates the registration of a vessel on grounds (a)–(c) above, then he will immediately issue a closed transcript of registry to the owner and notify any mortgagees of the closure of the registration. Once the registration has been terminated, an owner is obliged to surrender the certificate of registry to the Registrar.

Transfer of registration to other British possessions. Part IX of the Regulations[84] sets out the circumstances in which a vessel registered on Part I of the Register may be transferred to a port of registry in a relevant British possession, and vice versa.[85] The ability to transfer a yacht from the United Kingdom Register to another Red Ensign register and vice versa is not often used, but has a number of significant advantages. A transfer of port, as the process is known, will avoid any requirement for a tonnage measurement

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survey by the new flag state administration. It will allow a vessel to be transferred subject to any existing registered mortgage, thereby preserving mortgage priority and avoiding the cost and expense of entering into a new mortgage. It will also avoid any possibility of a security gap between the closure of one register and registration under another. The outgoing registry is likely to inform a mortgagee of the application for a transfer of port and such action will normally require a mortgagee's consent under most mortgage deeds of covenant, in any event. Finally, a change of port may assist an owner of a commercial yacht who wishes to reflag his vessel within the Red Ensign Group of registries in order to take advantage of the variation in registration and survey fees, or indeed a difference in the manner in which the Large Commercial Yacht Code is applied between one flag state and another.

Formalities of transfer. An application for a transfer of port from the UK to another Red Ensign registry is subject to the Registrar being satisfied that the registration in the intended port of registry will not be precluded[86] by:

(a) any Order in Council in force under s.18, Merchant Shipping Act 1995, which deals with the regulation of registration in British possessions by reference to categories of registry;[87] or

(b) any provision of the law in force in the possession in question.[88]

A certificate from the registrar of an intended port of registry that any such provisions are in force shall be conclusive evidence for the purpose of "transfer out". When the registrar in the intended port of registry has issued a new certificate of registry, the Registrar shall terminate the registration in the United Kingdom and the UK Certificate of Registry must be surrendered to the Registrar for cancellation.[89]

Transfer of registration from other British possessions. Where a yacht owner wishes to transfer the registration of a vessel from a port of registry in another British possession to Part I of the United Kingdom Register, an application must first be made to the registrar in the existing port of registry, in the form of a declaration in writing by all persons appearing to be interested in the vessel as owners. The vessel may be transferred to Part I of

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the Register if the Registrar receives:

(a) a copy of the application and declaration sent to the Registrar in the existing port of registration;

(b) a copy transmitted to him by the registrar of the existing port of registry setting out the registered particulars of the vessel and the names appearing on his register to be interested in the vessel as owners and mortgagees;

(c) the vessel's certificate of registry;

(d) the applicant's preferred port of choice from the list of ports in Sch. 2, Part I of the Regulations; and

(e) the applicant's proposed name for the vessel (if not previously approved).

On being satisfied that the proposed name satisfies the requirements of Sch.1, a marking note is issued by the Registrar for completion and return by an Inspector or the owner, as appropriate. Upon receipt of the completed marking note, the Registrar will then enter the details into the Register and issue a new certificate of British Registry. Notwithstanding that a vessel is otherwise entitled to be registered, the Registrar is entitled to refuse to register it if he considers it inappropriate, taking into account the statutory requirements relating to the condition of the vessel or its equipment from the perspective of safety or risk of pollution, or the risk to the safety, health and welfare of persons employed or engaged in any capacity on board.[90] This safeguard is particularly important as it gives the Registrar the power to reject a substandard vessel from an Overseas Possession where the Registrar may not have a corresponding power.

4. REGISTRATION AS A SMALL SHIP ON PART III OF THE REGISTER

Eligibility for registration. To be eligible to be registered on Part III a ship must be less than 24 metres in overall length, and not a fishing vessel or a submersible vessel. Pleasure yachts or small yachts engaged in commercial activity may therefore be eligible if they are less than 24 metres in length and

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their owners are qualified. The following persons are qualified to be owners of a small ship registered on Part III of the United Kingdom Register:[91]

(a) (i) British citizens; or

(ii) non-United Kingdom nationals exercising their right of freedom of movement or workers or right of establishment;[92]

(b) British Overseas Territories citizens;

(c) British Overseas citizens;

(d) persons who under the British Nationality Act 1981 are British subjects;

(e) persons who under the Hong Kong (British Nationality) Order 1986 are British Nationals (Overseas);[93] and

(f) Commonwealth citizens not falling within the previous categories;

provided that the person or persons seeking to be registered are ordinarily resident in the United Kingdom for 185 or more days each year.[94] This requirement for a "British connection" will therefore disqualify the use of the Small Ships Register ("SSR") by expatriate British citizens or other qualified individuals who live permanently abroad. Perhaps of greater significance is the inability to register a ship on Part III in the name of a limited company. The rationale for this restriction probably stems from the original objective of providing private individuals in the United Kingdom with an inexpensive means of proving national identity for leisure craft.

Application for registration. An application must be made on a prescribed form and may be submitted to the United Kingdom Ship Register by post or online. The applicant is required to provide the following details:

(a) a brief description of the vessel;

(b) the overall length;

(c) the name of the vessel;

(d) the name and address of every owner; and

(e) a declaration that the owner is eligible to be the owner.

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As the SSR is not a title register, there is no requirement for the application to be accompanied by a bill of sale or other documents of title. On receipt of the application the Registrar will require to be satisfied that the vessel may be registered, and that the proposed name is not undesirable, and if so will record the details of the vessel and issue a certificate of registry on which will appear the SSR month of registry and maintain it during the period of registration. There is no requirement for the completion and return of a carving and marking note.[95] As is the case with Part I registration, registration of a vessel on Part III is valid for five years, unless previously terminated as a result of a change of ownership or another change affecting the vessel registration.

5. THE ENTITLEMENT TO FLY THE BRITISH FLAG

The meaning of "British ship" for registration purposes. The definition of a "British ship" contained in s.1(1), Merchant Shipping Act 1995 is wider than that of a "United Kingdom ship", essentially a ship registered in the United Kingdom under the 1995 Act.[96] The term "British ship" will include a ship registered under the laws of a relevant British possession,[97] as well as a small ship other than a fishing vessel, which is not registered under the Act, is wholly owned by qualified persons and not registered in a country outside the United Kingdom. A yacht registered on either Part I or Part III of the United Kingdom Register is clearly a British ship. A small unregistered yacht may also be so treated, if she is owned by a qualified owner who has not chosen to register the vessel outside the United Kingdom.

Section 2, Merchant Shipping Act 1995 provides that:

"(a) The flag which every British ship is entitled to fly is the red ensign (without any defacement or modification) and, subject to subsections (2) and (3) below, no other colours.

(b) Subsection (1) above does not apply to Government ships.

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(c) The following are also proper national colours, that is to say—

(a) any colours allowed to be worn in pursuance of a warrant from Her Majesty or from the Secretary of State;

(b) in the case of British ships registered in a relevant British possession, any colours consisting of a red ensign defaced or modified whose adoption for ships registered in that possession is authorised or confirmed by Her Majesty by Order in Council."

Special ensigns. Since the early part of the nineteenth century, Royal warrants have been granted to members of certain yacht clubs allowing those individuals to fly from their yachts special ensigns denoting membership of their clubs. Prior to 1 April 1985, warrants were issued directly to the yacht owner by Her Majesty or the Secretary of State for Defence. Since that date, the Secretary of State has issued warrants to yacht clubs rather than individual yacht owners, enabling those clubs to issue permits to their members, allowing their yachts to wear special ensigns on certain strict conditions, the most important of which are as follows:

(a) to be eligible, a yacht must be registered on either Part I or Part III of the Register. A yacht registered on Part I must be not less than 2 gross tons. A yacht registered on Part III (the Small Ships Register) must be not less than 7 metres in length overall;

(b) the owner must be a British citizen;

(c) the special ensign may be worn only by a yacht used privately by the yacht club member to whom a permit has been issued;

(d) the yacht must not be used for any commercial purpose;

(e) the yacht may be registered in the name of a limited company, provided that the user is a member of a designated yacht club who is both a British citizen and the holder of a permit;

(f) the special ensign may be worn only when the owner, or the user, is on board or in overall control of the yacht.

Special ensigns include the white ensign worn only on yachts belonging to

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members of the Royal Yacht Squadron (as well as ships of the Royal Navy), the blue ensign (plain or defaced) and the red ensign defaced with the badge or emblem of the relevant yacht club. Finally, there is the light blue ensign, defaced with an RAF roundel, wings and crown, worn by yachts of the Royal Air Force Sailing Association. The annual Navy Directory (formerly The Navy List) includes the current details of those yacht clubs to whom warrants have been issued.[98] If incorrect national colours are worn by a British ship, including the unauthorised use of a special ensign without a warrant from Her Majesty or from the Secretary of State for Defence, the master, owner and any other person hoisting them shall be guilty of a criminal offence.[99]

6. COMMERCIAL USE OF YACHTS AND PASSENGER YACHTS

Commercial yachts. As we have already seen, any United Kingdom registered motor or sailing yacht of more than 24 metres load line length, that is engaged in commercial use, carries no cargo and no more than 12 passengers, is obliged to comply with the Large Commercial Yacht Code or LY3,[100] as it is often known. Earlier editions of the Code applied only to yachts of less than 3,000 gross tons by volume. The removal of the tonnage restriction in LY3 was of particular importance within the superyacht industry. Non-compliance with the Code will not prevent a vessel being registered or remaining on the United Kingdom Register, but it will prevent it from being operated commercially. Because the Code sets out recommended standards of safety and pollution prevention appropriate for the size of vessel, the Maritime and Coastguard Agency recommends that pleasure vessels comply with the Code standards on a voluntary basis. For that reason, many owners of yachts will require them to be Code-compliant, even if there is no immediate intention of using them for commercial charter. It should not be forgotten that, for vessels under 24 metres in load line length, there are three separate codes of practice for the safety of small commercial sailing and motor vessels.[101] Where a large or small commercial yacht has been issued with a certificate of compliance under the relevant code of practice, the yacht owner or his

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advisor will usually apply to the Registrar for the amendment of the Certificate of British Registry to show the vessel as a commercial yacht rather than a pleasure yacht. Such alteration is not mandatory, but is advisable in order to demonstrate to third parties that the vessel is fully certificated to operate on a commercial basis. This is of particular importance if the vessel will visit ports outside the United Kingdom.

Passenger yachts. The limitation of carrying 12 passengers or fewer, and prior to 2012 the tonnage restriction referred to in the previous paragraph, has restricted the circumstances in which the owner of a large yacht is able to avail himself of the equivalent safety standards set out in LY3 and the earlier editions of the Code. To overcome the problem, the Red Ensign Group of registries ("REG") led by the Cayman Islands, first published in 2010 the Passenger Yacht Code ("PYC"), which applies to pleasure yachts of any size, in private use or engaged in trade, which carry more than 12 but not more than 36 passengers and which do not carry cargo. Since the PYC was first launched, it has been revised almost every year in response to the frequent changes to the relevant IMO Conventions affecting passenger ships, the most recent edition being published in January 2016.[102] The United Kingdom Government has submitted the PYC to the International Maritime Organisation as an equivalent standard to the Load Line,[103] SOLAS[104] and STCW[105] Conventions, in the same manner as was the case for LY3. If a yacht is designed to carry more than 36 passengers, then neither the LY3 nor the PYC equivalent safety standards will apply, and the vessel will be treated as a passenger ship subject to the full requirements of SOLAS.

Consolidation of yacht coding. It will be apparent from the previous paragraphs that there has been rapid development in the regulation of the large yacht and superyacht sectors since the Maritime and Coastguard Agency published the first edition of the Large Yacht Code in 1997.[106] The continuing development shows no sign of abating, as was demonstrated by an announcement in November 2016 by the Red Ensign Group that the Group was currently working on a new regulatory framework to be known as the "Red Ensign Group Yacht Code", bringing together updated versions of the LY3 and the PYC. The new Code will be launched in November 2017 and will

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come into force on 1 January 2019. The ability of a yacht to comply with the existing or future Codes, whether mandatory in the case of commercial and passenger yachts, or advisory in the case of pleasure yachts, is of crucial importance to anyone considering a choice of registry.

7. CHOICE OF REGISTRY

Pleasure yachts. For a private individual who is a British citizen resident in the United Kingdom or in another Member State of the European Union, registration of a pleasure yacht on the UK Register is the most obvious option. Indeed, if the owner wishes to fly a defaced special ensign denoting membership of a nominated yacht club,[107] or participate in competitive sailing, he or she will almost certainly choose to register under the national flag. As will be apparent from Chapter 3 of this work, a liability for payment of Value Added Tax ("VAT") will arise when an EU resident takes delivery of a new yacht within the EU, or imports one upon which VAT had not been previously paid and reclaimed.[108] In the vast majority of cases, an EU resident yacht owner will have no option but to pay VAT. However, in certain circumstances, an owner may choose to reduce or defer payment of VAT by acquiring the yacht by means of a leasing structure set up in one of the jurisdictions where such schemes are offered and into which jurisdiction the yacht may be required to be registered.[109]

Where a pleasure yacht is owned by a private individual or a corporation based outside the European Union intent on importing the vessel into the EU under the temporary admission scheme without payment of VAT,[110] registration on the UK Register will not be appropriate as such admission is conditional on the yacht's being registered outside the EU. In that situation an owner should consider registration in one of the non-EU Red Ensign Group jurisdictions, or a foreign register such as the Marshall Islands. The future departure of the UK from the EU in March 2019 following the formal notification under Art.50 of the Treaty of the European Union in March 2017 will take away from the Cayman Islands and other non-EU flags the current

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advantage they currently enjoy at the expense of the UK Register.

Commercial yachts. The operation of large commercial yachts under the UK flag, or other flag states within the Red Ensign Group, is subject to compliance with LY3 (the "Code"). The amount of work necessary for a yacht to meet the standards required by the Code should not be underestimated. In some instances it may be impossible to alter the design of a yacht sufficiently to satisfy the requirements. In other cases, the cost of carrying out the conversion work may be prohibitively expensive. For that reason, a prudent yacht owner will consult his classification society and flag state surveyor before deciding on a choice of registry, or indeed before entering into a contract to buy a yacht that does not already comply with LY3, or earlier editions of the Code. While the Code is applicable to vessels registered in the UK and other Red Ensign Group jurisdictions, the manner in which the Code is applied may vary from one jurisdiction to another, as does the manner in which surveys are carried out and certification is issued. The Maritime and Coastguard Agency has surveyors who are specialists in LY3 compliance work, as does the Cayman Islands Shipping Registry, which has surveyors based in their Southampton and Monaco offices, as well as in the Cayman Islands. Other Red Ensign Group jurisdictions may use their own surveyors, or delegate inspection work to a classification society or to the Maritime and Coastguard Agency if they do not have their own surveyors available to undertake inspections. As a result, an owner may choose to register a commercial yacht in one Red Ensign Group registry rather than another, taking into account not only the cost of the modifications required to satisfy the Code, but also the relative costs of initial and subsequent annual LY3 inspections and the availability of flag state or classification society surveyors to undertake the work on an ongoing basis. If it is not economically possible for a yacht to meet the required safety standards, or if the intended crew do not hold the necessary qualifications[111] required by the Code, then an owner may have to consider registering the yacht in an alternative jurisdiction outside the Red Ensign Group. Since the original version of LY3, known as LY1, was first adopted in 1998, an increasing number of foreign flag states have adopted their own codes of practice for commercial yachts that in some instances were modelled on LY1. It is outside the scope of this chapter to

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include an analysis of all possible flagging options.[112] However, it should be noted that the Marshall Islands, Belize and St Vincent and the Grenadines are but three examples of open registers whose jurisdictions have put in place their own commercial yacht codes.

Considerations affecting choice of registry. Whether a yacht is operated as a pleasure yacht, a commercial yacht or a passenger yacht built in accordance with the Passenger Yacht Code, tax considerations, in particular Value Added Tax,[113] will have an important bearing on both the choice of flag and the country in which an owning company should be established. The following list sets out the principle factors that a yacht owner and his professional advisors should take into account when considering a change of flag of a yacht, or comparing one jurisdiction over another:

(a) the current tax status of the yacht;

(b) the intended use of the yacht, private or commercial;

(c) the place of use and place of intended berth or mooring;

(d) the current flag, if any;

(e) the current class and coding status of the yacht;

(f) the nationality, tax status and place(s) of residence of the beneficial owner and immediate family members who may use the yacht;

(g) the beneficial owner's preferred choice of flag, if any;

(h) Paris MOU status of flag state, White List or not;[114]

(i) efficiency and user friendly approach of flag state registry and surveyors;

(j) acceptability to mortgagees of yacht, if any;

(k) acceptability to insurers of yacht;

(l) availability of naval and consular support from flag state in case of emergency;

(m) cost of initial registration and ongoing fees to maintain registration certification of vessel;

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(n) availability of crew with the necessary qualifications to meet flag state requirements.

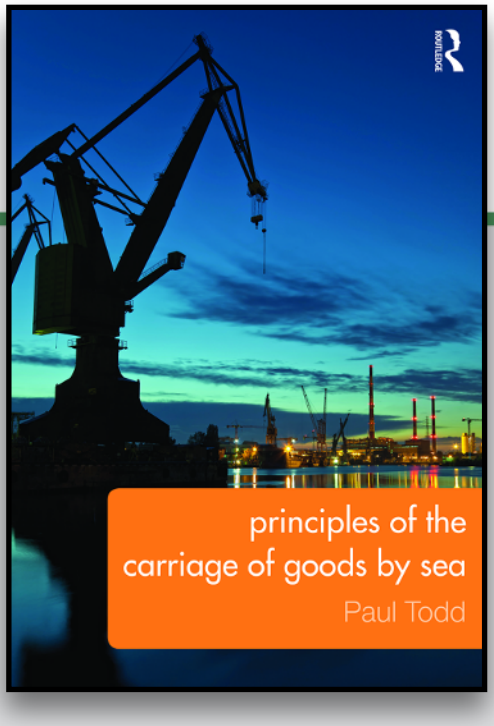
The above list is intended only as a guide. Any decision as to choice of registry of a large yacht should be taken by the yacht owner in consultation with his or her maritime lawyer, tax advisor, yacht manager and any other professional advisor involved with the operation of the yacht.

CHAPTER

3

HAGUE AND HAGUE-VISBY RULES

BY PAUL TODD



This chapter is excerpted from
Principles of the Carriage of Goods by Sea
by Paul Todd.

Learn more

HAGUE AND HAGUE-VISBY RULES

Excerpted from *Principles of the Carriage of Goods by Sea*

Introduction

Whereas charterparties are generally free of regulatory control,[1] that is not true of bills of lading. In fact, either the Hague or the Hague-Visby Rules (which generally protect cargo-owners) apply to almost every bill of lading issue anywhere in the world. A very small number might be governed by the Hamburg Rules,[2] and occasionally the common law applies, but in this last case it is either because of a mistake, or because there is a gap in the coverage of the law.[3]

This chapter covers the Hague and Hague-Visby Rules, but it is not complete coverage, because some parts of the regime are (or have been) more conveniently covered as part of the substantive coverage of an area. Examples are deviation, seaworthiness, privity issues, and misrepresentations in bills of lading.[4] This chapter is best seen as an outline of the backbone and principles of the Rules.

By way of a brief introduction, by about the end of the nineteenth century carriers were able to incorporate wide exceptions into carriage contracts, reducing the value of bills of lading.[5] This was the age of freedom of contract, and carriers must have enjoyed strong bargaining power, but a feature of bills of lading is that they are transferable.[6] Consequently their terms affect third parties, who will generally have had no say in those terms. The value of bills of lading as negotiable documents was being reduced.[7] This was widely thought to justify an international convention, and UK legislation, implementing a pro-cargo-owner regime.

The original Hague Rules were drafted in 1922, and implemented in the UK in 1924 (in the US not until 1936).[8] They were very successful at harmonising the law, probably applying at one time to most of the world's international carriage. They offered essentially fault-based liability, with seaworthiness remaining paramount, but otherwise subject to excepted perils (these being based on the exceptions used in contracts in 1922), and also subject to limitation of liability and a time bar. But carriers were not permitted to lower their liability below that provided by the Rules.[9]

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Excerpted from *Principles of the Carriage of Goods by Sea*

By the 1960s the Hague Rules were becoming dated in some respects (mostly financial), and there were issues with some of the English decisions. The Visby amendments were a response to this, and were evolutionary in nature, by which I mean that they made no radical alterations to the structure. The Visby amendments were agreed as the Brussels Protocol of 1968 and brought into force in the UK by the Carriage of Goods by Sea Act 1971, which came into force (in the UK and internationally, on adoption then by 20 nations) in 1977. The Hague-Visby Rules are set out in the Schedule to the 1971 Act, and are set out in full in Appendix A.

Briefly, the motivations for the Visby amendments were as follows:

(1) Most importantly (probably) from a practical viewpoint, the package limitation was regarded as too low.

(2) The package limitation also did not work well with large undivided bulk cargoes, or with car- goes that were consolidated, for example by being packed into a container.

(3) There was dissatisfaction with the House of Lords decision in The Muncaster Castle, on the due diligence standard for provision of a seaworthy vessel. However, agreement could not be reached on what to do about it, and The Muncaster Castle remains unchanged by the amendments.[10]

(4) There was also dissatisfaction with Midland Silicones Ltd v Scruttons Ltd, considered in the last chapter.[11] I explained that the amendments may not have effected a useful change, but that matters have been to some extent overtaken by the Contract (Rights of Third Parties) Act 1999.

(5) The rule in Grant v Norway, the subject of the next chapter, was altered but not entirely abolished. This has also been overtaken, this time by the Carriage of Goods by Sea Act 1992.[12]

(6) Article X, on the application of the Rules, considered later in this chapter, is new, and was a reaction to the Privy Council decision in Vita Food.[13]

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Even at the time of Visby, there was dissatisfaction with it in some quarters. Excepted perils were seen as too wide, the seaworthiness obligation too narrow, and limits of liability too low. Moreover, Hague-Visby does not deal well with multimodal transport (which creates quite difficult issues). These issues were, to some extent, addressed by the Hamburg Rules, and later by the Rotter- dam Rules, the latter of which were agreed in 2009. Rotterdam goes far further than was necessary, though, and covers a great deal of ground over which there was no general dissatisfaction, and which would be more appropriate in a Maritime Law code. Whether or not for this reason, Rotterdam has not yet been widely adopted, at any rate as a whole.[14]

The chapter will now move on to consider the general scheme of the Rules. We will then consider some problems in detail, as to their application and, finally, criticisms of the regime.

General scheme of the Rules

In this section we deal with the main principles of the Rules, the principles behind Arts. III and IV. Later, we will consider when they apply, and examine aspects of the regime in greater detail.

The Hague-Visby Rules are set out, almost *verbatim*, in the Schedule to the Carriage of Goods by Sea Act 1971, the text of which can be found in Appendix A.

The general principles are that liability should be fault-based (essentially, for lack of care or due diligence). The carrier should not be liable for the excepted perils that are defined in Art. IV, and that are based on the excepted perils that were in use in bills of lading in 1922. There are statutory limitations on damage per unit or package, and time for bringing actions. Beyond that, the carrier is not permitted to reduce the extent of his liability further (Art. III(8)).[15] Cargo-owners therefore gain because they can bring actions where they could not before. On the other hand, exemptions and limitations on carrier liability are also written into the Rules. The Rules can properly be seen as a package. They are not entirely pro-cargo-owner, and

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cargo-owners should not be entitled to take the benefits without the burdens (for example by suing in tort).[16]

Filling out, the common law duties, whose origins as we have seen derive from the law of bailment,[17] are set out in Art. III(1) and (2), the former of which requires the carrier "before and at the beginning of the voyage to exercise due diligence to" make the ship seaworthy. Note that the requirement is one of due diligence only, not the strict liability of the common law.[18] By contrast with Art. III(1), Art. III(2) applies throughout the voyage, requiring the carrier "properly and care- fully [to] load, handle, stow, carry, keep, care for, and discharge the goods carried". Note again that it does not provide for strict liability, nor even the common law bailee liability, requiring the bailee to disprove fault.

Art. IV of the Rules set out the excepted perils (in Art. IV(2)). Art. III(2) is subject to Art. IV, whereas Art. III(1) is not; we will see that Art. III(1) mirrors the common law, in that the seaworthiness obligation remains paramount, in the sense that once loss is shown to have been caused wholly or partly by a breach of Art. III(1), the carrier will be unable to rely on the excepted perils in Art. IV.[19] The Rules provide a floor of rights for cargo-owners, in that carriers are prevented from reducing their obligations below that provided by the Rules. Thus, Art. III(8) provides that any term "lessening [carrier] liability otherwise than as provided in these Rules, shall be null and void and of no effect". Conversely, carriers are free to increase their responsibilities, this being provided by Art. V.[20]

The Visby amendments

By the 1960s the Hague Rules were showing their age, and there was a trio of House of Lords and Privy Council decisions that caused dissatisfaction. In the end, however, Hague-Visby represents only a minor update and clean-up.

The Visby changes in outline

The most important change perhaps was the package limitation (Art. IV(5)).

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Under the original Rules it was £100 sterling, a figure that seemed very low by the 1960s.[21] It is now 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.[22] A point to note, however, now that multi-modal operations are much more common than they were 50 years ago, is that the Hague-Visby weight limit is much lower than for other unimodal conventions.[23] This can lead to obvious problems, where it is not known where the damage has occurred (for example, if the goods are in a sealed container).

Other changes include to the value of statements in bills of lading when the bill has been negotiated (Art. III(4), covered in the next chapter),[24] and to protecting carriers, servants and agents when the action is brought in tort, rather than contract.[25]

There is also Art. X, considered below (a reaction to Vita Food Products Inc v Unus Shipping Co).[26]

I observed earlier that the trigger for the Visby amendment process was The Muncaster Castle,[27] with which there was much dissatisfaction. Ironically, no agreement could be reached, and The Muncaster Castle remains good law, untouched by the Visby amendments.

The Visby amendments attracted widespread, but by no means universal, support, so now both Hague and Hague-Visby are in force, in various parts of the world.

In summary:

Seaworthiness and due diligence were unchanged by the amendments;

Art. IV bis was added, to deal with privity issues;[28]

Art. X was added to deal with the *Vita Food* decision;[29]

Changes were made to the rule in *Grant v Norway*;[30]

The package limitation was changed.[31]

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Evaluation and subsequent history

Hague was a remarkably successful harmonisation of the law, but 90 years on we see fragmentation into two or more regimes.

Hague was based on a model of sea transport in 1922, which is no longer universal today. It is very pro-carrier by today's standards, and applies only to unimodal, rather than multimodal transport.[32]

It has been suggested that Hague-Visby remains too favourable towards carriers (with its wide excepted perils, low liability limits, lack of explicit liability for delay, and seaworthiness only "before and at the beginning of the voyage"), and it remains unsuited to multimodal operations. Criticisms have been levelled primarily at the liner rather than the tramp trade, and hence less at the bulk cargo trade.

Very soon after Hague-Visby, cargo-owning nations proposed the Hamburg Rules, which were adopted by UNCITRAL in 1978.[33] These have achieved limited international success, but have not been adopted in the UK. They favour cargo-owners significantly more than Hague-Visby. More recently we have the Rotterdam Rules, finalised and adopted by an UNCITRAL Convention at the end of 2009.These are not quite so favourable towards cargo-owners, but can extend to multimodal operations. Hamburg and Rotterdam are briefly discussed in chapter 21.[34]

We now consider Hague and Hague-Visby in more detail.

Arts. III(1), III(2) and IV

Central to the operation of the regime are the basic duties of the carrier, and the excepted perils, and this section considers the interplay between these.

Article III(1) provides a seaworthiness obligation, and Art. III(2) other responsibilities caring for the cargo. They need to be considered alongside Art. IV(1), all these provisions being identical in Hague and Hague-Visby. They are set out in full in Appendix A. Article III(1) requires the carrier, before and

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at the beginning of the voyage, to exercise due diligence to make the ship seaworthy.[35] Article III(2) provides:

"Subject to the provisions of Art. IV,[36] the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

The effect of Art. IV(1) is (in summary) to prevent liability arising from unseaworthiness, unless caused by want of due diligence on the part of the carrier. It also provides that the burden of proving the exercise of due diligence shall be on the carrier.

A number of points can quickly be made about these provisions:

(1) The Art. III(1) standard is the exercise of due diligence. This is lower than the common law strict liability, and is part of the package (the provision is not all pro-cargo-owner). Strict liability might be thought inappropriate, given the complexity of modern ships.

(2) Art. IV(1) is the other side of the coin. It precludes liability under Art. III(1), unless there is a want of diligence, and provides for the burden of proving due diligence to be on the carrier.

(3) The Art. III(1) duty operates only "before and at the beginning of the voyage"; this is similar (but as we will see not identical) to the position at common law.[37] Article III(2) is not so limited temporally, and applies up to and including discharge of the goods.

(4) The Art. III(2) standard is to act "properly and carefully". This has been interpreted as meaning acting in accordance with a sound system, "properly" relating to the conception and "care- fully" to the implementation.[38] It is akin to a negligence standard, rather than strict liability.

(5) Article III(2) is, but Art. III(1) is not, made "[subject] to the provisions of Article IV". Article IV(2) sets out the excepted perils.[39] This reflects the common law, to the extent that the seaworthiness obligation is paramount, but Art. III(2) is not paramount, in the same way. By contrast, the duty not to

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be negligent, in the care of the cargo, was treated as a paramount obligation.[40]

(6) The excepted perils mirror those that were commonly used in bills of lading in 1922. Note however Art. IV(2)(q):

"Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

This is consistent with the general fault basis for liability. However, the carrier is not always liable even if at fault, since Art. IV(2)(a) provides as an excepted peril:

"Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

As we will see in chapter 21 of *Principles of the Carriage of Goods by Sea*, Hague and Hague-Visby have come under criticism for their inclusion of this excepted peril, and it does seem to run counter to the general fault-based liability of the regime.

Seaworthiness before and at the beginning of the voyage

Though the seaworthiness obligation mirrors that at common law, at least in applying only at the start of the voyage, in Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd,[41] the Privy Council took the view that under the Hague Rules the obligation was of a continuing nature (up until the vessel sailed), rather than applying only at specified points. The Privy Council did not apply the common law doctrine of stages.[42]

In Maxine, the cargo was damaged by fire, caused by an acetylene torch used to thaw out frozen scupper pipes. The person using the torch was an

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employee of an independent contractor, acting on the authority of the master of the ship, but since the fire was not caused "by the actual fault or privity of the carrier", the carrier attempted to rely on Art. IV(2)(a) and (b) (the bill of lading incorporating the Hague Rules):

"(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

(b) Fire, unless caused by the actual fault or privity of the carrier."

However, the Privy Council took the view that the fire resulted in the vessel becoming unseaworthy (she had to be scuttled, along with the cargo). She certainly became unseaworthy before she sailed, but perhaps not before loading. However, this did not matter, Lord Somervell saying of the doctrine of stages:[43]

"In their Lordships' opinion, 'before and at the beginning of the voyage' means the period from at least the beginning of the loading until the vessel starts on her voyage. The word 'before' cannot, in their opinion, be read as meaning 'at the commencement of the loading'. If this had been intended it would have been said. The question when precisely the period begins does not arise in this case, hence the insertion above of the words 'at least'. On that view the obligation to exercise due diligence to make the ship seaworthy continued over the whole of the period from the beginning of loading until the ship sank. There was a failure to exercise due diligence during that period. As a result the ship became unseaworthy and this unseaworthiness caused the damage to, and loss of, the appellants' goods. The appellants are, therefore, entitled to succeed."

He continued:[44]

"When the warranty was absolute [as at common law] it seems at any rate intelligible to restrict it to certain points of time. It would be surprising if a duty to exercise due diligence ceased as soon as loading began only to reappear later shortly before the beginning of the voyage."

So the case is authority that there is no doctrine of stages under the Hague or

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Hague-Visby regimes, whether or not there is at common law.

Though there was no "actual fault or privity of the carrier", the carrier nonetheless lacked due diligence; this is consistent with the decision in The Muncaster Castle, which we look at below.[45] We will also see below that, because Art. III(1) is paramount, the carrier in breach of Art. III(1) was disentitled from relying on Art. IV.[46]

On the issue of unseaworthiness (but not on the application of the doctrine of stages), Maxine Footwear was distinguished in The Apostolis.[47] The Apostolis also concerned fire on board a ship, but the cargo-owners failed to prove the cause of the fire, and that it had been caused by unseaworthiness (the burden of proof being on them at this stage).[48] But did the fire itself make the ship unseaworthy? The Court of Appeal thought not, in spite of Maxine Footwear. In Maxine the fire was in the fabric of the vessel (the cork lining of the hold). In The Apostolis the court rejected the notion that fire in one cargo might render the ship unseaworthy in respect of another. Unseaworthiness was (in the view of the Court of Appeal) about the state of the ship. If The Apostolis is right then it also impacts on the definition of unseaworthiness, considered in Chapter 5.[49]

As we will see in chapter 21, the Rotterdam Rules, should they ever become part of English law, would alter everything.[50] The seaworthiness obligation in Art. 14 of Rotterdam continues throughout the voyage. The effect of Rotterdam, Art. 17(5) would be to retain the paramount nature of the seaworthiness obligation, so the main effect of this change would probably be to preclude carriers relying on excepted perils, where Art. 14 was breached, even after the start of the voyage.

Paramount obligations

We saw in Chapter 5 how, at common law, the obligation to provide a seaworthy vessel, and not to damage the cargo negligently, are regarded as paramount obligations.[51]

Under the Hague and Hague-Visby Rules, Art. III(2) begins: "Subject to the

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provisions of Article IV, . . ." (Art. IV containing the list of excepted perils). Clearly, therefore, Art. III(2) is not paramount. There are no similar words in Art. III(1), though nor does the Rules explicitly state that if there is a breach of Art. III(1), the carrier cannot rely on Art. IV.

This issue was resolved in Maxine Footwear, where the Privy Council held that Art. III(1) is overriding (this mirrors the common law).[52] In Maxine the vessel was rendered unseaworthy by fire during loading (fire being an excepted peril under Art. IV(2)(b), unless caused with actual fault or privity of the carrier). Because the carriers were in breach of Art. III(1), they were held unable to rely on Art. IV(2). Lord Somervell observed that:[53]

"Article III (1) is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage the immunities of Art. IV (2) cannot be relied on."

We saw in Chapter 5 of *Principles of the Carriage of Goods by Sea* how, when the shipowner is in breach of Art. III(1), he cannot rely on Art. IV(6), the dangerous cargo indemnity.[54] All of this is, of course, consistent with the paramount nature of the Art. III(1) obligation. However a different view has been taken of the relationship between Arts. III(1) and IV(5), the package limitation. The package limitation (Art. IV(5)) applies even if the carrier is in breach of Art. III(1).[55] We will consider the relationship between Art. IV(5) and serious breaches of contract in a later chapter.[56]

By contrast, Art. III(2) (care of the cargo) is expressly subject to Art. IV, and so a breach of Art.III(2) does not preclude the carrier from relying on any of the excepted perils.

Due diligence

Article III(1) is qualified by a due diligence standard. Strict liability would arguably be a very harsh regime, at a time when ships have become sufficiently complex that a shipowner has to contract out maintenance, and trust the contractors. However, in *The Muncaster Castle*[57] the House of Lords held that the carrier could be liable under the Hague Rules for any negligent

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work done on the ship prior to the voyage, including that of contractors whose fault the shipowner could not readily detect. A fitter in a ship repair yard had failed to harden up nuts on some inspection covers, with the result that seawater got into the hold, damaging the cargo of ox-hides. The House held the carrier liable, although he was not personally at fault. In reality the decision was not unexpected and was probably legally uncontroversial; the House simply applied earlier case law.[58] Nonetheless, it was this decision, perhaps above all, that prompted the revision process culminating in the Hague-Visby Rules. It was proposed, for example, that a carrier should be protected who engaged an independent contractor of repute,[59] but agreement could not be reached, and *The Muncaster Castle* was unchanged.

Due diligence involves a weighing up of risks, and very small risks can be ignored. In *The Amstelslot*[60] cargo suffered a general average loss because of a breakdown caused by a failure in the reduction gearing. The issue was whether cracks in the gearbox should have been spotted by surveyors before loading. No doubt there were tests the surveyors could have performed, but did not, which would have led to the discovery of the cracks. But for a gearbox suddenly to crack was most unlikely, and just because more tests could have been performed did not put the owners in lack of due diligence. The fact that the burden of proof was on the carriers did not affect the standard of care.

Burden of proof

We have seen that rules on burden of proof can be important where there is no other evidence. We have also seen that the Hague(-Visby) regime (in Art. IV(1)) qualifies the seaworthiness obligation with a due diligence standard, but then places the burden of proving due diligence on the carrier. In other respects, it does not change the common law, and so one might expect the shifts in the common law burdens of proof to remain otherwise unchanged. However, the interplay between the provisions may lead to changes in practice.

This is essentially what Lloyd J held in *The Hellenic Dolphin*.[61] This is a summary of the way in which he saw the burden of proof shifting:

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(1) Cargo owner proves loss;

(2) Carrier proves peril of the seas (or other Art. IV excepted peril);

(3) Cargo owner proves a breach of Art. III(1) – note that it is no good to show a breach of Art. III(2);

(4) Carrier proves no lack of due diligence (Arts. III(1) and IV(1)).

Lloyd J said in respect of (2) that the "position in that respect is exactly the same whether the Hague Rules are incorporated or not". He also thought that (3) was unaffected: "The cargo-owner can then seek to displace the exception by proving that the vessel was unseaworthy at commencement of the voyage and that the unseaworthiness was the cause of the loss. The burden in relation to seaworthiness does not shift."[62] Lloyd J seemed to take the view that only the last stage (4) had been altered by the Hague(-Visby) regime.[63]

In *The Hellenic Dolphin*, water had undoubtedly entered the ship through a leaking seam, causing damage to the cargo of asbestos. The issue was timing: if the seam was leaking at the commencement of the voyage there was potentially a breach of Art. III(1); otherwise not. The claimants failed to prove that the vessel was unseaworthy before the commencement of the voyage, and the burden of course was on them to do so: "if at the end of the day, having heard all the evidence and drawn all the proper inferences, the Court is left on the razor's edge, the cargo-owner fails on unseaworthiness and the shipowners are left with their defence of perils of the sea". (Even if Lloyd J was wrong about this, the carrier had acted with due diligence.)[64]

That the burden is on the carrier at stage (2), where the carrier claims an excepted peril, is fairly clear, and, for example, the carrier failed to show negligence in navigation and management in The Canadian Highlander.[65] But for stage (2), the carrier is protected if he proves the loss was caused by an Art. IV(2) excepted peril, as Lloyd J observed, but alternatively, he can directly refute the claim that he failed to act properly and carefully under Art. III(2).The burden is not explicitly on the carrier under Art. III(2), but if the

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goods arrive lost or damaged an explanation is called for (*or res ipsa loquitur*: the thing speaks for itself). So the burden is in reality on the carrier at stage (2), whether he seeks to refute Art. III(2) directly, or to rely on an excepted peril defence.

While on the relationship between Arts. III(2) and IV(2), the carrier does not need to show absence of negligence to claim the benefit of an excepted peril, though he must have acted properly and carefully, if he is to defend an Art. III(2) claim directly.[66] For some of the excepted perils, however, proof of the peril and rebuttal of Art. III(2) can amount to the same thing. For example, if the carrier shows that the loss was caused by inherent vice, that will also necessarily negate a breach of Art. III(2).[67] The same would be true of the catchall Art. IV(2)(q) (the general lack of fault exception).

There can also be a link between stages (2) and (3). Indeed, this may well be more common than the situation in *The Hellenic Dolphin*, where it was either perils of the seas or unseaworthiness, stages (2) and (3) being clearly distinct. Where there is a link, the practical effect may be to put the onus on the carrier to disprove unseaworthiness. In *The Torenia*[68] there was incursion of seawater into the ship, and, as in *The Hellenic Dolphin*, the shipowners claimed the protection of Art. IV(2)(c) (perils of the seas). In Hobhouse J's view, they had to show that the only cause was a peril of the seas and, therefore, the onus was on the shipowners to show that unseaworthiness was not also a concurrent cause. In effect, therefore, the burden was on the owners at the seaworthiness stage. By contrast, in *The Hellenic Dolphin*, there was no question of concurrent causes. The cause was either a peril of the seas or unseaworthiness. It was not both. If *The Torenia* is correct, it has significant ramifications where concurrent causes are claimed. Probably *The Torenia* is more likely to represent the normal situation than *The Hellenic Dolphin*.

Art. III(2) and (8)

Any legislation that protects a weaker party against a stronger must also render void contractual terms reducing the liability of the stronger party, since otherwise the stronger party could simply use his superior bargaining

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strength to avoid the regime. To the extent that the Hague Rules are intended to protect cargo-owners as the weaker party, this is the logic of Art. III(8):

"Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. . . ."

We have seen that Art. III(2) requires the carrier properly and carefully to perform the various tasks enumerated therein. Consequently, a contractual term that purported to substitute a lower standard would be void and of no effect – similarly a term purporting to add excepted perils, lower liability limits, and so on, compared with the provision of the Hague(-Visby) regime.

However, the effect of Art. III(8) has been weakened by a line of a line of cases culminating with *The Eems Solar*.[69] As long ago as *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd*,[70] Devlin J had thought that Art. III(2) defines not the scope of the contract service but the terms on which that service is to be performed. Suppose, for example, under the carriage contract the shipowner did not undertake to engage at all in the loading or discharge processes, or perhaps the charterparty placed the responsibility on the charterers, and these terms were incorporated into the bill of lading.[71] It might be thought that this is precisely the sort of term that should be caught by Art. III(8), but it defines the scope of the contract service (to exclude cargo-handling), and, according to Devlin J, is therefore outside the ambit of the provision.

The reason Devlin J had to face the issue was because he held, in *Pyrene v Scindia*, that the Hague Rules covered the entirety of the loading process, both before and after the goods crossed the ship's rail. He therefore had to address the argument:[72] "If 'load' includes both stages, does [Art. III(2)] oblige the shipowner, whether he wants to or not, to undertake the whole of the loading?" His answer:[73]

"The phrase 'shall properly and carefully load' [in Art. III(2)] may mean that the carrier shall load and that he shall do it properly and carefully: or that he shall do whatever

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loading he does properly and carefully. The former interpretation perhaps fits the language more closely, but the latter may be more consistent with the object of the rules."

It was in this context that he took the view set out above. While, clearly, to take the opposite view would have impacted heavily on the operation of FIO clauses in charterparties,[74] the consequence of allowing carriers to determine the extent of the contract service might be to allow them an easy way out of the Rules.

Devlin J's views were affirmed by a majority of their Lordships *in G.H. Renton & Co Ltd v Palmyra Trading Corp of Panama*.[75] The issue was whether a clause in the bill of lading:

"should it appear that . . . strikes . . . would prevent the vessel from . . . entering the port of discharge or there discharging in the usual manner and leaving again . . . safely and without delay, the master may discharge the cargo at port of loading or any other safe and convenient port . . .".

allowed the shipowner to discharge in Hamburg when London was strike-bound. One issue was whether the clause was struck down by Art. III(8), but the majority view (Lords Morton of Henryton, Cohen, and Somervell of Harrow) was that Devlin J had been right, and that a clause merely defining the scope of the contract did not come within Art. III(8). (Viscount Kilmuir LC and Lord Tucker reached the same result, but only on the basis that the obligation in Art. III(2) "properly to carry and discharge the goods carried" had no geographical significance; in other words it did not require discharge in any particular place.)

The correctness of *Renton v Palmyra*, and its rationale, came again before the House of Lords in *The Jordan II*,[76] which categorically reaffirmed the majority view in the earlier case. The issue there was precisely whether any agreement purporting to transfer responsibility for loading, stowage and discharge from the carrier to the shippers, charterers and consignees was invalid under the Hague Rules. The House held that, if the carrier performs the stowage

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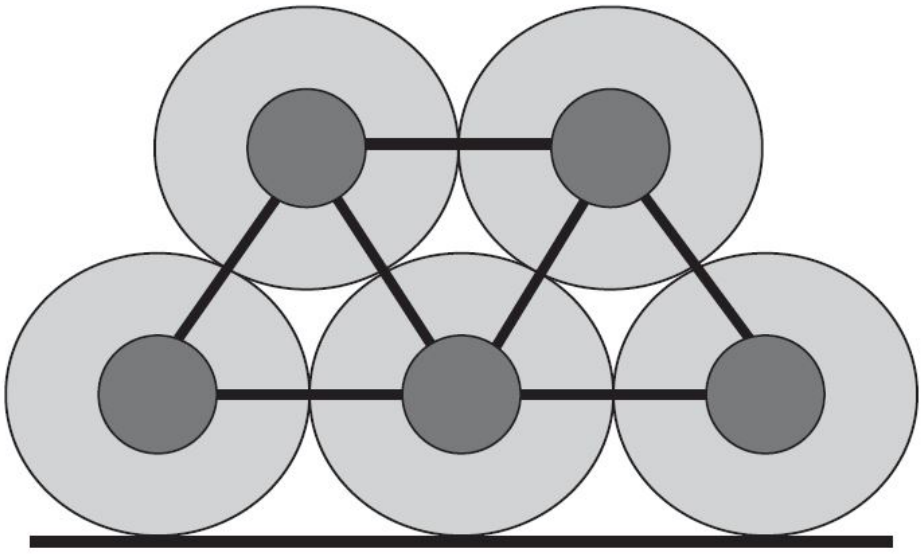
operation, he must do it properly and carefully, but there is no reason why the Rules should not leave the parties free to determine by their own contract the part that each has to play, whether, in other words, the ship- owner undertakes stowage at all. The correctness of the majority view in *Renton* was the main issue in *The Jordan II*.

Renton and *The Jordan II* were (of course) followed at first instance in *The Eems Solar*.[77] The case concerned a cargo of steel sheets that had shifted and been damaged in bad weather, because they were not properly constrained by locking coils (which should look something like this – they are intended to prevent the rolls from moving):

Locking coils in bold



The cause was held to be bad stowage and not unseaworthiness, and a term in the charterparty (incorporated into the bill of lading by general words of incorporation) relieved the shipowner of stowage obligations.[78] The bill of lading holders attempted, without success, to advance an argument based on Art. III(8). There was, however, an additional argument in *The Eems Solar*. In *Pyrene v Scindia* itself, Devlin J had made the point that the "carrier is practically bound to play some part in the loading and discharging",[79] and

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Lord Wright observed in *Court Line Ltd v Canadian Transport Co Ltd* "that to the extent that the master exercises supervision and limits the charterers' control of the stowage, the charterers' liability will be limited in a corresponding degree".[80] In *The Eems Solar*, Jervis Kay QC (Admiralty Registrar) thought that, had the stowage plan made by the master and the mate (which failed to provide for the necessary locking coils to be placed on three rows of cargo) been relied on by the stevedores, the shipowners would not have been able to avoid liability for bad stowage. In reality, however, there "is no evidence that the stevedores paid any attention to the stowage plan provided or that they felt obliged to follow it or that their own responsibilities for proper stowage were inhibited".[81] Consequently, the position was covered by *The Jordan II*, and there was no liability.

There is the issue to which of the carrier's obligations these principles apply. Is it just stowage? Lord Steyn in *The Jordan II* observed that in *Pyrene,* "Devlin J certainly did not suggest that the owner may by agreement under [Art. III(2)], transfer responsibility for caring for the cargo during the voyage."[82] *Renton* is less guarded however, Lord Morton observing that Art. III(2) "does not place any obligation on the carrier to transport the goods at all, unless the contract says he is to transport them".[83]

Under the Rotterdam Rules, should they ever become part of UK law, Art. 13(2) would explicitly allow Art. 13(1) (the Rotterdam equivalent of Art. III(2) of Hague or Hague-Visby) to be qualified, providing that: "the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee". The carrier is then relieved of liability under Art. 17(3)(i). There is, however, no more general provision in Rotterdam, just the provisions to do with cargo-handling.[84]

Package limitation

One of the motivations for the Visby amendments was to raise the package limitation, the original £100 limit looking rather low by the 1960s.[85] There were also problems in applying the package to bulk cargoes, or to cargoes

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that were consolidated, for example, into containers. So, the current Art. IV(5) provides:[86]

"(a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

. . ."

Thus it can be seen that, for cargo that is above a third of a tonne in weight, the weight limitation will be higher, Art. IV(5) thereby making provision for bulk cargoes.

The units of account in Art. IV(5)(a), defined as IMF special drawing rights (SDRs) in Art. IV(5)(d), though protected against currency fluctuation, are not inflation-proofed (unlike the gold units under Hague-Visby as originally implemented).[87] The value of course varies, but an approximate figure would be £500 per package. We should also observe Art. IV(5)(e), providing for breaking of the limits for intentional or reckless damage.

The Visby amendments were intended to improve the position of cargo-owners, but the cases now suggest that, in some respects, the Hague Rules were actually better.

Amount

Undoubtedly the Visby amendments were intended to improve the position of cargo-owners, but SDRs are not protected against inflation (indeed, their value has already been significantly eroded since Hague-Visby was adopted internationally). It is interesting to compare the position under the original Hague Rules, which in some respects are considerably better for cargo-owners than Hague-Visby.[88]

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We start with *The Rosa S*,[89] where the bill of lading simply incorporated the Hague Rules by par-amount clause. We should observe that, though there was an English law and jurisdiction clause, the case concerned a shipment from Italy to Kenya, which does not trigger the compulsory application of Hague-Visby.[90] The £100 limit was interpreted as meaning £100, tied into the sterling gold value in 1924, in other words, the value of gold that could have been purchased with £100 then. This is much higher than the non-inflation-proofed Visby package, and indeed was £6,491.25, even in 1989! *The Rosa S* is an interpretation of Art. IX of the unamended Rules:

"The monetary units mentioned in this Convention are to be taken to be gold value.

Those contracting States in which the pound sterling is not a monetary unit reserve to themselves the right of translating the sums indicated in this Convention in terms of pound sterling into terms of their own monetary system in round figures.

. . ."

The court simply interpreted this provision at face value, being unimpressed by arguments advanced to cut down its scope.[91] *The Rosa S* interpretation would not, however, apply to all implementations of Hague. For example, the limit in US COGSA 1936 is clearly $500, and there is no question of it being tied into a gold value.[92] Where the Hague Rules are incorporated by paramount clause, Art. IX (the gold clause) might be excluded.[93]

Containers

In order to deal with containers, Art. IV(5)(c) of Hague-Visby provides:

"(c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit."

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For containers, then, the container itself is not the package, as long as the number of packages are enumerated in the bill of lading. This is probably a compromise, enumeration allowing the shipowner accurately to be able to calculate his maximum liability, useful of course for insurance purposes.

This is another respect in which the original Hague Rules may be more generous. *In The River Gurara*,[94] action was brought by the cargo-owners, after ship and cargo were lost. This was another case where the Hague and not the Hague-Visby Rules were applicable (West African ports of loading, and Hague Rules incorporated in accordance with the law of the places of shipment).[95] The bills of lading also stated, in cl. 9(B):

". . . notwithstanding any provision of law to the contrary the Container shall be considered a package or unit even though it has been used to consolidate the Goods, the number of packages or units constituting which have been enumerated on the face hereof as having been packed therein by . . . the Merchant and the liability of the Carrier . . . shall be calculated accordingly."

In other words, they provided for the container to be the package, and the limit therefore to be correspondingly lower. The bills of lading also stated that each container was "said to contain" a number of packages. The cargo-owners successfully claimed cl. 9 of the bill of lading to be void under Art. III(8) of the Hague Rules (a provision that is identical to its counterpart in Hague-Visby).[96] At first instance,[97] Colman J thought that Hague Rules should be interpreted similarly to Hague-Visby, and that "said to contain" did not negate enumeration for liability limit purposes (a point that, if correct, is therefore of importance for Hague-Visby as well).The Court of Appeal went further, with Phillips LJ (with whom Mummery LJ agreed) taking the view that the units inside, not the containers, were the packages, *whether enumerated or not*. The *travaux* were referred to,[98] and also the object of Rules and their interpretation in other countries, none of which, in Phillips LJ's view, supported the shipowner's argument that he must be able to verify his liability (the point being, of course, that he does not know the number of packages). Moreover, Phillips LJ was unwilling to allow the shipowner effectively to contract out of liability by inserting "said to contain" into the

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bills of lading. If Phillips LJ's view is correct, then the original Hague Rules are also more favourable to cargo-owners (on enumeration) than their Visby successors.

Other container issues

Containers are often carried multimodally, and often under documents other than bills of lading. The problems to which this gives rise are considered later.[99]

Application of the Hague-Visby Rules

Now that we have examined the general principles of Hague and Hague-Visby, we need to consider when they apply. There are three aspects to this enquiry:

Article X (this provision, which is only in the Visby amendments, is a reaction to gaps in cover- age in the original Hague Rules);

temporal application; and

documentary requirements.

Trigger for application: Art. X

We should remind ourselves that international conventions have no force, whether the UK signs them or not, unless they are enacted into law UK. The Hague Rules were brought into force by the Carriage of Goods by Sea Act 1924 (COGSA 1924), Hague-Visby by the Carriage of Goods by Sea Act 1971 (COGSA 1971). In each case the Schedule sets out the Convention, and the (short) main part of the Act sets out implementation provisions.[100]

Article X of Hague-Visby was a reaction to gaps in the original Hague coverage, so we need to start with the position under COGSA 1924.This

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applied to bills of lading issued in Great Britain and Northern Ireland, and (hence) outward voyages from Great Britain and Northern Ireland.[101] Similar provision was made in the legislation in other contracting states, the idea being that the Hague Rules would thereby apply to outward voyages from all contracting states.

Unfortunately, this legislative technique did not work in all circumstances. Section 1 of the 1924 Act (which brought into effect the original Hague Rules in Great Britain and Northern Ireland) provided that:[102]

". . . the Rules shall have effect in relation to and in connection with the carriage of goods by sea in ships from any port in Great Britain or Northern Ireland to any other port whether in or outside Great Britain or Northern Ireland".

Section 3 of the 1924 Act provided:

"Every bill of lading or similar document of title issued in Great Britain or Northern Ireland which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Act."

Note that this covers outward voyages only (but there would have been similar provision in all contracting states, and the idea, therefore, was obviously to apply the Rules to outward voyages from all contracting states). However, the Vita Food case tells us that there was a gap in the coverage.[103]

In *Vita Food Products Inc v Unus Shipping Co Ltd*, the carriage was from Newfoundland to New York, on the Hurry On, a vessel that was registered in Nova Scotia. Newfoundland was a Hague Rules signatory, and had enacted legislation similar to our own COGSA 1924.[104] Consequently, the bill of lading should have contained a statement that the Rules were to apply. An old bill of lading was accidentally used, which did not contain the required statement. This would not have mattered, had the bill of lading been governed by Newfoundland law, but it was made expressly subject to English law. English law also, of course, applied the Hague Rules, but only for bills of lading issued

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in Great Britain or Northern Ireland, and hence outward voyages from Great Britain or Northern Ireland, not to outward voyages from Newfoundland. The Privy Council (to which the case came from the Supreme Court of Nova Scotia) held that the English choice of law clause was valid, despite there being no connection between the carriage contract and England; the only requirement was that the intention expressed was *bona fide* and legal, and that there was no reason for avoiding the choice on the ground of public policy. Since English law did not apply the Hague Rules to an outward voyage from Newfoundland, it followed the Hague Rules did not apply.

In the event this made no difference to the decision. The cargo of herring was damaged when the ship grounded in a gale, and the carrier wished to rely on an exception. He could rely on either the Hague Rules negligence in navigation excepted peril, or on an express clause in the bills of lading, exempting him from liability for negligence of servants. Though he failed on the Hague Rules, he was able to rely on the clause in the bill of lading, the Privy Council having also held that the carriage contract was not illegal.

The conclusion in *Vita Food* seemed absurd. Here was a carriage from a contracting state, where the bill of lading was governed by the law of a contracting state, yet the Rules did not apply. The problem in *Vita Food* arose because old bills of lading were used by mistake. This was certainly not a case where the carrier was attempting to avoid the application of the Rules; indeed he argued for their application, but the decision opened up the possibility of deliberate evasion. Thus, Colinvaux observed:[105]

"The fact is that a carrier, provided he makes his bill of lading subject to English law, may con- tract on what terms he pleases, in the case of shipments to the United Kingdom. This loophole has been of assistance to shipowners importing fruit and other perishable cargoes, particularly from the Mediterranean, and it might be a matter for consideration whether carriers of such cargoes should not be entitled to contract on special terms."

The current Art. X is a reaction to *Vita Food*. During the amendment process, a proposal to apply the Rules to inward voyages was not adopted,[106] but Art. X compulsorily applies the Rules (which under the implementation provisions

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are given the "force of law")[107] where:

"(a) the bill of lading is issued in a contracting State, or

(b) the carriage is from a port in a contracting State, or

(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract

. . ."

In other words, the Hague-Visby Rules (by Art. X) apply compulsorily to bill of lading contracts, not only where shipment is from the UK (or the bill of lading issued in the UK), but also where it is from other contracting states (or the bill of lading issued there). Article X(c) was intended to cover proper law clauses choosing the law of a contracting state. The *Vita Food* scenario is therefore comprehensively covered by Art. X, and had the Hague Rules had Art. X, each of the sub-provisions would have applied. As we will see, however, there are still gaps, reminiscent of *Vita Food*, even under the Hague-Visby regime.[108]

It became clear that the legislative changes were generally effective in *The Hollandia*.[109] There the House of Lords held that Art. X creates a mandatory rule, which cannot be avoided by (in that case) a choice of law and forum clause. The case concerned an outward voyage from Scotland, and the House held that Art. X applied Hague-Visby, whatever forum was chosen (in this case Amsterdam, which would have applied the lower limits of the Hague Rules).[110]

The action came to the English courts because of the arrest of *Hollandia*, and the shipowner applied for a stay, on the basis of the jurisdiction clause. The application failed because the Amsterdam court would apply lower Hague Rules limits, and the jurisdiction clause was rendered void by Art. III(8) of Hague-Visby. One issue in *The Hollandia* was whether Art. III(8) could be triggered by a procedural clause, such as choice of forum, which did not *ex facie* deal with liability at all. Moreover, it is not possible to tell in advance of litigation whether a choice of forum clause will trigger Art. III(8), since it will depend on the dispute. Lord Diplock said that:[111]

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". . . the time at which to ascertain whether a choice of forum clause will have an effect that is proscribed by Art. III(8) should be when . . . the carrier seeks to bring the clause into operation and to rely upon it . . .".

The carriers in *The Benarty* also claimed the benefit of an exclusive jurisdiction clause,[112] this time for Indonesia, in respect of a voyage from London, when Indonesia applied the Hague Rules. However, during the proceedings (after the writ was issued), the carriers disclaimed any reliance on the Hague Rules at all, and indeed undertook not to use a package limit below that provided by Hague-Visby. They were intending to rely on a tonnage limit, but their ability to invoke the tonnage limit was expressly preserved by Art. VIII of Hague-Visby. The Court of Appeal held the carrier entitled to rely on the Indonesian choice of forum clause, *The Hollandia* being distinguished. Given their disclaimer, this is entirely consistent with Lord Diplock's statement on timing, set out above.

Limits to Art. X

Article X does, however, depend on the concept of the contracting state. In *The MSC Amsterdam*,[113] the bill of lading was issued in South Africa. Though South Africa had enacted domestic legislation giving effect to the Hague-Visby Rules, it was not a signatory state. Had the bill of lading been governed by the law of South Africa, there is no doubt that Hague-Visby would have applied, but it was subject to English law, and incorporated the original Hague Rules (not Hague-Visby) by paramount clause. The particular implementation of Hague would have led to a package limit of £1,800 for 18 containers, whereas the Visby limits (based on weight) were significantly higher.[114] The Court of Appeal, however, held that neither Art. X(a) or (b) applied (as clearly they do not, on a literal interpretation), and that Art. X(c) was circular: English law would apply the Hague-Visby Rules if English law would apply the Hague-Visby Rules. Hence the limit was that of Hague not Hague-Visby.[115]

The decision is in many respects reminiscent of *Vita Food*. England and South

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Africa apply Hague-Visby; the bill of lading was issued in South Africa and subject to English law, yet Hague-Visby did not apply. Had it not been incorporated by paramount clause, even Hague would not have applied, since there was no compulsory regime. Of course, the practical implications of this aspect of *The MSC Amsterdam* are limited to those states that have enacted HVR but are not contracting states. There are not many, but there are some.[116] The case therefore demonstrates a potential problem with the present drafting of Art. X.

The lower limit did not avail the carrier in the end, since, as we will see in the next section, he could not rely on it in any event.

Temporal application of Hague and Hague-Visby

Another issue in *The MSC Amsterdam*[117] was when coverage starts and stops under the Rules. This was first considered in *Pyrene Co Ld v Scindia Navigation Co Ld*.[118] The cargo (a fire engine) was damaged (by being dropped) during loading, before crossing the ship's rail, and the carrier wished to rely on the Hague Rules package limitation.[119] Devlin J, interpreting Art. 1(e), concluded that it included the loading and discharge process:

"(e) 'Carriage of goods' covers the period from the time when the goods are loaded to the time they are discharged from the ship."

Thus the Hague Rules applied to the time in question. The cargo-owners (FOB sellers of the goods) argued that they were a ship's rail to ship's rail provision. Rejecting this contention, Devlin J said:[120]

"In my judgment this argument is fallacious, the cause of the fallacy perhaps lying in the sup- position inherent in it that the rights and liabilities under the rules attach to a period of time. I think that they attach to a contract or part of a contract. . . . Even if 'carriage of goods by sea' were given by definition the most restricted meaning possible, for example, the period of the voyage, the loading of the goods (by which I mean the whole operation of loading in both its stages and whichever side of the ship's rail) would still relate to the carriage on the voyage and so be within the 'contract of carriage'."

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Later in his judgment he famously commented that:[121]

"Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail."

So the whole of the loading process is covered. In *Volcafe Ltd v Compania Sud Americana deVapores SA*,[122] the Hague Rules were incorporated (by paramount clause) into a multimodal contract under which the carrier undertook responsibility for the whole of the intermodal transport. Terms were LCL/FCL,[123] which meant that the containers were provided and "stuffed" by the carrier but "unstuffed" by the consignee after arrival at their destination. David Donaldson QC applied *Pyrene v Scindia*, holding that the Rules applied to the stuffing. He observed that "the parties are free to agree on what for the purpose of Art. I(e) constitutes loading . . .", and that "[where], as here, the obligation to stuff its own containers is assumed by the carrier, I . . . have little difficulty in interpreting the contract of carriage as including that as part of the loading".[124] He also observed, however, that, unlike *Pyrene v Scindia*, there was no damage caused during the stuffing process as such, but that poor stuffing led to later damage (by condensation):"The breach alleged is thus of a duty at the heart of the carriage."[125]

At the other end of the operation, it may be presumed that the whole of the discharge process is also covered. But container cargoes in particular are often stored after discharge, before being delivered. Post-discharge breaches were considered in *The MSC Amsterdam*;[126] they are generally outside the regime, though the courts will readily accept extension of the regime by contract to cover this period.

The MSC Amsterdam concerned a misdelivery of cargo from a container depot, after it had been discharged from the ship, the issue being whether the shipowner could limit his liability in respect of the misdelivery. As well as Art. I(e), the Court of Appeal also had regard to Art. II:

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"Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth."

It referred to Art. III(2):[127]

". . . the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried".

In each case the words used are "discharge", not "deliver", and on this basis the Court of Appeal concluded that the regime was intended to run only as far as discharge.

There are contrary arguments. Devlin J had observed *in Pyrene v Scindia Navigation* that some obligations, for example, that under Art. III(1),[128] to use due diligence to make the ship seaworthy and man and equip her properly "are independent of time". It is also true that the time bar in Art. III(6) refers expressly to *delivery*, not *discharge*. However, these arguments did not persuade the Court of Appeal in respect of the package limitation in Art. IV(5).

Suppose, then, that as in *The MSC Amsterdam*, the Hague(-Visby) regime does not apply. During the post-discharge period, however, common law bailment and conversion obligations continue, and indeed the misdelivering shipowners were held liable for conversion in *The MSC Amsterdam* itself.[129] If the Rules do not apply, a consequence will be that the carrier will be unable to rely on the package limitation, again as in *The MSC Amsterdam* itself. However, a continuation on Hague(-Visby) terms will easily be implied.[130] It was not in the case itself, because of another clause in the contract purporting expressly to exclude liability. Though it failed because it was not sufficiently visible,[131] its mere presence precluded an argument that the shipowner intended to contract on Hague Rules terms. Ironically, the shipowner would have been better off not including the exemption clause at all!

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Need for document of title

The Hague-Visby Rules were brought into force in the UK by the Carriage of Goods by Sea Act 1971, s. 1(4) of which provides:[132]

"(4) Subject to subsection (6) below, nothing in this section shall be taken as applying anything in the Rules to any contract for the carriage of goods by sea, unless the contract expressly or by implication provides for the issue of a bill of lading or any similar document of title."

The Rules themselves are set out in the Schedule to the Act, and we also need to note Art. I(b):

"(b) 'Contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same."

`As explained in chapter 14, in *The Rafaela S* the House of Lords held that "a bill of lading or any similar document of title" included a straight bill of lading. However, a waybill is not covered, making it necessary to find tests for distinguishing between the two types of document.[133]

We have seen that Hague(-Visby) was never intended to have any application to charterparties, and indeed Art. V provides that:

". . . [the] provisions of these Rules shall not be applicable to charter-parties, but if bills of lading are issued in the case of a ship under a charter-party they shall comply with the terms of these Rules. . . ."

It is argued that the rationales for the Rules do not apply to charterparties, since there is no issue about protection of third parties, as with bills of lading.[134] However, it can also argued that this is not a good reason today for

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limiting application to bills of lading and other documents of title. Third parties could have been provided for directly, rather than relying on the document of title trigger. This is more of an issue today, with the proliferation of documentation, than it was when Hague was originally agreed in 1922.

Bill of lading not yet issued

A consequence of the damage in *Pyrene v Scindia Navigation* occurring when it did was that the goods were never loaded, and no bill of lading was ever issued. Nor was a bill of lading ever issued in *The Happy Ranger*,[135] again because the damage occurred earlier. However, the wording of Art. 1(b) is "contracts of carriage *covered by* a bill of lading or any similar document of title", and as Tuckey LJ observed in the latter case:[136] "Provided it was contemplated that a bill of lading would be issued which would contain the terms of the contract it was covered by a bill. "The contemplation, rather than the issue of the bill, is therefore what is crucial, and so it does not matter that no bill of lading is eventually issued.

No bill of lading issued

What if there is no intention to issue a bill of lading at all? We have already seen that COGSA 1971, s. 1(4) requires a document of title,[137] but it is subject to s. 1(6):

"(6) Without prejudice to Article X (c) of the Rules, the Rules shall have the force of law in relation to-

(a) any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract, and

(b) any receipt which is a non-negotiable document marked as such if the contract contained in or evidenced by it is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading,

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but subject, where paragraph (b) applies, to any necessary modifications and in particular with the omission in Article III of the Rules of the second sentence of paragraph 4 and of paragraph 7."[138]

Thus, in principle at least, non-negotiable documentation can be included.

These provisions have been considered twice, in *The Vechscroon* and in *The European Enterprise*.[139] The issue has been what exactly is required to trigger s. 1(6)(b)? In *TheVechscroon*,[140] Lloyd J refused to distinguish between a document that said "this non-negotiable receipt shall be governed by the Hague-Visby Rules" and a document that said "this non-negotiable receipt shall be governed by the Hague-Visby Rules as if it were a bill of lading". He therefore applied the Rules to a document containing the former wording. *The Vechscroon* was not followed in *The European Enterprise*. There, the document (a consignment note) did not expressly provide that "the Rules are to govern the contract as if the receipt were a bill of lading", and Steyn J held that the words used: "as if the receipt were a bill of lading", did not suffice. On one view this is simply a very literal interpretation of a statute, but, even on a strict interpretation, s. 1(6) allows carriers easily to avoid the Hague-Visby Rules, in trades where a non-negotiable document could reasonably be used. Indeed, Steyn J observed that:[141]

"It follows that shipowners, if they are in a strong enough bargaining position, can escape the application of the rules by issuing a notice to shippers that no bills of lading will be issued by them in a particular trade. Subject to the limited restriction introduced by the Unfair Contract Terms Act, 1977 in favour of carriage for consumers . . ., the position is that freedom of con- tract prevails. Section 1(6)(b) can only be activated by contracting into the statutory regime in the appropriate contractual form."

If the rationale for the Rules is to protect weaker parties then this is obviously a problem. If it is to protect third parties it is probably not, since documents of this type are less likely to be used where the goods are resold (though of course, the original consignee can be affected by a contract that

has been negotiated by the shipper).

Deck cargo and live animals

Article I(c) of Hague-Visby provides:

"(c) 'Goods' includes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried."

However, COGSA 71, s. 1(7) provides:

"(7) If and so far as the contract contained in or evidenced by a bill of lading or receipt within paragraph (a) or (b) of subsection (6) above applies to deck cargo or live animals, the Rules as given the force of law by that subsection shall have effect as if Article I(c) did not exclude deck cargo and live animals.

In this subsection 'deck cargo' means cargo which by the contract of carriage is stated as being carried on deck and is so carried."

In the UK at least, therefore, deck cargo and live animals can fall within the Hague-Visby Rules.

Interpretation of Rules

The Hague-Visby Rules, like the Hague Rules before them, are brought into force by an English statute. It would be possible to interpret them just like any other English statute, and, for example, in The Canadian Highlander, Lord Hailsham said of negligence in navigation or management of the ship, interpreting Art. IV(2)(a):[142]

"I am unable to find any reason for supposing that the words as used by the Legislature in the Act of 1924 have any different meaning from that which has been judicially assigned

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to them when used in contracts for the carriage of goods by sea before that date . . . ."

He then proceeded to analyse the pre-1924 English case law. This might be acceptable for an excepted peril that reflected English bills of lading that had been in use prior to 1924, but part of the justification for the Rules was to harmonise the law throughout the world. The question is how far an English statute can be interpreted to achieve this objective.

Stag Line v Foscolo, Mango & Co differs from *The Canadian Highlander* in that it is concerned not with a commonly-used bill of lading exception, but with a longstanding principle of English law. The case involved a deviation to drop off engineers,[143] and one of the issues was whether this was a reasonable deviation within Art. IV(4) of the Hague Rules. By the time of the case there was, of course, a body of English law on permitted deviation, but the House of Lords took the view that COGSA 1924 (implementing Hague) should not be assumed to be simply a codification provision, and that the old common law deviation authorities were irrelevant. Courts should look at plain language rather than adopt the construction of earlier English courts; international uniformity was important, and the Act should be construed by reference to "broad principles of general acceptation" appropriate to the international mercantile subject matter.[144] Even on that interpretation, the deviation was held not reasonable, and consequently the carrier was unable to rely on the perils of the seas excepted peril. Promotion of international conformity implies a purposive rather than a literalist approach, and this has been confirmed by later decisions of the House of Lords.[145]

Stag Line was silent on the issue whether it was permissible to take account of the published *travaux préparatoires,* explaining the reasons for the provisions forming part of the Rules.[146] Had the Rules come into force later, the Vienna Convention on Treaties 1969, Art. 31(1) would have provided that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", and Art. 32 allows "the preparatory work of the treaty" to be taken into account to resolve ambiguities. The Vienna

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Convention came into force only after 1977, however, so cannot assist in the interpretation of the Hague or Hague-Visby Rules.

No doubt the use of *travaux préparatoires* may tend to promote uniformity of approach, but purposive interpretations raise constitutional issues in the UK, arguably allowing the courts too much influence over what should be matters for Parliament. Aside from the Vienna Convention, therefore, their use is only allowed in UK law to resolve ambiguity.[147] The limits on the cautious use of *travaux* were set out by Lord Wilberforce in *Fothergill v Monarch Airlines Limited*:[148]

"first, . . . the material involved is public and accessible; secondly, . . . it clearly and indisputably points to a definite legislative intention . . .".

In *Fothergill* itself, the House would have allowed their cautious use in the interpretation of the Warsaw Convention (on air carriage), but in the event they were unnecessary; the language alone resolved the issue, on a purposive construction.

Travaux préparatoires have been referred to in UK cases, but have usually been found to be unhelpful, and have rarely been decisive. For example, they were referred to in *The Rafaela S*, but found unhelpful, principally because the issue to be resolved had not been considered in 1922, and hence the *travaux* were silent.[149] Given that international conventions are nearly always borne of compromise, one might also suppose that *travaux* would not point to a definite legislative intention, where a Convention is a compromise of conflicting views (as indeed was the case with Hague).

The *travaux* were referred to in *The Captain Gregos* (on the application of the Hague-Visby Rules time bar, but were of limited help, discussing a different issue).[150] They were referred to in *The River Gurara*,[151] where the Court of Appeal differed from the international law consensus (which the *travaux* did not support). In other words, the *travaux* and the international consensus were not at one, and so neither can be said decisively to have influenced the court. In *J.J. Silber Ltd v Islander Trucking Ltd*,[152] Mustill J observed that "the foreign cases do not establish any coherent body of authority". In summary, it is

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difficult to find cases, at any rate in this area of law, where either the *travaux* or the international consensus have been decisive.

There are also problems about what to do with foreign precedents, which may be summarised as follows:

Can UK courts understand them?

Do they speak with one voice?

Are they consistent with *travaux*?

Different ideas of precedent.

Do we allow bad foreign decisions to govern our law, just because first in time?

The idea of achieving international conformity is very attractive, but difficulties lie in the way of achieving it, and it cannot be said that the issues have been properly resolved.

Incorporation into charterparties

The problems of incorporating into charterparties rules intended for bills of lading (and definitely not for charterparties) are the converse of those considered at the end of chapter 15.[153] However, we saw there that in *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd*[154] the House of Lords was prepared to manipulate the words to fit their new context. In that case, the US Hague Rules were incorporated by paramount clause. The House was also prepared to delete any part of the provision that was "insensible", such as s. 5 of US COGSA 1936, which (mirroring Art.V) provides, "The provisions of the Act shall not be applicable to charterparties." In effect, the courts will strive to make Hague or Hague-Visby work, in a charterparty context.

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One difficulty is in determining how the time bar in Art. III(6), which provides that the carrier and the ship shall be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered, operates where the charterer complains of continuing breaches of the charterparty, which prevent the cargo being loaded on board the vessel. In *The Marinor*[155] Colman J saw no reason in principle why the protection provided to the shipowners by Art. III(6) should not apply in such cases, provided that it was possible to identify a date when goods sufficiently relevant to the claim were delivered or should have been delivered. The charterers had claimed market losses caused by delays in shipping cargoes of sulphuric acid, which were eventually shipped on board other vessels, and the shipowners successfully claimed the benefit of the time bar.

Summary and conclusions

On one level, the Hague Rules were an astonishingly successful harmonisation initiative, and the Hague-Visby Rules have been widely used, in both bills of lading and charterparties, for almost 40 years. However, the Visby amendments do not by any means solve all the problems of carriage under bills of lading; privity, the package limitation, and the due diligence requirement for the sea- worthiness obligation, have all be argued as unsatisfactory. They are also arguably dated, being unduly favourable to carriers (both in terms of the package limits and the excepted perils), and being unsuited to multimodal transport. We consider criticisms, and possible ways forward, in chapter 21. I suggest, however, that Hague and Hague-Visby will be around for a time yet.

Questions

Question 1

Alan's cargo of sugar reaches the end of the voyage, and is discovered to be damaged by seawater. The sugar was on board a vessel chartered from

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Yvonne for the voyage, the charterparty incorporating the Hague-Visby Rules. The vessel is old, and the welding of some of the hull plates has failed, allowing seawater to get into the cargo holds. Heavy weather has been encountered on the voyage, and it is not known if the plates were still holding when the vessel sailed.

Advise Alan as to any claim he may have against Yvonne, what will need to be shown and on which party the burden of proof will lie.

Comment

An easy question based on *The Hellenic Dolphin*,[156] but remember that most real-life fact situations will be more complex than the issues in that case.[157]

Question 2

Are there any circumstances where the Hague Rules are more onerous on carriers than the later Hague-Visby Rules?

Comment

Hague-Visby was meant to offer more protection to cargo-owners, but have a look at section [18.5].

Question 3

A B/L incorporates the Hague Rules with the exception of Art. IX, and there is a clause that a container is to constitute one package. What, if anything, is the effect of Art. III(8), and what is the package limitation? Would your view be different if it said "whether enumerated or not"?

Comment

The Art. IX point is the same as in The MSC Amsterdam,[158] and there seems to be no question of Art. III(8) applying, where only part of the Hague Rules are incorporated in the first place. There was also a clause in *The MSC Amsterdam* that a container is to constitute one package. There is no decision in the case

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on whether this was valid, or would have been caught by Art. III(8) (had the Hague Rules ultimately applied).[159] The alternative part ("whether enumerated or not") is on all fours with *The River Gurara*.[160] Whether the original container clause in the problem is caught by Art. III(8) might depend on whether Phillips or Hirst LJJ's view, or on the need for enumeration in *The River Gurara*, is correct. If Phillips LJ is correct, then that clause should surely be rendered void also.

Question 4

The Cargoworthy is chartered on terms that state that the charterers shall load and stow the cargo at their expense, the charterparty also placing all responsibility for loading and stowing on the charterers. Puffer is the owner of a large box of cigars loaded on board *The Cargoworthy*. A bill of lading is issued, in Southampton, in respect of the box of cigars, signed by the master, incorporating "all terms and conditions as per charterparty".

Puffer's box of cigars is badly damaged during stowage. The charterers have gone into liquidation.

Advise Puffer. Does your answer depend on whether the shipowners have intervened in the loading process, and, if so, what type of intervention would suffice?

Would your answer be different in any of the following scenarios:

(i) The bill of lading (which is expressly subject to English law) is issued, not in Southampton, but in a state that, though it has enacted legislation in similar terms to the Hague-Visby Rules, is not a signatory to the Rules?

(ii) The bill of lading (issued in Southampton) also stated that "the contract evidenced by this bill of lading is between the merchant and the charterer of the vessel and it is therefore agreed that said charterer only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage". The boxes are damaged not

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during stow- age, but when seawater comes through an open hold while the vessel is at sea?

Comment

The main part of this question is similar to the problem question at the end of chapter 5.The bill of lading here is, however, subject to the Hague-Visby Rules, and there is an intervention point here, which there was not there. Have a look, in particular, at *The Eems Solar*.[161]

Alternative (i) invites you to consider whether Hague-Visby applies, in the light of *The MSC Amsterdam*.[162]

Alternative (ii) is a demise clause such as examined in chapter 17.163 Are they affected by Art.III(8)? Have a look at the discussion of *Renton v Palmyra* and *The Jordan II*.[164]

Question 15

Suppose that in *The River Gurara*[165] the shipment had been from the UK, rather than Africa. On what basis would the package limitation have been calculated: what would have been the package, and what would have been the amount per package?

Comment

An easy question, because Hague-Visby now applies, but is your answer here also relevant to question 2? (This depends on whether Phillips LJ or Hirst LJ is correct in *The River Gurara*.)

CHAPTER

4

TRIP CHARTERPARTIES AND THEIR BINARY ENDGAMES

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by Johanna Hjalmarsson.

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TRIP CHARTERPARTIES AND THEIR BINARY ENDGAMES

Excerpted from *Lloyd's Maritime and Commercial Law Quarterly, [2018] LMCLQ 376*

The author is indebted to colleagues Professor Yvonne Baatz, Professor James Davey, Professor Andrea Lista, Dr Meixian Song and Professor Paul Todd for their comments on various drafts. Any remaining errors are attributable to the author alone.

The following abbreviations are used:

Cooke et al, *Voyage Charters*: J Cooke, T Young, J Kimball, L Lambert, A Taylor, D Martowski, *Voyage Charters*, 4th edn (Informa Law, London, 2014);

Scrutton: Sir B Eder, D Foxton, S Berry, C Smith, H Bennett, *Scrutton on Charterparties and Bills of Lading*, 23rd edn (Thomson Reuters, London, 2015);

Wilford's *Time Charters*: T Coghlin, A Baker, J Kenny, J Kimball, TH Belknap Jr, *Time Charters*, 7th edn (Informa Law, London, 2014);

Wilson: J Wilson, *Carriage of Goods By Sea*, 7th edn (London: Pearson Longman, 2010).

This article takes as its starting point the normative framework surrounding charterparties and explores the limits and degree of flexibility of that contractual framework. While certain categories of charterparties are well established and universally acknowledged, it is also generally recognised, both judicially and in literature, that the parties are not bound by such categories but are free to develop their own terms, within a spectrum of hybrid contractual forms deviating from the entrenched typology. The example of trip-time charters is here considered in the context of contract certainty and predictability: while by no means a rare or recent phenomenon in chartering practice, and while textbooks and judicial dicta signal recognition in principle of this form of contract, this article argues that reality differs from such assertions. It will be argued that the absence of judicial and literary attention to these issues to date suggests a deeper unspoken truth: there are in fact no hybrid charterparties, and the endgame will always be a reversion to the binary model.

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I. INTRODUCTION

The trope of certainty in commercial contract law and dispute resolution is well rehearsed.[1] The parties expect, it is said, to labour in a commercial environment where the outcome of contractual stipulations is predictable and certain—this promotes commerce through clarity. Indeed, the predictability of the common law has been considered one of the beneficial characteristics of the law of England and Wales: the law does not intervene in the contract, and the parties are free to make their own contract. The courts will uphold their bargain: party autonomy is said to be the pre-eminent strength of English contract law.[2] Flexibility is the other virtue embraced: "the role of statute is primarily to lay down a balanced set of rights and duties that will apply in default of agreement; that of the courts is to respect and enforce reasonable mercantile practice …".[3] In the same vein, it has been argued that formalism at the dispute resolution stage is in the interests of commercial parties.[4]

However, what will party autonomy and contract certainty look like on the fuzzy edges of the accepted framework, where there is assertion that law exists, but there is none in evidence? Is contract certainty really at hand, where the assertion or general belief over time has been that a body of law, type of contract or interpretive mechanism exists, but has failed to be evidenced or established in positive law? It may well be that the reason uncertainty has persisted over time is that it does not matter, or that parties have developed mechanisms to cope with it.[5] But, if commercial practices are frequently based on a form of contract which does not enjoy the recognition of law, can it be said that the law falls short of providing certainty? Can a fallback mechanism be detected that permits the restoration of certainty? These questions arise upon a careful analysis of charterparties, a type of contract common in the shipping industry. While the law on time and voyage charters has been recorded in great detail,[6] hybrid charterparties are, as will be demonstrated, an area of charterparty law that has enjoyed little cohesive attention and as a result is surprisingly nebulous.

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The example explored in this article will be one particular form of hybrid charterparty: trip time charters.[7] While some essential rules are supposedly well established, they contain inherent inconsistencies: leading authorities both in the form of textbooks and case law are laconically unassertive or even ambiguous. This article considers the available law on trip time charterparties and argues that it is an area of law that requires some caring attention by judiciary and commentators to support normative, and as a result also commercial, certainty. Where each case is decided on the basis of its own facts, and commentary is limited to descriptive endeavour, the law cannot evolve. The mere result of an individual, commercially sensible solution between parties to a litigation is not the optimal outcome from the perspective of the law as canon.

It will be argued that the absence of such attention to these issues to date suggests a deeper unspoken truth: there are in fact no hybrid charterparties. The endgame will always be a reversion to the binary model of time and voyage charterparties. This conclusion would in itself be surprising given that the binary model is not a statutory construct, but has arisen entirely from practice.

II. THE SOURCES OF LAW ON TRIP TIME CHARTERPARTIES

The chosen example merits a brief substantive introduction, before embarking on a review of relevant literature and case law. While English law is comparatively slow to categorise contracts according to types ascribed with preconceived qualities, maritime law in practice operates some distinct types of contract: bareboat (or demise) charterparties,[8] time and voyage charterparties. A time charterparty is essentially circumscribed by a period of time, while a voyage charterparty is limited by geography. Time charters may in turn be concluded for a period, or for a trip. The latter form of time charterparty will contain some clauses more characteristic of voyage charters

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because, while similar in form to a time charterparty, the function of a trip time charterparty is that of a voyage charterparty in that it is designed to bring a specified cargo from point A to point B. The length of the trip time charter will be measured by reference to the performance of one or a specified sequence of trips. The outer limits of a trip time charterparty may therefore be both geographical and temporal.

The differences in the terms between time and voyage charters are distinctive: some are practical, some principled. As will be seen,[9] literature presents a starkly binary image where distinctive characteristics are attributed to each of the two forms of contract. Thus, a voyage charterparty is considered a contract of carriage, whereas a time charterparty is a contract for the hire of the services of a vessel.[10] A voyage charter contains provisions on freight, laytime and demurrage, whereas characteristic provisions for a time charter are hire, off-hire, anti-technicality clauses as well as redelivery instructions. Under a time charter, the charterer ensures that bunkers are taken on board which are then "sold" to the owner upon redelivery. Under a voyage charter, freight is earned rather than hire, and there is a rule against set-off for freight.[11] Time charterparties instead obey the general rule that set-off under the same contract is permitted, although set-off under a time charterparty is limited.[12] Trip time charterparties concern a voyage or a few voyages, and therefore a short-term commercial relationship, compared with period time charterparties, which may be concluded for periods of many years. The standard form in use, NYPE,[13] is designed for the latter.[14] Perhaps the most significant difference between a time and a voyage charter comes at the end of the performance, where a time charterparty ends with redelivery within a specified time, hire being due in the usual amount up until the final moment, whereas the voyage charterparty will terminate with laytime and potentially demurrage— difficult to calculate and arguably more conducive to disputes.[15] The distinction between time and voyage charterparties as having respectively temporal and geographical limits breaks down in hybrids, which may provide for a combination of definitions of the end point of the contract.

There is a high degree of standardisation in the law of charterparties, permitting incomplete negotiations and shorthand contract formation in the

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form of recaps (brief recapitulations). Established business practice along with a relatively limited number of standard forms, the main form for time charterparties being the successive iterations of NYPE,[16] mean that various duties will be generally associated with each of the parties to the contract, such as bunkering, loading and discharge, or issuing bills of lading and the duty of seaworthiness. Like most forms of standard terms in the shipping market, NYPE does not conspire to produce contracts of adhesion—the terms are invariably adapted to the needs of the parties. This in turn is a function of a market involving a multitude of contracting parties—the familiarity and indeed standardisation of the standard terms here contributes to transactional predictability.

In reality, the standard categories of contract are only the beginning. In spite of the limited number of clear categories, there is a need for infinite variety and potential in contract-making; and, if the law were to operate strict immutable contractual categories, commerce would quickly be restricted to an unacceptable extent. Nor should the value of standard terms of contract be underestimated—they provide rules in a market where there may otherwise be none.[17] Indeed, there may be a temptation for judges to think of the market as independently capable of resolving issues, so that as little intervention as possible is desirable.[18]

The negotiation of a charterparty may be a messy and haphazard affair: the negotiating phase is characterised by shorthand contract-making following speedy negotiations, only rarely involving legal advice. This results only in a recap rather than a well-presented contract, and the settled terms and terminology employed will be indicative of the type of charterparty intended. Hybrids may consist of distinguishable elements, such as a voyage to a place, circulation for a period at that place,[19] followed by delivery to a third place. In such a segmented contract the constituent elements could technically be assessed separately, albeit under a single contract.[20] However, the scope for hybrids is infinite and it is perfectly permissible for an orthodox period time charterparty to contain some of the idiosyncratic terms of a voyage charter. This complete freedom of contract is simultaneously an asset and a difficulty, supporting a nebulous approach to the negotiation, performance and

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commercial resolution stages, but providing less support at the litigation stage, where there may be little for the judge upon which to base a reasoned decision.

The following discussion considers and evaluates the positive framework available as evidenced by literature and judicial decisions, supporting the operation and interpretation of trip time charterparties. The conclusion will be that there is surprisingly little law surrounding and supporting hybrid charterparties.

A. Literature

As is the case with many highly specialised forms of contract, literature provides important authority by providing, in effect, a code for the form of contract, recognised by the parties as authoritative. Judicial decisions on charterparties in fact frequently cite a small number of well-respected specialised works.[21] The reason may well be that it is perceived that these works offer otherwise unavailable insights into established market practice.[22] That said, while the position of the central works on voyage and time charterparties is firmly established, there is a distinct shortage of even incipient, let alone developed, principled commentary in relation to trip time and other hybrid charterparties except on specific issues such as the measure of damages.[23] This section aims to present the available literature and its approach to the subject.

Time and voyage charterparties are in practice highly standardised contract types, with characteristic terminology, types of clauses, standard terms and remedies for breach. The "Special Contracts" volume of the standard work *Chitty on Contracts*[24] is silent on charterparties. The void is filled by well-established standard works,[25] namely Wilford's *Time Charters*,[26] Cooke et al on *Voyage Charters*[27] and *Scrutton*,[28] which deals with both forms of charterparty. These standard works are all of the same character—they are descriptive in nature, summarising and evaluating case law with only the minimum of theoretical excursions beyond the law as established by the case law. The unequivocal purpose of these texts is to provide a reliable, normative

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source of, or guide to, authorities for the benefit of practitioners. Perhaps as a result of this distinctly descriptive, case-law derived approach, these works are of limited assistance where trip time charterparties are concerned. Cooke et al on *Voyage Charters* contains exactly one index entry for trip time charters.[29] In Wilford's *Time Charters*, an introductory paragraph alerts the reader to the existence of hybrid contracts and notes some of the ambiguities that arise from contracts that define the services to be provided under the contract by reference to both a period and a trip:[30]

"Although, as in any other time charter, the owners' remuneration will still be periodic (typically daily) hire, a trip time charter may in other respects have more in common with a simple voyage charter than with, for example, a long period charter for worldwide trading carrying all manner of cargoes. Whether all of the ordinary incidents of a time charter apply equally to a trip time charter for a fixed or narrowly-defined particular trip has not been fully explored in the cases."

The only other index entry in Wilford's *Time Charters* consists of two paragraphs that briefly consider four key cases and conclude with a counterfactual on the hypothetical result "had the contemplated trip been more precisely defined",[31] in which case the authors consider that "it might have been more difficult to decide whether the trip or the period was intended to be paramount".[32] It will be argued in the following that no such difficulty would have been experienced and that, on the contrary, a sterile binary approach has been adopted judicially.

The few paragraphs in Wilford's *Time Charters* are thus mostly devoted to identifying, but not resolving, the issues said to arise from difficulties arising in the context of charterparties of a hybrid nature. The editors of *Scrutton* are more detailed, dealing with trip time charterparties in six of the 21 chapters of the work. The increased frequency does not result in a developed narrative: there are usually only a few words in each paragraph. Equally, Wilson's well-known student textbook contains exactly one index entry of the expression "trip charters",[33] referring to an introductory page offering a brief description of time charters and voyage charters, along with hybrids including trip time charters, consecutive voyage charters and long-term freighting contracts. Other literary works adopt the same approach.[34]

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Similarly, academic and practitioner commentators' attention has focused on individual points arising in case law, such as the interpretation of individual clauses, or assessment of revision of standard clauses.[35] This focus on individual points is in character with both case law and literature, but comes at the expense of the development of a more overarching, principled framework. It is not clear whether this is due to a lack of ambition, or because it is perceived that a framework adding nuance to the binary framework is surplus to requirements. However, it is fair to characterise the law and commentary on charterparties as descriptive—as opposed to prescriptive. The prevailing approach of commentary is binary, accepting a clear line between time and voyage charterparties. While the existence of developed literature means that there may not be any pressing need for principled reasoning on the main forms of charterparty,[36] there is a striking lack of authoritative description, let alone principles-based theorisation, of the intermediate or non-binary forms. As will be seen,[37] case law has yet to produce a convincing account of a truly hybrid charterparty. There is as a direct result little in literature supporting the application of anything other than either the time charterparty or the voyage charterparty framework.

Where literature is dominated by the approach of case law annotation or commentary, the result is that, while intermediate contract types are widespread in practice and their existence is acknowledged in literature, readers are left much to their own devices inseeking to understand the implications of the law to such a hybrid.

B. Judicial approaches

In this section, we will review existing case law on trip time charterparties. It will be demonstrated that, while, as in literature, lip service is paid to the concept of hybrids, there is little to support such a third framework in practice. The analysis here deliberately considers judicial decisions to the exclusion of arbitral awards. That is because, while arbitral awards are frequently reported in this sector,[38] judicial decisions have the additional distinguishing characteristic of being designed not just to resolve the dispute

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but to establish or develop the law. The confidentiality and selective access to arbitrations makes them less suited in this regard.

Disputes in charterparty cases arise out of the modality of negotiation as well as the standard contents of such contracts. They are often negotiated in haste, typically have sparse contents and take the form of recap fixtures relying heavily on standard forms, especially where the purpose of the charterparty is only to carry a cargo from load port to discharge port. It should perhaps come as a surprise to any keen observer that contracts negotiated in haste, on poorly adapted standard terms, do not give rise to more litigation than the few cases at hand. The author attributes this fact to the mechanisms identified by Lisa Bernstein on the basis of empirical studies of the grain and feed market,[39] resulting in concepts that will support the analysis that follows. Bernstein developed the terminology of *relationship-preserving norms and endgame norms*. [40] Empirical research into the grain and feed markets led her to caution against the use of market practice and trade usages in judicial dispute resolution to quite the extent foreseen by the Uniform Commercial Code.[41] She identified a number of reasons why the parties may wish to bargain on two levels: one for the purpose of maintaining a working relationship and another for the purpose of dispute resolution. Her distinction is essentially that the parties may have many unspoken intentions in negotiating and performing the contract. Such unspoken intentions may be a tacit bargain or a permissive option as to performance left open to compromise by a party, which nevertheless does not wish to be held to the lower standard of the compromise. Intentions remain tacit, in part because they are not intended by the parties to form part of the endgame norms.[42] Judicially, Lord Wilberforce put it thus in *Prenn v Simmonds*:[43] "The words used may, and often do, represent a formula which means different things to each side, yet may be accepted because that is the only way to get 'agreement' and in the hope that disputes will not arise."

Adopting the terminology of endgame and relationship-preserving norms, the endgame in the context of trip time charterparties is characterised by a collapsed commercial relationship, not reparable by commercial measures such as splitting the difference or more formal mediation.[44] It is at this stage

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that Bernstein identifies the applicable norms as those present in the negotiated contract. The terms applicable between the parties are at this stage crystallised and formalised—the written terms of the contract were not necessarily those intended to be applied within the commercial relationship itself. Indeed, the parties may well have been prepared to demonstrate significant flexibility based on elusive business relationship factors such as market dominance, replacement spot rates and commercial relationships but did not wish to place themselves in a position where they could be held to such relationship-preserving norms. An important element of the characterisation of relationship-preserving norms is that they do not necessarily amount to a judicially identifiable, formal trade usage; or even established practice between the parties capable of binding effect. With norms of an intrinsically relationship-preserving nature, it is arguably a mistake for arbitrators and—*a fortiori*—judges to seek to base a decision thereon. At the endgame stage, where arbitrators and judges labour, the parties instead rely on an interpretation of the contract terms as agreed and set out, against a background of objectively identifiable interpretative factors. While the relationship preservation stage may be highly idiosyncratic between the parties, the endgame is standardised by near- universally accepted terms and acceptance of a legal framework that has arisen entirely from practice.[45] One would therefore expect the judicial approach to these contracts to be comparatively standardised and formalised. As will be seen, these assertions bear out for trip time charterparties if seen in the light of distinct frameworks of relationship-preserving and endgame norms.

In the following, we will consider the position from the perspective of the law offering a blank canvas on which to create the contract; the approach that the parties have opted for a framework available to them; the effect of selection of standard terms, and finally, the facts as sole guiding principle for dispute resolution. The *relationship-preservation and endgame* norm paradigm will be a recurrent theme in the discussion.

(i) The blank canvas

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A starting point of English law is that it expects the parties to set out the parameters of their contract. But how open-textured is the law in reality? The blank canvas of the charterparty is painted under the light of commercial realities. There is authority in the trip time charterparty context for an approach that considers the balance of risks and identifies the party to which the contract seeks to allocate those risks. The emphasis accordingly is not on established frameworks or on classification, but on a more holistic commercial approach.

The commercial difference between a voyage and a time charterparty was described by Rix LJ as follows in *The Doric Pride*,[46] where the question was whether a vessel was off- hire under the provisions of a trip time charterparty where her entry into the New Orleans Port had been delayed by instruction from US Coast Guard:

"under a voyage charter the risk of delay on an approach voyage is the owner's risk, the charterer is only at risk once the vessel becomes an arrived ship and goes on demurrage, whereas under a time charter the risk of delay is fundamentally on the charterer, who remains liable to pay hire in all circumstances unless the charterer can bring himself within the plain words of an off-hire provision."[47]

Appearing to take a global view of the parties' intended balance of responsibilities, the Court of Appeal criticised the judge's description of the trip time charterparty as "essentially a voyage charter transaction".[48] The Court went on to hold that, although this was a trip time charterparty and time charterparty rules therefore applied, the overall allocation of responsibilities intended by the parties was that delays upon approach to the load port should be upon the disponent owner—the same outcome as if the charterparty had been a voyage charter. That said, the judge at first instance had gone too far in stating that the transaction was "the use of classic time charter clauses in what is essentially a voyage charter transaction",[49] and in describing the charterparty at issue as "in form as well as in commercial reality a voyage charter".[50]

This decision appears to support an approach to each individual contract as *sui generis* with the balance of responsibilities and liabilities taking the paramount role in interpretation. This chimes with the blank canvas paradigm

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and the open-texturedness desirable at the relationship-preserving stage. However, the approach presents distinct difficulties at the endgame stage—although commercial parties are free to agree as they please and appear to enjoy the freedom that English law offers, it is also the case that a minimum of predictability in dispute resolution requires there to be an applicable framework available. An entirely blank canvas at least theoretically requires commercial parties to rewrite contract law, for the purpose of their one-off transaction—an unlikely outcome of sometimes chaotic negotiations.

The blank canvas does have some pre-existing texture. Distinctions are forced upon the contract in some contexts: time charters are contracts for the hire of the services of a ship, and voyage charters are contracts for the carriage of goods—a distinction not without importance for some purposes, not least the immutable and, unlike charterparty law, highly prescriptive framework for conflict of laws. Assertions that parties have the benefit of open-textured law in defining their charterparties, making hybrids possible, lose force where conflicts of laws are concerned: that body of law operates a small number of pre-defined categories conditioned upon a characterisation of the service to be performed by the vessel. Thus, in *Martrade Shipping & Transport GmbH v United Enterprises Corp (The Wisdom C)*,[51] Popplewell J was tasked with the construction of a charterparty in the conflicts context. The contract in that case was a trip time charter. The owners had won an arbitration regarding payment of hire and had been awarded interest under the Late Payment of Commercial Debts (Interest) Act 1998. The application of that Act depended in turn on the application of Art.4 of the Rome Convention.[52] The question before Popplewell J was whether a trip time charter was to be characterised as a contract for the carriage of goods—not an unreasonable question, given that that was certainly its function. If so, the presumption in Art.4(2) would be disapplied in favour of that in Art.4(4). The presumption in Art.4(2) is based—in brief terms—on the place of the party most closely associated with the characteristic performance under the contract. Article 4(4) disapplies that presumption and enters the place of loading or discharge into the equation. It provides:

"In applying this paragraph single voyage charter-parties and other contracts the main

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purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods."

Popplewell J endorsed the argument of counsel for the charterers that:[53]

"it is not sufficient that the main purpose of the contract is the carriage of goods in this sense. ... What matters is that the charterparty is not in nature an undertaking by the owner to carry goods, but an undertaking by the owner to make available to the charterer a vessel and crew for the latter to employ in transporting goods."

The contract was therefore subject to Art.4(2) and the characteristic performance was that of the disponent owner.[54] Accordingly, absent a choice of English law, the applicable law would not have been English law and the arbitrators had erred in awarding interest under the Late Payment of Commercial Debts (Interest) Act 1998. The specifics of the litigation aside, the judgment is clear in its assertion that a trip time charter is a contract for the supply of services in the context of the Rome framework,[55] similar to a time charterparty, not one for the carriage of goods, like a voyage charterparty. It is a striking example of how important the characterisation of the contract can be, in the face of assertions of freedom of contract and the forced limits of "the ingenuity of chartering brokers and the ever changing demands of the market".[56] Given the nature of the question and the stark choices available in response, the option of deference to market practice or discussion of the nature of hybrid charterparties was not available to Popplewell J, who stated:[57]

"[T]he nature of the contract for the duration of the period remains that of making the vessel and her crew available to the charterers as a means for the charterers to transport goods, not a contract for carriage of the goods by the owners."

A similarly stark choice arises in the context of incorporation of terms. The bill of lading example of a clause incorporating terms "as per charterparty" has been extensively discussed in literature.[58] Similar issues of incorporation could be envisaged where the parties incorporate by reference some existing charterparty, and disagreement results as to which one. Bills of lading will usually refer to and incorporate the terms of a charterparty designated by its

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date of conclusion. There is extensive case law determining that the voyage charterparty highest in the chain is, as a matter of practice, more likely to be that intended for incorporation, to the exclusion of time charterparties, which are more likely to contain incompatible terms.[59] The head voyage charterparty in a chain of charterparties may be incorporated even if neither party to that contract is also a party to the bill of lading, as seen in *The Nanfri*.[60] However, there is no rule against the incorporation of a time charterparty. *In Southport Success SA v Tsingshan Holding Group Co Ltd (The Anna Bo)*[61] the bill of lading designated a charterparty by a date which corresponded only to the time charterparty. There was also a voyage charterparty, but bearing a different date. The judge, faced with an unequivocal contract clause including a clear date, held that there was no rule against incorporating the time charterparty, and that the words "freight payable as per charter-party" did not mean that only a voyage charterparty could be incorporated. Given that the argument for the incorporation of the voyage charterparty in preference to the time charterparty is that the terms of the former are more likely to be compatible with the bill of lading, it may well be that there is a distinction to be made between period and trip time charterparties in this regard, the terms of the latter being more germane to the individual voyage than a period charter.

What then is the reality of the supposed blank canvas? An early case, *Ocean Tramp Tankers Corporation v V/O Sovfracht (The Eugenia)*,[62] concerned a "trip out to India via Black Sea" under a time charterparty. In the course of performance of the specified contract voyage, the ship was intercepted by the authorities due to the Suez Canal crisis. The owners contended that charterers' order to proceed had placed them in breach of contract. The charterers' contention was that, "although the charter-party was on a printed form applicable to a time-charter, nevertheless the 'paramount feature' of it was a voyage, and it was to be construed accordingly".[63] The Court of Appeal disagreed, siding on this point[64] with Megaw J at first instance[65] in holding that charterers were in breach in ordering the vessel into dangerous territory. The charterers' argument, that they were entitled to order the performance of the specified contract voyage, was of little effect, in the context of a time charterparty where the ship was under charterers' orders throughout. Here, the blank canvas was not a reality: by opting for the time charterparty framework the

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parties had declined any advantages or disadvantages associated with the liberty to contract.

Perhaps most starkly, in *The Democritos*,[66] one of the issues before the Court of Appeal was the effect of some language typical for voyage charterparties in the context of a time charterparty. When the vessel was redelivered late, was freight owed, as under a voyage charterparty, or did hire continue to be payable on a day-to-day basis? This mattered because of the difference between the amounts. Lord Denning MR considered the nature of the contract:[67]

"It is on a time charter form. The words 'Duration about 4 to 6 months' are typical time charter periods. The only provision which might make it look like a voyage charter is in the words, '... for a trip via Port or Ports via the Pacific'. It is suggested that that provision makes it a voyage charter, or alternatively a hybrid charter. But it seems to me that those words are far too indefinite to indicate any specific voyage at all. They do little more than state the trading limits within which the vessel is to trade during the time charter. They only show that the vessel has to call in at the Pacific during its course of operations. There is an [option] in cl. 44 to carry a cargo from the west coast of the United States to Japan. But that cannot affect the duration period which is specified in the charter itself. It was to my mind clearly a time charter."

Lawton LJ in his brief concurring speech added that the provision "for a trip ..." would have come from the charterers.[68] This judgment provides as clear an indication as could be wished for of a rejection of hybrid charterparties at the endgame stage: while the charterers had sought to build in flexibility at the performance stage, at the endgame stage, the contract would be ruthlessly mapped onto the binary model.

Ultimately, the canvas is not completely blank. The law operates categories and choices that result in the early adoption by the parties of some framework or other. The binary choice is mandated in the context of conflict of laws, where a trip time charterparty is a contract for the hire of a vessel for a defined period. The parties also decide the limits of their contract with existing matrices in mind. A place of redelivery is stipulated. Are the geographical limits of the time charterparty of reduced importance, compared with the time limits?[69] The placement of the vessel under charterers' orders

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has pervasive effects on the distribution of liability between the parties. It appears that there is little or no scope for flexibility as to the subject matter, the limits and the allocation of liability under trip time charterparties. Perhaps the canvas is not quite as blank as contract freedom ideology would have us believe?

(ii) Choice of framework

Is it fair to say that the endgame stage is characterised by a general, if silent, judicial assumption that a framework has been chosen? At its lowest, the notional starting point is that the parties are free to agree the contract terms and that the court will not intervene, but that the choice of an existing framework will be respected by the courts. The judicial approach is neatly encapsulated by two quotations from the same judgment. In *The World Symphony*[70] at first instance, Hobhouse J[71] considered a final nomination under a period time charterparty, which had extended the period of the charterparty beyond the contractual duration. He sought to make the point that the parties are essentially in charge of the contract and can create its terms in any way they wish. Having noted the existence of hybrid contracts with brief descriptions of trip time and consecutive voyage charterparties, he went on to say:[72]

"The variety of contractual structures that can be adopted by charterers and shipowners for any given transaction are as various as the ingenuity of chartering brokers and the ever changing demands of the market may determine. It is not for Courts to fit the parties' transactions within a strict and limited frame-work which the parties themselves may have not chosen to adopt."

In other words, the canvas is blank and the parties are the painters. As noted, English law is not prescriptive in terms of types of contract—the parties can generally identify the contract in the way they choose and apply existing standard terms to it as they see fit. This ethos offers a non-interventionist and non-paternalistic starting point and is considered a main attraction of English law as the chosen law of shipping and commercial contracts.[73] However, with regard to trip time charters, is such a minimalist approach the optimum? A counterpoint to the open-textured approach can indeed be found within Hobhouse J's reasoning in *The World Symphony* itself. Having made the above

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statement, the judge next went on to say the following:[74]

"Once it has been demonstrated that the parties have chosen to adopt a particular frame-work, then the Court can point out its legal consequences, as did Bingham LJ in the passage that I have quoted from [The Peonia[75]], where the parties had expressly chosen to reiterate that their contract was a period 'time charter'. But to state the consequence first and to argue from that to the nature of the bargain is to put the cart before the horse. (Cf the quotation from the arbitrators in The Black Falcon.[76])"

The passage is characteristically flawless; indeed, it would not do to permit some extraneous judicial construction of the parties' words and intentions to stand in place of the parties' own arrangement. That said, the first few words of this quotation are notable. The position considered is that the parties have *adopted a framework* and intended that it should apply to the contract. In *The World Symphony,* the question was of a period time charterparty, the accepted framework of which has been extensively catalogued.[77] That framework is prima facie equally applicable to trip time charters, but existing works do not consistently address issues arising where the framework of the contract that the parties have adopted may be different for a trip time charter and how to address variations to achieve consistency. Does this lack of detailed guidance cause uncertainty for prospective contractual parties? Does a judicial approach that takes its starting point in individually crafted terms of the contract "put the cart before the horse", where the parties had in reality envisaged the adoption of a framework? Can the parties successfully signal that their contract belongs on a nuanced, hybrid scale, where the developed framework is binary in nature?

The answer may lie in the distinction between relationship-preserving and endgame norms. The parties may be perfectly content with the blank canvas and happy to populate it themselves, as long as the relationship-preservation stage is in operation, with a preference for the binary, predictable framework at the endgame stage. Such pragmatism commends itself if one subscribes to a narrow view of the judge as a resolver of disputes; but not if one also considers that the judge has a role in assisting the development of the law in an industry where most disputes are resolved through arbitration, and court litigation tends to arise only where an issue has been identified as being of

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general importance to the markets concerned. This is so, even acknowledging the limitations of judges as prospective, principled lawmakers.[78] If the commercial need is accepted for clear default rules, from which the parties may easily opt out, what is the present role of judge-made law in relation to trip time charters? A tension arises from the proposition that the legal system is unbiased and does not adopt stringent categories as to types of contract, where the contracts used in practice do not conform to type. What does this mean for the judicial approach to hybrid charterparty cases? Where the parties fall back at the endgame stage on existing frameworks, should judges give effect to the existing, binary framework, or seek to assist the development of a spectrum-based framework? As will be seen in what follows,[79] the general approach of judicial reasoning in trip time charterparty cases tends to be limited to establishing the narrow meaning of designated contractual provisions without express consideration of the wider framework.

(iii) Choice of standard terms

As indicated above, standard terms fulfil a crucial function in charterparties, which must be considered next. One potential way for the parties to express that they "adopt a particular frame-work"[80] is the deliberate choice of standard terms designed for and applicable to that and only that framework. In the context of trip time charterparties, what effect, if any, is given to the parties' choice of standard terms? On the binary scale of orthodox time and voyage charterparties, the factor of the choice of standard terms is inevitably consistent with the nature of the charterparty. A choice of NYPE would indicate a time charter and— for example—Asbatankvoy a voyage charter foundation of the contract. However, where the parties intend to conceive a hybrid, is this a decisive factor?

Acknowledgement of the existence of hybrids ought logically to be followed by judicial acceptance of open-texturedness, with a paradigm where the standard terms are the starting point and the parties are taken to have wanted to modify them into their idiosyncratic contract. However, as will be seen, such open-texturedness is not evident. Nor is there principled judicial

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affirmation of the contrary position, that the choice of standard terms expressed in the contract is presumed to align with the binary framework. The result of this unspoken conclusion is a fiction that the choice of standard terms does not necessarily entail a choice of framework.

An example of judicial unease is in evidence in *Ispat Industries ltd v Western Bulk Pte Ltd (The Sabrina 1)*,[81] where a direct question as to the effect of incorporation of the NYPE charter remained judicially unanswered. A trip time charter had been concluded with the specified load port habitually used by the charterer to export its cargoes. That port became unavailable due to insurgency. Under a voyage charter, where a nominated load port—whether nominated in the charterparty or subsequently—has unexpectedly become unavailable, the charterer has neither the right nor the obligation to make a different nomination.[82] This rule that the determined load port is a final choice is referred to as the doctrine of election, and limits the voyage charterer to its initial choice.[83]

In *The Sabrina 1*, it so happened that the charterer did not wish to nominate an alternative port and therefore argued that this voyage charterparty rule applied to the trip time charter—from a commercial and contractual point of view a perfectly feasible term. One of the questions of law upon which the right to appeal the arbitration award under the Arbitration Act 1996, s.69 had been granted was phrased as follows:[84]

"In relation to a charterparty contained in a fixture recap incorporating by reference an NYPE time charter form, is the form chosen by the parties determinative of the true nature of the charterparty and, in particular, to what extent can the background matrix, fixture recap and voyage instructions inform the construction of the charterparty."

The appellant charterer's argument was that "properly construed, the charterparty was 'a voyage charter or at least a charter limited to a very specific trip only', with the consequence that if the voyage or specific trip was not possible then performance of the charter was not possible".[85] The judge considered the timing of the insurgency with reference to the termination of the charterparty and concluded that on the facts, "Since the charter was a time charter rather than a voyage charter …",[86] the charterer ought to have given new directions when the original load port became unavailable.

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There was no further reasoning on the nature of the charterparty or the role of the standard terms—only the statement that this was a time charterparty. Given that the question of law asked was specifically to this point, a conclusion on the facts without reasoning in principle brings little closure in itself. However, with the assistance of the concept of endgame norms, the conclusion can be interpreted as one of principle: the assignation of the contract within the binary time/voyage charterparty framework is an example of an application of the stark endgame norms at the expense of the flexible relationship-preserving norms. There being no standard terms covering time and voyage charters alike, the use of one set of terms is a comfort-inducing indication that the parties intended to create just such a contract. Mistakes in the contract formation process are of course always possible—the parties could have erred in the reference to the standard terms, the contract making process might have been inconclusive on the point or the parties might have inadvertently omitted to include any terms at all.[87] While such facts are rare, and will sometimes be resolved by means of rectification, they are not so rare as to be dismissed entirely and inevitably cause difficulties when they do arise.[88] But is an automatic assumption based on the standard terms justified, where the parties have adapted the bargain by adding individually crafted terms?

Indeed, if hybrid charterparties are indeed real and not merely a figment confined to the stage of operation of relationship-preserving norms, the question would arguably have merited a reasoned judicial response. While the contract is being performed and at the relationship-preservation stage, the parties may not be particularly interested in a precise identification of the norms applicable—in *The Sabrina 1*, perhaps both parties valued the flexibility of potential renomination. At the endgame stage, the position is the opposite.

The stark question of precisely what set of norms is applicable to a trip time charterparty is an intrinsic part of the endgame stage and the encroachment of individually crafted terms on the binary framework gives rise to undesirable uncertainty. The answer to the question of law asked in *The Sabrina 1* is not insuperably elusive, but if the fiction of flexible hybrids is to be preserved, the question of law asked in that case can be given no reasoned

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answer.

(iv) The facts as refuge

What role may be ascribed to the framework adopted by the parties? The underlying factual situation of a ship's journey from A to B may appear to be of little assistance: it is identical in a voyage and a trip time charterparty. The trip time charterparty's function in itself therefore provides little guidance to an understanding of the form of risk allocation within the adventure. The form must arise less from the facts of the adventure itself than from the (judicially inferred) approach of the parties to that adventure. The identification of the chosen framework might therefore be expected to be the consistent starting point in deciding any case: including assertions as to the precise composition of considerations supporting any hybrid status of the charterparty. Such discussion, however, is surprisingly rare in reported case law, which tends instead to home in on individual contractual provisions for a narrow, black-letter interpretation.

The issue in *SBT Star Bulk & Tankers (Germany) GmbH & Co KG Cosmotrade SA (The Wehr Trave)*[89] contrasted the principles and nature of a trip time charter against a black- letter interpretation of its express terms. The charterparty was for "one trip" and made on the NYPE46 time charterparty standard form. The term describing the trip under the time charter named a range of load ports and a range of discharge ports. Upon completing the stipulated circuit, the charterer had issued an order to return to one of the permitted discharge ports to load further cargo—an order which the owner asserted was illegitimate. Illegitimate last orders are a characteristic feature of time charterparties: the charterer has freedom to order the vessel within the time limits of the agreed period, but not to exceed them. Under a voyage charterparty, the voyage is predetermined in the form, typically, of designated load ports and discharge ports or a range thereof. The question of law was phrased as follows:[90]

"On the true construction of the Charter, was the respondent charterer under a 'one time charter trip', after the vessel had discharged the entirety of all previous loaded cargo,

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entitled to order the empty vessel to another load port (Sohar) and discharge port to perform a further trip/voyage or only to order the vessel to proceed to the agreed Charter redelivery place having completed the agreed one time charter trip?"

The importance of the question is that, while the confines of a standard time charter are determined by a period of time, those of a voyage charter are determined in geographical terms, with arrival at the port of discharge marking the end point of the contract. What, if any, was the influence of the chosen trip time charterparty framework, and to what extent was a hybrid nature achieved? The owners argued that the ship ought not to have exceeded the time allocated. The arbitral tribunal, it was argued, had overemphasised the distinction between time and voyage charterparties, with the effect that the "one trip" time charterparty could in practice be extended indefinitely, paying the agreed daily rate of hire. The charterers for their part argued that the agreed geographical terms took precedence and, as long as they remained within those confines, they were within their rights. Both interpretations were consistent with a hybrid charterparty based on a time charterparty form—prompting consideration of the precise scope of the applicable framework.

There were a variety of options available to resolve the case: one could limit the solution to a weighting of the importance of the words "one trip" against the specification of geographical range, for a purely textual approach. Alternatively, one could decide on the basis of the parties' chosen time charterparty framework without consideration of the finer points of hybrid forms: a strict or orthodox approach. Finally, one could determine to what extent the parties had achieved modification of the standard time charterparty framework into a hybrid and consider the voyage provision in context. Given that the existence of hybrids, and in particular trip time charterparties, is well recognised, the latter approach is arguably that most supportive of further development of clear endgame norms on this point.

Eder J commenced with the observation that the contract was undoubtedly a time charter.[91] He went on to note that "This is not the place to perform an exhaustive analysis of the differences between the various types of charter".[92] The judge also noted that "from the charterer's perspective one of the

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advantages which a time charter (including a time trip time [*sic*] charter) has over a voyage charter is that voyage orders under a time charter do not constitute an irrevocable election"[93]—presumably to support a contractual intention of granting charterers some liberty in their voyage orders. Further support was derived from *The Aragon*,[94] to the effect that the concept of a time charterparty was that it "entitle[s] the charterer upon paying the hire to call upon the vessel to visit any port or ports which he wishe[s] within trading limits".[95] Accordingly, the question was whittled down to "whether this specific charter contains sufficiently clear words to exclude Sohar as a loading port".[96]

This narrow approach relied heavily upon the applicability of time charterparty norms, where no specification of loadport is expected or necessary and the charterer is free to order the vessel as it pleases within the time available to it. However, having concluded that the time charterparty framework was determinative, was it logically consistent with that framework that the charterer was at liberty to exceed its allotted time by giving further orders? The decision arguably recognises the validity of hybrid terms, without incorporating them in the reasoning around the applicable endgame norms.

Development of firm hybrid norms would rely on well-phrased questions of law reaching the courts for authoritative determination. With reference to the question of law asked (above), the judge rightly observed that:[97] "it seems to me that the question of law in the present case does not involve any general point of public importance but turns on a rather narrow question of construction of this specific charter …"

The unfortunate conception of broader definitions and characteristics of hybrid forms of charterparty, including trip time charterparties, as lacking broader interest is perhaps what is holding back the development of a legal framework of any conceptual profundity. While the judge's decision is a reasonable decision on the facts of the case, there was little scope here to address the wider issues, as a result of the manner in which the question was asked. The position arguably remains that a binary framework of time and voyage charters applies.

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III. ANALYSIS

Clarity in the endgame norms and predictability in the judicial resolution of commercial cases are of value to the contracting parties, who can foresee at the relationship-preservation stage what the endgame will be, and can decide whether repudiation is the appropriate route. This is particularly so as most of these cases end at arbitration so that published judgments are scarce. That being the case, judicial interpretation—and academic scrutiny—of trip time charterparties is an important endeavour which has received surprisingly little attention. In spite of frequent assertions to the contrary, it appears that what is available to contracting parties at the endgame stage is a binary choice between time and voyage charterparties. Where, in general, contract law respects the capacity of the parties freely to determine the norms that will bind them, the options are narrowly limited in negotiating a charterparty.

The outcome of the binary choice will be determined by choices made by the parties, and by the balance of powers they wish to achieve. Unlike with a prenuptial agreement, where no one wishes to consider the termination of the agreement, the end-point of the contract— discharge or redelivery—is of paramount importance from the outset. Thus, under a time charter, the vessel is redelivered at the end of the period by notification from time charterers to shipowners. There is no redelivery of the vessel under a voyage charter, because the vessel has remained at all times under the control of the disponent owner. Instead, at the end of a voyage charter, once the vessel is an arrived ship, laytime starts to run, immediately followed by demurrage, should laytime expire. Dispensing with laytime and demurrage, a time charter for one trip will cover cargo operations at the discharge port end, with hire being due for the duration, and terminate as soon as these operations are completed. It appears likely that this is the impetus behind the development of trip time charterparties: hire commends itself over demurrage by being more straightforward to predict.

On a binary scale, when the parties narrow down the scope of the time

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charter to encompass just one trip, the contract will in function or factual essence, although not in form or nature, be a voyage charterparty. The result for the charterers is that achieving the status of an "arrived ship" is of much reduced importance, without the spectre of demurrage looming at the terminus. Although the doctrine of election will not be available to liberate the charterers from the contract, such a bargain may present few advantages to them.

One way or another, the need in practice for a more nuanced scale of charterparty types is evident and has never been disputed. But perhaps the binary framework in the endgame is desirable for its clarity and simplicity? The adoption of the time charterparty framework surrounds trip time charters with certainty in practice. In a time charter, we expect to see all the usual clauses consonant with such a contract—a clause on payment of hire, an employment and indemnity clause, redelivery provisions and so forth. We would interpret the contract in accordance with the nature of a time charterparty as a contract for the hire of a ship with associated services against payment of daily hire, uninfluenced by the function of the contract which is to ship cargo from one port to another. All in all, there would appear to be very little that is contentious about them—at least judging by available case law. This, along with contractual flexibility, is undoubtedly a feature that recommends them to disponent owners and charterers alike.

Where contention arises, the judicial approach is arguably neither decisive nor unambiguous. Some contexts demand definition of the contract: the example of the Rome Convention, and subsequently Rome I, categorising contracts into those for the supply of services and those for the carriage of goods, and giving different outcomes for each is one, and a reference in a bill of lading incorporating terms "as per charterparty", is another. On this basis alone, there is a need for certainty as to characterisation. In judicial practice, there is a preference for determining cases based on the facts and clauses applicable in the instant case, rather than to defer to the nature or framework of the trip time charterparty and place the clauses and facts in context. While there is judicial deference to the balance of responsibilities the parties are taken to have been seeking to achieve, there is no real ambition in evidence

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of development beyond the binary standard framework. That approach, while legitimate in each case, is less helpful in developing the law on trip time charterparties, and other hybrids, to a point where their distinctiveness is well understood and idiosyncrasies are given their proper space. Trip time charterparties, among all potential hybrids, are arguably capable of recognition as a distinctive and independent type of contract, with its own nature, standard terms and principles of construction; but there is little evidence of judicial assistance underpinning development in that direction.

Although, undoubtedly, simplicity in the endgame has its virtues where parties intend to default back to that framework, this does not apply to all contractual relationships. Given the frequent assertions that hybrid charterparties are a distinct phenomenon, commercial parties, content with the blank canvas that they require at the relationship-preservation stage, may well find themselves surprised at the lack of fluidity in the endgame. If certainty as to the contents of the law is one of the features of English law that recommends itself to parties to commercial contracts, it may be time for a principled approach to trip time charters, assisting such contracts and other hybrids in becoming an accepted phenomenon at the judicial stage. The distinction between relationship-preserving norms and endgame norms implies that it would be a mistake to think that judicial intervention and elucidation are universally unnecessary in such an independent marketplace: but that is not universally so. Clarity as to the endgame demarcates and delineates the scope for flexibility at the relationship-preservation stage.[98]

Not least, an approach relying on typified contracts as a starting point would still have to recognise the existence of true hybrids, where the parties have indeed sought to establish their own idiosyncratic framework of liabilities. A starting point for interpretation embracing such bird's-eye views is arguably of assistance in interpreting the specific provisions—or the absence of expected provisions—in the charterparty. Insofar as typical time and voyage charters are concerned, it very much remains the case that the two types of contract are distinct and separate. This has been a constant assumption, in spite of the ubiquitous literary assertions that some contracts should be considered hybrids.

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If it is true that the law is not as settled as it ought to be, this adds weight to the onus on judges to set out the principles according to which cases are decided. Instead of considering the expectations of the parties, reasonable or otherwise, reasoned and assertive explications of the law will not only contribute to a clear and comprehensive statement of the law—to a legal academic, in itself a thing of beauty—but may also encourage innovation. There is currently no standard form of terms designed for trip time charterparties. Perhaps judicial attention and more forceful and principled judicial dicta in trip time charterparty cases could lead the way towards a strengthened framework in this area of law.

On the other hand, judges have thus far been demonstrably reluctant to elaborate on the nature and principles of hybrid frameworks. In the final count, must the conclusion be that hybrids are purely a figment of the contracting parties' frenzied contract-making imagination? Are they a feature of relationship-preserving norms only, but crystallise mercilessly into the binary endgame norm framework as soon as a dispute arises? If so, that is contrary to what all the textbooks say—but case law appears to bear out the conclusion by actions, if not as a matter of reasoned theory. If not, judicial reasoning on the construction of hybrid charterparties, admittedly along with academic commentary, has some work to do. But a conclusion that endgames are binary should not be a source of unnecessary worry to the judiciary and commentators. As Bernstein reports, the markets may well be on board with this conclusion already:[99]

"There is empirical evidence from a variety of contracting contexts that suggests that merchants behave in ways that reflect an implicit understanding of the distinction between end-game and relationship-preserving norms and that they do not necessarily want the RPNs they follow during the cooperative phase of their relationship to be used to resolve disputes when their relationship is at an end-game stage."

IV. CONCLUSION

The degree to which charterparty norms developed in practice have

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crystallised into set models appears to be a unique feature within contract law, as is the judicial diffidence observed in recognising a framework idiosyncratic to the parties at the expense of such models. Trip time charters, while recognised in contract-making practice as a distinct phenomenon, appear to have no developed legal framework of their own. They are, in the final tally, merely a quirky form of time charterparty to which in the endgame the law developed for period time charterparties will be applied. Judicial practice and descriptive academic commentary have been reluctant to recognise them as a third species of charterparty with its own principles and norms, let alone a contract form on a spectrum of hybrids. This is consonant with evidence from other markets where merchants have been observed to recognise that the norms applied in the performance of the contract are distinct from those the parties expect to be applied at the dispute resolution stage. The paradigm offers certainty and clarity, but may be at odds with the expectations of some contract parties who had genuinely expected to operate on a blank canvas and to conclude a hybrid contract. To accommodate such parties, the existing framework would need significant judicial focus and development. At present, such hybrids, including trip time charterparties, are little more than a profession of faith. Can they, with Paul, be justified by faith alone, or will the markets, with James, require them to be justified by works?

CHAPTER

5

PUBLIC INTERNATIONAL LAW ASPECTS OF SHIPPING REGULATION

BY ANDREW SERDY

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Learn more

PUBLIC INTERNATIONAL LAW ASPECTS OF SHIPPING REGULATION

Excerpted from *Maritime Law, 4th edition*

1. INTRODUCTION – THE PLACE OF INTERNATIONAL LAW IN THE SHIPPING WORLD AND ITS SOURCES

In the regulatory framework for shipping, no less than for most other fields of human endeavour, it is not possible to escape the influence of public international law.[1] This is the system of law that governs relations between States[2] and other actors whose personality is recognised on the international plane, most relevantly for present purposes international organisations established by States.[3] Every State is a single legal person in international law, even if it is federal in character like Australia, Brazil, Canada, Germany, India, Malaysia, Mexico, Nigeria, Switzerland or the United States (US), or, like the United Kingdom (UK), has devolved substantial governmental powers to regional authorities in parts of its territory. International organisations are established by treaties between States, which usually provide that the organisation is to have independent legal personality. The oldest international organisations such as the Universal Postal Union appeared in the late nineteenth century, but it is since the Second World War that the growth in their number has been most rapid. Examples include the United Nations (UN) and its specialised agencies like the International Maritime Organization (IMO) discussed below,[4] as well as regional organisations such as the European Union (EU) or the North Atlantic Treaty Organization (NATO).[5]

Natural and legal persons, i.e. human beings and companies or other entities that the law of a given country endows with personality, were until quite recently not subjects of international law, and their role in it today remains fragmentary.[6] While treaties might be entered into by States for their benefit, they did not confer rights on those persons under international law – rather, they conferred rights on their States of nationality to insist that all other States party to the treaty comply with its provisions. Although some modern treaties confer rights directly on individuals (usually in the field of human rights) and companies (usually in the field of investment protection), it does not automatically follow – unless, that is, the treaty specifically provides a

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mechanism for it – that they will have some means of enforcing these rights on the international law plane. For example, if a company's rights are violated by a foreign State, it must rely on its own State of nationality (normally the State under whose laws it was incorporated) to espouse a diplomatic claim on its behalf against the delinquent State.

Thus, while today it is accepted that private shipping interests as natural or more frequently legal persons, even though not subjects of international law under the traditional view, can have certain rights and obligations under international law, these are far more limited in extent than those of States. An illustration of this is the 2008 decision of the European Court of Justice (ECJ) in the *Intertanko* case[7] declining to rule on whether Directive 2005/35/EC of the European Parliament and Council on Ship-Source Pollution, which requires EU Member States to ensure that within their legal systems pollution caused by "serious negligence" attracts criminal sanctions, was contrary to the United Nations Convention on the Law of the Sea (UNCLOS).[8] This was on the basis that UNCLOS as a treaty created rights and obligations only for States, not for the applicants, who were a coalition of shipping industry associations.[9] Another way of putting this is to say that, at least in the UK and other States whose legal system is based on the common law,[10] international law works on private companies and individuals by way of interposition: if, for example, the master of a ship is charged with an offence as a consequence of a collision, the offence tried before the UK court will be described not as a contravention of the COLREG Convention,[11] but rather of the provision of the Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1996[12] under the Merchant Shipping Act 1995 which enacts these rules into UK law. The UK, by virtue of being party to that convention, has to legislate domestically in order to be able to implement and comply with its obligations.

One of the crucial differences between the international legal system and its national counter- parts is that there is no international legislature which can enact laws binding on all States. The two main sources of international law affecting shipping (and everything else) are custom, also known as customary international law, and treaties.[13]

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(a) Customary international law

This refers to the body of international law rules having their source in the settled practice of States. Not all practices which States customarily observe, however, are required by international law – the reason for them may be no more than courtesy, or the relevant State's own self-interest. To be a rule of customary international law, the practice of States must meet two requirements:

• constant and uniform usage practised by States (State practice for short); and

• recognition by them that this practice is the result of a rule of law or legal obligation (this psychological element is called *opinio iuris sive necessitatis*, usually abbreviated simply to *opinio iuris*).[14]

Some rules of custom have evolved over centuries of practice, such as those regulating diplomatic immunity. It is, however, possible for a permissive rule (i.e. a State may do X) to be established by the practice of just a few States over a short period if other States acquiesce in it, as occurred at the beginning of the space age when States began to send satellites into orbit passing over other States' territories. Until then a State's sovereignty had been thought to extend infinitely upwards from the earth above its territory, but henceforth it was confined to airspace only, beyond which a new set of rules operated in outer space. On the other hand, a mandatory rule (i.e. a State must [not] do Y) requires the widespread practice of States acknowledging its existence, especially by those States particularly affected – though it need not be completely uniform (since States do after all sometimes breach international law).

One of the uncertainties about rules of customary international law is that it is often difficult to know whether, and if so when, they have been modified by the subsequent practice of States. A new customary rule often begins life by way of an apparent breach of the old one that goes largely unchallenged.

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Thus, the various claims made by States from the 1960s onwards to extend their fisheries and pollution jurisdiction beyond the territorial sea were, on their face, contrary to the customary rule codified in the 1958 Convention on the High Seas, that "[t]he high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty".[15] Since not all States accepted the validity of such claims, there ensued a period of chaos in the law of the sea, putting an end to which was one of the aims of the Third United Nations Conference on the Law of the Sea. The proceedings at this conference confirmed that such jurisdictional claims were valid at customary international law, even before UNCLOS, the product of the conference, entered into force on 16 November 1994.

(b) Treaties

UNCLOS, the central instrument of the modern law of the sea, is a treaty.[16] Treaties come under a variety of formal titles (apart from "treaty" itself, "convention" as in UNCLOS, "protocol", "covenant", "agreement", "exchange of letters" are often encountered), but their essence is that they are agreements between States or international organisations intended by their parties to be binding in international law. They are a versatile instrument. Bilateral treaties (those concluded between two States) serve some of the same functions as contracts under national law, particularly where they are for a specific purpose. By contrast, multilateral treaties – those laying down general rules of conduct for all States parties – are to a lesser degree comparable to legislation in national law, for instance the many shipping-related conventions negotiated under the aegis of the IMO.[17] The most important distinction from legislation, however, is that a treaty is only ever binding on those States which are parties to it.[18]

The last sentence does, however, require a qualification, for treaties can themselves be a source of customary international law. If many States are parties to a multilateral treaty containing a certain rule, and there is no practice of other States inconsistent with that rule, then the treaty may be evidence of a rule of custom. Thus over time treaties exert what Mendelson

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has called a "gravitational pull" on the pre-existing custom, so that even non-parties become bound – not by the treaty as such, but by some or all of the substantive rules within it.[19] Some multilateral treaties are expressed to codify existing rules of international law in a given field, the 1958 Convention on the High Seas being a prominent example.[20]

As between parties to a treaty, its provisions prevail over rules of customary international law (though occasionally, as seen above, new rules of custom may displace older treaty rules). Thus, by entering into treaties, States modify their mutual rights and obligations under custom. Because of the relative certainty and ease of reference they offer as a source of law by comparison with custom, treaties have become the major vehicle for international co-operation. Developed States are commonly party to thousands of treaties affecting all areas of governmental activity; for the UK the number is over 13,000.[21]

(c) Judicial decisions and academic writings

As there is no doctrine of precedent in international law,[22] decisions of international courts and tribunals are binding only on the parties to the actual dispute. (Nor does international law impose judicial settlement and arbitration *a priori* as methods of settling disputes – the basic obligation is no more than that it be done peacefully.)[23] Even so, they are influential as a subsidiary means for determination of rules of international law, especially judgments of the International Court of Justice (ICJ) and, specifically for shipping and other uses of the ocean, of the International Tribunal for the Law of the Sea (ITLOS).[24]

Academic writings can also be evidence of a rule of international law, if the writer is eminent, and the study is based on a comprehensive and impartial examination of State practice. Also significant in this regard, and frequently cited by the ICJ in its judgments, are reports of the International Law Commission (ILC), a body of eminent international lawyers established by the UN General Assembly in 1947 to promote the codification and progressive development of international law.[25]

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Excerpted from *Maritime Law, 4th edition*

2. MARITIME ZONES RELEVANT TO SHIPPING

In this work, concentrating as it does on navigation, it is not necessary to consider the full panoply of maritime zones known to the contemporary law of the sea, as most of the modern ones were created in order to deal with problems of the exploitation of oceanic resources. The following introduction is based on the two "traditional" zones only, expanded where appropriate to take into account developments in the twentieth century.

(a) The two traditional maritime zones

The traditional zones are (i) a narrow belt of water running along the coast, known as the territorial sea, beyond which are (ii) the high seas. The territorial sea is in places supplemented by internal waters (under the full sovereignty of the coastal State, and treated as equivalent to land) lying landward of the baselines from which the breadth of the territorial sea is measured. The territorial sea is also under the coastal State's sovereignty, but subject to the right of innocent passage for foreign ships, a concept considered further below. The high seas were defined negatively as an area beyond the territorial sea, in which no claim to sovereignty or jurisdiction by any State was permitted.[26] Freedom of navigation thus prevailed on the high seas, as well as certain other well-recognised freedoms such as fishing. This is not to say that States could act as they pleased on the high seas, for that would have been anarchy; rather, States had to exercise their freedoms with reasonable regard for the like exercise of freedoms by other States.[27]

Through the advent of the exclusive economic zone (EEZ) the high seas are now much reduced in area, and the seabed is subject to changed rules, but the outlines of the regime affecting the surface and water column – which is all we are interested in for shipping purposes – are largely left unaltered by UNCLOS. Instead of the four freedoms in the 1958 Convention (navigation, fishing, laying of submarine cables and pipelines, overflight) there are now

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six: the new ones are the freedom to construct artificial islands and other installations permitted under international law, subject to Part VI, and freedom of scientific research, subject to Parts VI and XIII. (This does not mean that the high seas are becoming freer, for neither the 1958 nor the UNCLOS list is exhaustive, and their elements are better thought of as instances of a single undifferentiated freedom of the high seas, which over the years has become subject to more qualifications, as is apparent in the UNCLOS list itself.) The EEZ, as explained below, can by virtue of Article 58 also be treated as equivalent to the high seas for most navigational purposes.

In the pre-UNCLOS era the major controversies were over the maximum permissible breadth of the territorial sea and the use of straight baselines, from which that breadth is measured, to enclose areas of ocean as internal waters. The major maritime powers of the day – the UK, US, Germany, Japan, France – maintained that the territorial sea was 3 nm (nautical miles),[28] but even then there were widely tolerated regional departures from this practice, such as 4 nm in Scandinavia and 6 nm in parts of the Mediterranean. The twentieth century saw the making of claims by increasingly numerous States to a territorial sea of 12 nm, mainly because of security and fisheries concerns, and in the 1940s and 1950s a number of mostly Latin American States made claims to a territorial sea of 200 nm. Reaching agreement on the maximum breadth was one of the aims of the 1930 League of Nations Conference on the Codification of International Law, but this effort ended in failure. Attempts to reach a compromise of a six-mile territorial sea plus a further six miles of exclusive coastal State fishery jurisdiction came close to success at the First (1958) and Second (1960) UN Conferences on the Law of the Sea, but agreement remained elusive. All that the ILC could conclude in the commentary to its draft articles prepared for the 1958 conference was that the limit was certainly no more than 12 nm, but might be less.[29]

UNCLOS Article 3 has now settled the maximum breadth of the territorial sea at 12 nm. The rules on straight baselines and bay-closing lines (Articles 7 to 10), however, though admittedly putting some discipline on the drawing of baselines as a way of expanding the area under a coastal State's sovereignty, still leave quite some leeway for their manipulation to this end. Only the US

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through its Freedom of Navigation programme dating from the 1970s systematically challenges baselines it believes to have been improperly drawn, by a combination of diplomatic protest and directing the US Navy to exercise its navigational rights in the area concerned with- out seeking prior permission from the relevant coastal State. By contrast, other States tend to protest at only those baselines that directly affect the extent of their own maritime zones, i.e. those of their near neighbours, and take interest in the baselines of more distant States only if they impinge on some specific navigational interest.[30]

Why was the breadth of the territorial sea so controversial? The long insistence by maritime States on 3 nm was fuelled by the fear that certain narrow straits essential for military and commercial communication would lose the high seas corridor through their middle if a broader territorial sea were to become the norm. Innocent passage was not an acceptable substitute because it could be suspended by the coastal State.[31] Ultimately they accepted 12 nm as the maximum only on condition of a new regime of transit passage through straits used for international navigation that forms Part III (Articles 34–45) of UNCLOS.[32] This regime incorporates wider navigational rights (subject to the requirement that the transit be "continuous and expeditious") into a new concept of non-suspendable transit passage in those straits, which the littoral State may not ham- per, superimposed on the territorial sea status of the strait.[33]

(b) New maritime zones in the modern law of the sea

Several more zones now exist, but some of them are of limited relevance to shipping:

1. Archipelagic waters, added by Part IV (Articles 46–54) of UNCLOS. This concept recognises the special interest of States such as Indonesia and the Philippines, whose territory consists of many islands, in the waters within the archipelago previously regarded as high seas. They wished to be permitted to draw baselines around the archipelago, but this would have transformed the waters within into internal waters. The compromise solution is for

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archipelagic States (defined in Article 46) to have such baselines,[34] but within them the waters – known as archipelagic waters – have a status more akin to the territorial sea, including the rules on innocent passage,[35] while the routes hitherto used for transit through the archipelago now have a special regime of archipelagic sea lanes passage (Article 53) modelled on the transit passage regime for straits of Part III.[36]

2. The contiguous zone. From the early twentieth century many States made claims to jurisdiction over certain matters falling short of full territorial sea rights in a zone adjacent to and seaward of the territorial sea. Article 24 of the 1958 Convention on the Territorial Sea and Contiguous Zone permitted any State claiming a territorial sea of less than 12 nm to exercise out to 12 nm jurisdiction to prevent and punish infringements of its customs, fiscal, immigration and sanitary (that is, animal and plant quarantine) laws in its territorial sea or land territory, including implicitly any water between the two.[37] Article 33 of UNCLOS retains the 1958 regime but extends the outer limit of the contiguous zone to 24 nm from the baselines.

3. The exclusive economic zone. This is another of the compromises in UNCLOS, added by Part V (Articles 55–75). Up to a maximum of 200 nm from the baselines from which the breadth of the territorial sea is measured,[38] the coastal State may claim sovereign rights over the exploration, exploitation, conservation and management of the living and non-living resources, jurisdiction over artificial islands, protection of the marine environment (including against pollution) and certain other matters.[39] In this zone the coastal State in exercising its rights and duties must have "due regard to the rights and duties of other States" (Article 56(2)), which by Article 58(1) include the freedoms of navigation and overflight as well as laying cables and pipelines and "other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships". Article 58(2) imports into the EEZ the high seas rules (other than on resources) "in so far as they are not incompatible with this Part". The net result is that for almost all navigational purposes, although the EEZ is no longer part of the high seas,[40] it can still be treated as though it were. This explains the frequency of reference in navigational circles to "international waters", a term unknown to

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the law of the sea, but useful nonetheless, as it refers to the area seaward of the territorial sea, i.e. an amalgam of the EEZ and the high seas.

4. The continental shelf. Dating from the mid-twentieth century,[41] this zone, in which the coastal State has sovereign rights over mineral resources and sedentary living species (those which at the harvestable stage of their life cycle are unable to move except in constant physical contact with the seabed or subsoil), introduced for the first time a vertical separation into the law of the sea, as the waters above retained their high seas status, as confirmed by the 1958 Continental Shelf Convention.[42] The seaward extent of the continental shelf was originally based on the 200-metre isobath or beyond to the maximum exploitable water depth, but this provoked concern that the progress of technology would eventually result in the whole ocean becoming exploitable and thus, inequitably, falling under the jurisdiction of the nearest coastal State. In UNCLOS Article 76 the outer limit has therefore been changed to a complicated formula approximating the geologically inexact boundary between continental crust and oceanic crust[43] but, reflecting the introduction meanwhile of the EEZ, if this formula leads to a continental shelf extending less than 200 nm from the baselines, the coastal State is entitled in any event to a flat 200 nm.[44]

5. The seabed beyond national jurisdiction (i.e. beyond the continental shelf). An internationalised deep seabed mining regime exists here under Pt XI of UNCLOS (arts 133 to 191), administered by the International Seabed Authority.[45]

The main remaining task for States as regards the spatial division of the ocean is to delimit their overlapping entitlements to maritime zones and establish the outer limit of the continental shelf where it extends beyond 200 nm, both matters being beyond the scope of this chapter.

3. COASTAL AND FLAG STATE RIGHTS OVER SHIPPING IN THE MAIN MARITIME ZONES

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The main tension in the shipping world is between coastal or port States on the one hand and flag States on the other, particularly as regards pollution. The measures favoured by coastal States to minimise the risk of pollution to their coastlines may well have adverse economic consequences for shipping. Let us now examine the principal zones in turn.

(a) Internal waters (including ports)

A State's ports are part of its internal waters, since Article 11 of UNCLOS provides that "[f]or the purposes of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast". The clear position is that foreign ships have no general right to enter internal waters,[46] although there may still be a customary exception for ships in distress, preserved by the preambular paragraph of UNCLOS "affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law".[47] This gives the port (coastal) State the upper hand, since if it can withhold permission to enter, then *a fortiori* it can grant such permission on whatever conditions it chooses. This, however, is only the default position in the law of the sea. A right of ships flagged to State A to enter the ports of State B may be contained in a treaty between those States. Such provisions were typically included in the many bilateral "friendship, commerce and navigation" treaties common in the late nineteenth and early twentieth centuries, and some multilateral treaties also accord a right to parties for their ships to enter each other's ports, such as the 1923 Statute on the International Regime of Maritime Ports,[48] of which Article 2 requires *inter alia* that each party must allow all other parties' ships into its ports on the same terms as its own ships. Note also that in the General Agreement on Tariffs and Trade,[49] by which all members of the World Trade Organization (WTO) are bound, Article V(2) on freedom of transit may prevent closure of ports to a ship wanting to unload goods destined for a third State. A claim of breach of this provision was brought by the European Community (as it then was) against Chile in the WTO in 2000, but proceedings were soon suspended and in 2010 ultimately discontinued.[50] A like claim was made by Denmark (for the Faroe Islands) against the EU in 2013, but settled the following year.[51]

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A ship voluntarily in port subjects itself to the jurisdiction of the port State. Because its presence is only temporary, often there will be practical reasons for the port State to refrain from exercising this jurisdiction, but it retains the right to do so.[52]

(b) The territorial sea

The principal qualification of a coastal State's sovereignty over the territorial sea is that foreign ships have a right of innocent passage.[53] UNCLOS Article 18 defines this as "continuous and expeditious" navigation through the territorial sea to or from the internal waters or a port of a coastal State, or a traverse without entering its internal waters. Stopping and anchoring are not allowed, except as incidental to ordinary navigation or necessary due to *force majeure*, distress or in order to render assistance to persons, ships or aircraft in danger or distress. The definition excludes cabotage, the term for coastal shipping between two ports of the same State, leaving States free to reserve this for their own nationals or ships. A notorious example is the Jones Act in the US, which requires not only that goods transported by water between US ports be carried in US-flagged ships, but also that these must be constructed in the US, owned by US citizens and crewed by citizens or permanent residents of the US.[54]

In the territorial sea the main duties of the coastal State are not to hamper innocent passage and to publicise any danger to navigation of which it knows.[55] It may not levy any toll for passage,[56] but may temporarily suspend innocent passage for weapons exercises or other essential security reasons on due advance publicity.[57]

UNCLOS Article 19 elaborates to a much greater degree than the equivalent 1958 Convention[58] the activities which render passage no longer innocent if the ship engages in them. These comprise the threat or use of force against the coastal State's sovereignty or territorial integrity,[59] exercise or practice of weapons of any kind,[60] collection of information prejudicial to the security of the coastal State,[61] any act of propaganda aimed at the coastal State's defence or security,[62] the launching or taking on board of any aircraft or military device,[63] the loading or unloading of any commodity, currency or person

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contrary to the coastal State's laws,[64] any act of wilful and serious pollution,[65] fishing activity,[66] research or survey activities,[67] interference with communications,[68] or any other activity not directly related to passage.[69] The coastal State may prevent passage which is not innocent.[70]

The only other significant qualification is that coastal States may not prescribe their own conditions for the construction, design, manning and equipment of ships in the territorial sea, but can instead only enact and enforce the regulations contained in "generally accepted international rules or standards".[71] It will readily be seen that this is necessary if the right of innocent passage is to be at all meaningful, since otherwise ships could be subject to several different and potentially contradictory design rules in the course of a single voyage, with the result that compliance with one such rule may make compliance with another impossible.

A chance to elaborate on innocent passage was declined by the ECJ in 2008 when it declined to entertain a challenge to Directive 2005/35/EC of the European Parliament and Council on Ship-Source Pollution, mandating criminal sanctions for pollution caused by "serious negligence", as contrary to UNCLOS.[72] Such a possibility arises since by Article 19(2)(h) only an act of "serious *and* wilful" pollution would deprive passage of its innocence, hence pollution caused by serious negligence, by definition not wilful, cannot have this effect. The applicants had also argued that the mere presence of these laws on EU Member States' statute books, whether or not they were enforced, would have the effect of hampering innocent passage contrary to UNCLOS Article 24(1) (though note that this provision speaks of the "application" of coastal State regulations).[73] The issue has thus not been definitively disposed of, but may resurface through challenges to the implementing laws of one or more EU Member States by a non-EU flag State. Had there been proceedings by the Commission against any EU Member States failing to implement the Directive (which was opposed by several of them), these could conceivably have defended their position by arguing that, under the EU hierarchy of norms, the Directive yields to any treaty obligation of the EU with which it is inconsistent.

Although the events occurred in archipelagic waters rather than in the

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territorial sea, *the Duzgit Integrity Arbitration*[74] is mentioned here because the basic regime of archipelagic waters – sovereignty of the coastal State subject to innocent passage for foreign-flagged ships – parallels that of the territorial sea. The dispute arose in 2013 out of the attempt by the *Duzgit Integrity*, flagged to Malta, which had been bunkering other ships, to transfer its remaining supplies to another ship operated by the same enterprise that had come to relieve it. As a result of linguistic and other misunderstandings, although the master of the *Duzgit Integrity* repeatedly indicated his willingness to move outside São Tomé's territorial sea in order to make the transfer, it was in São Tomé's archipelagic waters that the attempt occurred, without the prior authorisation required for this under São Tomé law. Subsequently São Tomé detained the ship and its master; a local court ordered the master's imprisonment and imposed a €5,000,000 fine jointly against the master, owner and charterer of the ship as well as ordering the confiscation of the vessel and its cargo; other administrative fines exceeded €1,000,000. An arbitral tribunal constituted under Annex VII to UNCLOS upheld Malta's claim that the measures taken by São Tomé violated Article 49(3) of UNCLOS, which relates to the exercise of a State's sovereignty over its archipelagic waters.[75] Malta also claimed that São Tomé had breached various provisions of Part XII of UNCLOS relating to protection of the marine environment.[76] The tribunal held that enforcement measures taken by a coastal State against unlawful activity within its archipelagic waters must be reasonable, which means respecting the general principles of necessity and proportionality.[77] It found unanimously that the initial measures taken by São Tomé – detaining the ship, requesting the master to come ashore to explain the circumstances, and imposing an administrative fine – were well within its law-enforcement jurisdiction, but found by majority that the other penalties imposed by São Tomé taken together – the prolonged detention of ship and master, the monetary sanctions and the confiscation of the entire cargo – could not be regarded as proportionate to either the offence or São Tomé's interest in ensuring respect for its sovereignty and exceeded what was permissible under Article 49.[78] For this Malta was entitled to compensation in a quantum to be determined in a succeeding phase of the arbitration. Malta's claims relating to the marine environment under Part XII of UNCLOS were

dismissed, the tribunal not being persuaded on the evidence before it that São Tomé had exposed the marine environment to an unreasonable risk.

(c) The EEZ: "creeping jurisdiction", bunkering, law enforcement

Maritime States keep a keen eye out for what they term "creeping jurisdiction", that is, jurisdictional claims by coastal States in the EEZ beyond what the Part V regime allows them, such as the closure of the EEZ to a single-hulled oil tanker in 2003 by Spain for fear of a repetition of the disastrous pollution consequences of the sinking of the *Prestige* in 2002.[79] Fears of the EEZ hardening in this way into a 200 nm territorial sea are often overplayed, as many coastal States themselves rely on the freedom of navigation, and creeping jurisdiction tends to be used as a pretext to oppose new rules placing additional regulatory powers into coastal States' hands even where there are good reasons to do so. Yet such fears are not entirely fanciful, as this is in fact how the modern doctrine of the territorial sea itself, which grew out of claims to jurisdiction over specific subjects, originally came about.[80]

Similarly, one of the string of cases on bunkering in recent years[81] shows that, while bunkering in itself may be thought of as belonging more to the freedom of navigation preserved by Article 58(2) of UNCLOS, it yields to the specific powers of the coastal States as regards marine living resources. In the first such case, *The M/V Saiga (No 2)*, ITLOS held that the coastal State Guinea had no right to apply its customs legislation prohibiting importation of gas oil into the customs radius (*rayon des douanes*) of Guinea extending to 250 nautical miles from the coast and thus including Guinea's EEZ, where the incident of which the flag State complained took place. ITLOS concluded that Article 58(3) of UNCLOS made it competent to determine the compatibility of Guinea's laws and regulations with UNCLOS. Beyond the contiguous zone overlapping with the innermost 12 miles of the EEZ, the only other part of the EEZ in which the coastal State could apply its customs laws was to artificial islands, installations and structures under Article 60(2), thus Guinea's actions in pursuing and detailing the *Saiga*, prosecuting and convicting its master, confiscating the cargo and seizing the ship were contrary to UNCLOS. It

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rejected Guinea's argument that the principle of "public interest" could serve as a basis for its laws, observing that this would curtail the rights of other States in the EEZ, contrary to Articles 56 and 58. It similarly rejected a plea of necessity under general international law: however essential Guinea's interest in protecting its tax revenue from the sale of bunkers to fishing vessels, it could not be said that the only means of safeguarding that interest was to apply its customs laws to the whole of its EEZ. While both parties made submissions on the broader question of the rights of coastal and other States in connection with offshore bunkering, ITLOS was able to reach its decision on whether Guinea's actions were consistent with the applicable provisions of UNCLOS without needing to address that issue and thus forbore from making any findings on it.[82]

In *The Virginia G*,[83] however, decided in 2014, ITLOS accepted that bunkering of fishing vessels falls under coastal State fisheries jurisdiction, confirming that coastal States are entitled to prohibit bunkering of such vessels and even confiscate ships engaging in it unlawfully, but only to the extent necessary to ensure compliance with coastal State regulations pursuant to Article 73(1), so the coastal State was ordered to reverse the confiscation in this case. This potentially opens the way to making significant inroads into the residual freedom of navigation preserved by Article 58, which the flag State here unsuccessfully argued should have been the dominant principle.

The *Arctic Sunrise* arbitration[84] concerned a claim before an Annex VII tribunal brought by the Netherlands as the flag State arising out of the pursuit and detention by the Russian authorities of a Greenpeace ship, from which activists protesting against exploration for oil in Arctic waters had unlawfully established themselves aboard a drilling rig in the Barents Sea in Russia's EEZ. Addressing the lawfulness of the measures taken by Russia against the eponymous ship and the 30 persons on board, the tribunal stated that, while protest at sea is an internationally lawful use of the sea related to the freedom of navigation, the right to protest does not override relevant coastal State rights. This led it to consider the possible legal bases for Russia's boarding, seizure and detention of the *Arctic Sunrise*. Of those related to the protection of the coastal State's rights and interests in the EEZ, the tribunal

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accepted that Russia had a right as a coastal State to enforce its laws regarding non-living resources in its EEZ, but found no specific Russian laws on the subject that the *Arctic Sunrise* might have contravened. Most plausibly, the tribunal noted that a coastal State may act to prevent interference with its sovereign rights for the exploration and exploitation of those resources, but held that none of the actions of the *Arctic Sunrise* up to the time it was boarded constituted such an interference.[85] It also considered whether the measures taken by Russia could have been based on the enforcement jurisdiction of the coastal State with respect to protection of the marine environment, but found no support in the relevant provisions of Part XII of UNCLOS for the particular measures taken.[86] The tribunal did not exclude that the coastal State might be justified in taking some kind of preventive action in its EEZ against a ship when there was reason to believe that it was involved in a terrorist attack on an installation or structure of the coastal State, but considered that there was no reasonable basis for Russia to suspect that the *Arctic Sunrise* was engaged in terrorism.[87]

(d) The high seas: nationality of ships, Flag State duties, piracy

Nationality of ships. This is the most fundamental regulatory matter pertaining to the high seas. The basic rule is set out in Article 92 of UNCLOS, identical (but for a cross-reference) to Article 6 of the 1958 High Seas Convention:

Article 92

Status of ships

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any

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other State, and may be assimilated to a ship without nationality.

There are two frequently encountered misconceptions as to the effect of this rule. The first is that high seas freedoms and exclusivity of flag State jurisdiction are absolute, so that States cannot enforce their laws even in their own ports where this would prevent a foreign ship from returning to the high seas, as occurred when the New Zealand Court of Appeal in *Sellers v Maritime Safety Inspector*[88] quashed a conviction for leaving port without the prescribed safety equipment. ITLOS by necessary implication rejected such reasoning in *The Louisa*, a case brought by the flag State of a ship detained in port pending investigation of offences relating to unauthorised removal of underwater cultural heritage objects, alleging *inter alia* an interference with the freedom of navigation guaranteed to its ship by UNCLOS Article 87. In dismissing this claim for want of jurisdiction *ratione materiae*, ITLOS took the view that the facts did not even engage Article 87.[89]

It is not certain whether this robust attitude will survive the decision on the merits, expected in 2018, in *The Norstar*. In late 2016 ITLOS dismissed a preliminary objection by Italy to the Article 87 claim of the flag State, Panama, arising out of the detention of the *Norstar* prompted by the Italian authorities' mistaken belief that it had committed tax fraud by bunkering another ship on the high seas, a charge dismissed by an Italian court which found that the high seas location meant that the conduct in question did not constitute an offence.[90] The decision to reject the preliminary objection means that ITLOS accepted that there was a plausible claim, distinguishing this case from *The Louisa* on the basis that the acts alleged to constitute an offence warranting the ship's detention, pleaded to have interfered with the flag State's freedom of navigation, occurred on the high seas, even though the detention itself occurred during its next port call. Whatever the outcome of this case, because there are several exceptions to exclusivity considered below, primacy rather than exclusivity for the flag State gives a truer picture of the actual position. Flag State jurisdiction should instead be seen as a way of preventing a legal vacuum on the high seas, given that no State has the competence to regulate activities there on a spatial basis. In *The Saiga (No 2)*, ITLOS held that UNCLOS

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considers a ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention. Thus the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.[91]

Seen in this light, allocating primacy of jurisdiction to the flag State, irrespective of the States of nationality of the owners and the various other interests connected with the ship – crew, cargo, insurers – ensures that the ship presents a single legal "face" to the outside world.

Second, the provision that ships must "sail under the flag of one State only" does not mean that ships can have only a single nationality at any given time.[92] The possibility of multiple nationalities is an unavoidable consequence of UNCLOS Article 91:

> Article 91
>
> Nationality of ships
>
> 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
>
> 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

Since States are free to grant their nationality or the right to fly their flag on whatever basis they choose, provided there is a genuine link between ship and State, it follows that inevitably States will do so on different bases and that there will thus be instances in which a ship satisfies distinct nationality criteria of two or more States simultaneously.[93] While from a policy perspective there is much to be said for the practice of many States that

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refuse to register a ship without proof that the previous flag State has deleted it from its own registry, there is no legal requirement underpinning this.[94]

Another matter on which Article 91 – indeed the whole of UNCLOS – is silent is the definition of "ship". While several of the IMO Conventions listed below have their own varying definitions, these do not extend beyond the narrow confines of each of these treaties.[95] The consequence of this is that it is left to each State to decide for itself what physical and other characteristics qualify a vessel to be accepted onto its register as a ship, and once registered this would probably oblige other States to treat it as a ship even if it would not qualify as such under their own laws. Should another State have reason to dispute whether the vessel is a ship (though only one incident of this kind has come to light, and it is a military one),[96] the compulsory dispute settlement provisions of UNCLOS may offer a way out of the impasse. This may become more of an issue in the coming years with the likely advent of unmanned vessels.

The "genuine link" wording is taken from Article 5 of the High Seas Convention,[97] which in turn was inspired by the ICJ decision in the *Nottebohm Case*,[98] where the facts concerned an individual with, at least on one view, multiple nationalities. Just as such an individual can only present one passport when entering a State, and thereafter that State can insist on treating him or her as a national of the issuing State and no other, a ship must elect one of its nationalities under which to undertake any given voyage; the penalty for using more than one flag is that it cannot claim any of the relevant nationalities and may be treated as though it were stateless.[99]

Another factor leading to the "genuine link" requirement losing much of its significance is the 1960 Advisory Opinion[100] sought from the ICJ by the Intergovernmental Maritime Consultative Organisation (as it then was) on the meaning of the "largest shipowning nations" in Article 28(a) of its 1948 Convention,[101] which the Court interpreted to mean those with the largest registered tonnage. These would be easily ascertainable, whereas attempting to establish the legal or beneficial ownership of ships, which often cannot be done directly but must instead be traced through a series of holding

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companies whose share registers are not readily available, would be a much more difficult exercise. This has favoured the growth of flags of convenience or open registers, maintained by States which require little or no prior link and often lack the personnel and administrative infrastructure necessary in order to enforce labour and safety standards on board the ships. Precisely for this reason, however, they are popular among shipowners anxious to minimise their costs, and it is generally these interests which shape the positions taken by their States of nationality at the IMO. This is no doubt also the reason why the 1986 United Nations Convention on Conditions for the Registration of Ships[102] fails to specify what constitutes a genuine link,[103] yet even so has received only 15 of the 40 ratifications and accessions accounting for 25 per cent of world shipping tonnage it needs to enter into force,[104] and is now widely regarded as unlikely ever to do so. Note also that this Convention lays down the rule that a ship can only be on one State's register at a time.[105] This would not have been necessary had that been the position anyway under Article 5 of the 1958 High Seas Convention and its successor in UNCLOS, Article 91.

Flag State duties. An opportunity to restore teeth to the genuine link requirement of Article 91 was not taken by ITLOS in *The Saiga (No 2)*, where it concluded that its purpose was "to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States".[106] That is, the existence of a genuine link is not a condition precedent to registration, but an obligation that arises as a consequence of it, since without it the flag State would not be in a position to perform the significant duties that it has pursuant to Article 94 of UNCLOS in respect of its ships:

Article 94

Duties of the flag State

1. Every State shall effectively exercise its jurisdiction and control in administrative,

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technical and social

matters over ships flying its flag.

2. In particular every State shall:

(a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and

(b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.

3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:

(a) the construction, equipment and seaworthiness of ships;

(b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;

(c) the use of signals, the maintenance of communications and the prevention of collisions.

4. Such measures shall include those necessary to ensure:

(a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;

(b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;

(c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

5. In taking the measures called for in paragraphs 3 and 4 each State is required to

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conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

7. Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall co-operate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.

Note the numerous cross-references to international regulations and standards, which are provided by IMO conventions among those listed below, and the requirement for periodic surveys in subparagraph 4(a), a task that many States delegate to private-sector classification societies.[107] The fact that the performance of the duty is thus delegated to a private body does not absolve the State from the obligation to ensure that it is properly discharged. In *The Erika*,[108] the defendant classification society unsuccessfully claimed sovereign immunity from the French court's juris- diction, derivative of that of the flag State.

Piracy. There was an upsurge of piracy off Somalia from 2007 which has in recent years largely abated, though the Gulf of Guinea has at the same time emerged as a new area of concern. The relevant international law is for the most part straightforward and well settled. Importantly, despite occasional calls for action implying the contrary, States already have under international law all the legal authority they need to combat piracy by capturing and prosecuting its perpetrators, as set out in Article 105 of UNCLOS below. What frequently stops them from doing so tends instead to be how their own domestic legal systems implement, either generally or in individual cases, the duty in Article 100 of UNCLOS to repress piracy: "All States shall co-operate to

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the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State." This duty, along with the other provisions of UNCLOS quoted or paraphrased below, is accepted as customary international law applying to all States whether or not they are party to UNCLOS, in as much as it reproduces the equivalent articles of the 1958 Convention on the High Seas. Yet Article 100 falls short of imposing an actual duty to do anything in particular in exercise of their Article 105 powers. In economic terms this has allowed States to be free-riders on each other's contributions to securing the oceans against piracy, making such contributions less likely and thus leading to an inefficient global underprovision of efforts in this regard. There is no realistic prospect of amending Article 100 to cure this defect, however, as many States, including most developed ones, are opposed in principle to reopening the text of any part of UNCLOS.

Article 101 of UNCLOS defines piracy as consisting of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by

the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of

facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

There are three main limitations under this definition. First is its geographic

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scope: it is some- times asserted that piracy can occur only on the high seas, but in the shipping context this needs a twofold qualification: (a) there is no such restriction affecting the acts of incitement or intentional facilitation of piratical acts, which can accordingly take place anywhere, including on land;[109] (b) most importantly, under Article 58 of UNCLOS States' EEZs are taken as still being part of the high seas for this purpose, so that in effect all waters outside the territorial sea of any State are covered. Moreover, similar acts committed within a territorial sea fall under the sovereignty and jurisdiction of the coastal State (although, in the case of Somalia only, a succession of UN Security Council Resolutions has established a system for States co-operating with Somalia to operate in its territorial sea).[110]

Second, because of the need for two ships (or aircraft) to be involved, hijacking of ships (or aircraft) by stowaways or persons posing as passengers is not piracy. The same applies if the second craft is not a ship or aircraft, as was the case in the *Arctic Sunrise* arbitration,[111] where Russia initially laid charges of piracy against the Greenpeace protesters but later downgraded these to hooliganism; the arbitral tribunal reasoned that, since the oil rig to which two of them gained access was not a ship, the Russian measures could not be considered as an exercise of the right of visit against ships suspected of piracy. Last, there is debate over whether the specification of "private ends" means that acts of politically motivated violence otherwise fitting the definition cannot be piracy, or simply reflects the rule that government vessels cannot commit piracy.[112]

Article 105 provides as follows:

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

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This has led to suggestions that suspected pirates seized by a State may be tried only by that State and cannot subsequently be transferred to another State (such as Kenya or the Seychelles under agreements reached with States patrolling waters affected by Somalia-based pirates) for trial and, if convicted, imprisonment. Note, however, that while Article 105 assumes that the capturing State will be also be the prosecuting State, it does not actually require this, and does not disturb the customary international law rule that all States have what is known as "universal jurisdiction" to try alleged pirates subsequently found in their territory, without the need for any other links with the piracy offence[113] – though again there is no duty to accept suspects for trial. States willing to use Article 105 that are party to the IMO's 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,[114] which appears to be drafted broadly enough to cover the acts of violence and hostage-taking often associated with piracy, may in addition rely on the mechanism in Article 8 of the latter Convention for delivering suspects to the authorities in a foreign port.

Note that by Article 107 seizures on account of piracy "may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect". When naval forces engage with pirate vessels, they may fire in self-defence or defence of others on any pirates who pose a clear threat to human life. On the other hand, Article 106 makes a State seizing a ship or aircraft on suspicion of piracy without adequate grounds liable to the flag State for any loss or damage caused by the seizure, somewhat undercutting the exception in Article 110 discussed below to exclusivity of the flag State's jurisdiction over law enforcement on the high seas, by which all States' warships may board and inspect vessels suspected of piracy.

In the light of the foregoing, a number of factors may contribute to the continuing reluctance of most States to prosecute pirates they capture, as opposed to disarming and releasing them instead with enough food and fuel to make landfall. One is evidential difficulties: physical evidence such as boarding ladders and weapons will often have been dumped into the sea, and the victims who would be called as witnesses at trial are typically seafarers

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not easy to release from their duties, yet if they make only written statements and are not presented for cross-examination by the defence, their evidence will, depending on the legal system, be discounted or possibly not admitted into court at all. Another is that many States do not have an offence of piracy on their statute books and, even if they do, their navies may – despite their clear international law powers – lack the domestic authority to arrest criminals if that is reserved to the police. Finally, logistics may be an issue; a warship taking captured pirates into port for prosecution is diverted from its principal task of protecting shipping in the vulnerable sea lanes, increasing the risks to other vessels.

In the United Kingdom, Articles 100 to 107 of UNCLOS are expressly recognised as customary international law by section 26(1) of the Merchant Shipping and Maritime Security Act 1997. This ensures that, even though the offence of piracy is committed outside the normal territorial jurisdiction of the UK courts, they will have jurisdiction to try a person accused of the offence, wherever captured, and if the person is convicted, to impose sanctions.

In response to the revival of large-scale piracy, the IMO in 2009 led the formation of the Contact Group on Piracy off the Coast of Somalia, subsequently endorsed by the UN Security Council. One of its fruits was a paper[115] presented to the November 2010 meeting of the IMO Legal Committee, concentrating on the possible courses of action in the legal field. This includes assistance to coastal States to adopt legislation which will empower their courts to prosecute and imprison pirates. The IMO has succeeded in persuading States in the region of Somalia to subscribe to the Djibouti Code of Conduct.[116]

The most significant development since then has been a debate on whether merchant ships should carry armed personnel. It was generally accepted previously that live firing on board a ship was likely to cause more problems than it solved, particularly if the ship in question was a tanker laden with volatile cargo, but the majority view has now changed.[117] The dangers are illustrated by the *Enrica Lexie* incident of 2012, in which Italian naval personnel posted on board a merchant ship for its protection shot and killed

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two Indian fishermen whom they mistakenly believed to be pirates. The charges of murder filed by Indian prosecutors against the two Italians who fired the fatal shots have been stayed pending resolution of a dispute between Italy and India as to whether, since the incident occurred outside India's territorial sea, Article 97(1) of UNCLOS ("In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national") operates to give Italy exclusive jurisdiction to try them. If not, then under the general international law rules on criminal jurisdiction India as well as Italy may do so.[118]

(e) Exceptions to exclusivity of flag State jurisdiction on the high seas

Article 110 of UNCLOS, little changed from Article 22 of the 1958 High Seas Convention, sets out a number of bases on which a warship of one State has a right of "visit" (boarding and inspection) over a ship flagged to another State.

Article 110

Right of visit

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

(a) the ship is engaged in piracy;

(b) the ship is engaged in the slave trade;

(c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;

(d) the ship is without nationality; or

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(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply *mutatis mutandis* to military aircraft.

5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

As is seen from the foregoing, the bases fall into two classes: (i) where there is reasonable ground for suspecting the ship is engaged in a specified unlawful activity (piracy,[119] slave trading or unauthorised broadcasting); (ii) the ship is either stateless or actually of the same nationality as the warship, despite either failing to fly or refusing to show its flag. If the suspicions prove unfounded, however, and the ship boarded did nothing to justify them, it must be compensated for any loss or damage sustained.

There is no readily available information on the frequency of such boardings or on the level of compliance with the obligation to pay compensation. No disputes between States arising out of them have become publicly known through litigation, although it is possible that disputes of this kind may have occurred but been settled by diplomatic means. The US Coast Guard maintains a fund for this purpose, but makes disbursements from it only for physical loss and damage, and denies compensation to ships for economic loss such as may, for example, be sustained through delays in arrival in port due to the boarding and inspection.[120]

A second exception is "hot pursuit" of a fleeing ship from one of the coastal State's maritime zones where it is suspected of having committed a relevant

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offence. That is, pursuits arising out of fisheries offences and others falling under the jurisdiction of the coastal State in the EEZ may be commenced from that zone; those arising out of offences against customs, fiscal, immigration and sanitary laws may be commenced in the contiguous zone (though the offences must have taken place within or landward of the territorial sea);[121] pursuit for any other offences must be commenced in the territorial sea. The conditions for valid commencement and maintenance of such a pursuit are to be found in Article 111 of UNCLOS, also little changed from Article 23 of the High Seas Convention, and were considered and applied in the *Arctic Sunrise* arbitration.[122] There an arbitral tribunal formed under Annex VII to UNCLOS found that one of the conditions, that the pursuit must be continuously maintained, had not been satisfied, since it took place in two distinct phases separated by an intervening period in which the pursuing Russian ship, though never losing visual contact with the *Arctic Sunrise*, had acted in a way inconsistent with an intention to maintain an active pursuit. While there is no cause to disagree with these factual findings, the applicability at all of Article 11 may be doubted: the pursuit began and ended in the Russian EEZ without ever reaching the high seas. The tribunal questionably treated the safety zone around the rig, mentioned in paragraph 2 of Article 111 as well as Article 60, as a separate maritime zone from which the pursuit into the surrounding EEZ for possibly relevant offences[123] needed to comply with the rules on hot pursuit. While it is possible to read the ambiguous words "including safety zones around continental shelf installations" in Article 111(2) this way, it implies that the safety zone is not part of the EEZ, and nothing in Article 60 supports this. Article 111(8) provides that "Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained." A final phase of the *Arctic Sunrise* arbitration is underway at the time of writing to determine the quantum of compensation due.

Note also that the opening words of UNCLOS Article 110(1) above preserve the right of visit where a separate treaty basis for it exists. The US under the Proliferation Security Initiative has concluded a number of treaties with

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prominent flag States such as Panama and Liberia by which such visits may occur.[124] The most prominent example of such a treaty provision is Article 21 of the 1995 UN Fish Stocks Agreement,[125] which has the effect of advance consent by its parties to boarding and inspection of their fishing vessels by any State that is a member of a regional fisheries management organisation or arrangement, whether or not the flag State is itself a member.

Also in force since 2010 is the IMO's 2005 Protocol[126] amending its 1988 Convention for the Suppression of Unlawful Acts against the Safety of Navigation[127] to cover carriage of weapons of mass destruction at sea. This inserts new Article 8*bis* on co-operation and procedures where a State Party desires to board a ship flying the flag of another party on reasonable suspicion that the ship or a person on board is, has been or is about to be involved in committing any of the offences in the revised Article 3[128] and new Articles 3*bis*,[129] 3*ter*[130] and 3*quater*.[131] Article 3*bis* prohibits a person from using against or on a ship or discharging from a ship any explosive, radioactive material or biological, chemical or nuclear weapon, using a ship in a manner that causes death or serious injury, transporting any explosive or radioactive material knowing that it is intended to cause death or serious injury, or committing any of a number of ancillary offences with intent to intimidate a population or to compel a government or international organisation to do or refrain from doing any act.

The flag State's authorisation and co-operation are required before a boarding may take place. The Protocol offers two ways for a State Party to give this authorisation in advance, by making either of the following notifications to the IMO Secretary-General in his capacity as depositary of the 1988 Convention, who then circulates them to the other parties (though, as far as is known, no such notifications have actually been made). One is a general authorisation to board and search a ship flying its flag, its cargo and persons on board, and to question those persons to determine whether a relevant offence in Article 3 as revised or any of Articles 3*bis*, 3*ter* or 3*quater* has been, is being or is about to be committed.[132] The second way is that the flag State's permission must still be sought through the usual channels, but is deemed to have been given if no response to the request to confirm

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nationality is received from the flag State within four hours of the request being made.[133] No use of force is allowed, unless either it becomes necessary to ensure the safety of the inspecting officials and other persons on board, or the officials are obstructed in the execution of authorised actions; it must then not exceed the minimum degree of force which is necessary and reasonable in the circumstances.[134]

4. THE IMO AND ITS CONVENTIONS

(a) Role of the IMO

The IMO is one of the 17 specialised agencies of the UN,[135] and is the only one whose headquarters are in the UK. Because both the UN and the IMO are created by treaties (the UN Charter and the Convention on the International Maritime Organization[136] respectively), and there is no hierarchy among treaties, the IMO, like the other specialised agencies, is not formally subordinated to the UN, but rather has been "brought into relationship" with the UN by an agreement with it under Articles 57 and 63 of the UN Charter, and reports each year to the UN's Economic and Social Council on its activities.

As at 31 December 2016 the IMO had 172 Member States and three Associate Members.[137] Because the 1948 Convention is only open to States,[138] the EU is not among them, but has expressed the view that the Convention should be amended to allow it to accede.[139] Not all of its Member States, however, are enthusiastic about such a proposal.[140] Of the various conventions negotiated at the IMO, only the 2002 Protocol to the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea[141] allows international organisations to become party, which the EU did in 2011.[142]

Under its Convention, the IMO is responsible for both shipping and, since a 1977 amend- ment,[143] its effect on the marine environment. Its purposes and functions are enumerated in Articles 1 and 2 (originally 3) respectively, namely:

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Article 1

The purposes of the Organization are:

(a) To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety, efficiency of navigation and prevention and control of marine pollution from ships; and to deal with administrative and legal matters related to the purposes set out in this Article;

(b) To encourage the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination; assistance and encouragement given by a Government for the development of its national shipping and for purposes of security does not in itself constitute discrimination, provided that such assistance and encouragement is not based on measures designed to restrict the freedom of shipping of all flags to take part in international trade;

(c) To provide for the consideration by the Organization of matters concerning unfair restrictive practices by shipping concerns in accordance with Part II;

(d) To provide for the consideration by the Organization of any matters concerning shipping and the effect of shipping on the marine environment that may be referred to it by any organ or specialized agency of the United Nations;

(e) To provide for the exchange of information among Governments on matters under consideration by the Organization.

Article 2

In order to achieve the purposes set out in Part I [i.e. Article 1] the Organization shall:

(a) Subject to the provisions of Article 3, consider and make recommendations upon matters arising under Article 1 (a), (b) and (c) that may be remitted to it by Members, by any organ or specialized agency of the United Nations or by any other intergovernmental organization or upon matters referred to it under Article 1 (d);

(b) Provide for the drafting of conventions, agreements, or other suitable instruments, and recommend these to Governments and to intergovernmental organizations, and convene such conferences as may be necessary;

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(c) Provide machinery for consultation among Members and the exchange of information among Governments;

(d) Perform functions arising in connexion with paragraphs (a), (b) and (c) of this Article, in particular those assigned to it by or under international instruments relating to maritime matters and the effect of shipping on the marine environment;

(e) Facilitate as necessary, and in accordance with Part X, technical co-operation within the scope of the Organization.

The purposes of countering discrimination and restrictive practices in shipping were controversial, which is one of the main reasons for the Convention taking a decade to enter into force. Initially, therefore, the focus of the IMO's activity was on safety of navigation, but more recently it has also engaged in related matters such as prevention of pollution. In both capacities the IMO is given a variety of roles in many provisions of UNCLOS, where, with one exception, it is mentioned not by name but as the "competent international organisation".

(b) Structure of the IMO

By Article 12 of the 1948 Convention, the IMO consisted at first of an Assembly, a Council, a Maritime Safety Committee, such subsidiary organs as it "may at any time consider necessary" and a Secretariat. The 1975 amendments that included the name change also entrenched the Legal and Marine Environment Protection Committees in the structure, as did the 1977 amendments for the Technical Co-operation Committee[144] and the 1991 amendments for the Facilitation Committee.[145] The IMO is currently (2017) in its first prolonged period of constitutional stability, as since 2008 there have been neither any outstanding amendments adopted but awaiting entry into force, nor plans to draft new ones.

The Assembly consists of all the Member States[146] and meets in regular session every two years, with provision for extraordinary sessions to be convened on 60 days' notice.[147] Among its functions are to elect the Members

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to be represented on the Council,[148] to determine the budget and financial arrangements of the IMO and approve its accounts[149] and to recommend to Members for adoption regulations and guidelines (or amendments to these) concerning maritime safety, the prevention and control of marine pollution from ships and other matters concerning the effect of shipping on the marine environment which have been referred to it.[150]

The Council consists of 40 Members, comprising: (a) ten States with the largest interest in providing international shipping services; (b) ten other States with the largest interest in international seaborne trade; (c) 20 further States having special interests in maritime transport and navigation elected so as to ensure the representation of all major geographic areas of the world.[151] It meets on a month's notice as often as necessary on the summons of its Chairman or on request by not less than four of its members; in recent years there has been a pattern of meeting twice yearly.[152] It receives the recommendations and reports of the various committees and transmits them to the Assembly together with its own comments and recommendations.[153]

The Council, with the approval of the Assembly, also appoints the Secretary-General.[154] It reports to the Assembly at each regular session on the IMO's work since the previous regular session,[155] and submits to the Assembly budget estimates and financial statements together with its comments and recommendations.[156] Between sessions of the Assembly, the Council performs all the functions of the IMO other than making recommendations for the adoption of regulations.[157]

The Maritime Safety Committee now consists of all IMO Members,[158] as do all other IMO Committees.[159] It meets once a year and at other times upon request of any five of its members.[160] The Committee's main duty is to consider matters concerned with aids to navigation, construction and equipment of vessels, manning from a safety standpoint, rules for the prevention of collisions, handling of dangerous cargoes, maritime safety procedures and requirements, hydrographic information, log-books and navigational records, marine casualty investigation, salvage and rescue, and any other matters directly affecting maritime safety.[161] It submits to the Council proposals for new safety regulations or amendments to existing ones,

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as well as recommendations and guidelines,[162] and reports to the Council on its work since the previous session of the latter.[163]

The Marine Environment Protection Committee, first established by the Assembly in 1973 as a subsidiary body of the Assembly,[164] was made permanent by the 1975 amendments to the IMO Convention.[165] Its remit is to consider any matter concerned with prevention and control of pollution from ships, in particular the adoption and amendment of relevant conventions and other regulations and measures for their enforcement.[166] Meeting at least once a year,[167] it submits to the Council proposals for regulations on prevention and control of marine pollution from ships or amendments to existing ones, as well as recommendations and guidelines,[168] and reports to the Council on its work since the previous session of the latter.[169]

Reporting to both the Maritime Safety Committee and the Marine Environment Protection Committee are seven subcommittees that are open to all Member States.[170] These are reorganised periodically, most recently in 2013 to reduce their number from nine.[171]

The Legal Committee traces its history to 1967 when it was established as a subsidiary body of the Council to deal with legal issues arising from the sinking of the *Torrey Canyon*.[172] Meeting twice a year, usually in April and October (though it is only required to do so annually),[173] it now oversees all the IMO's legal work, including the negotiation of IMO conventions, which are submitted in draft to the Council,[174] and reports to the Council on its work since the previous session of the latter.[175] The detailed drafting of conventions is largely delegated to correspondence groups working intersessionally, usually under the supervision of an appointed "lead delegation". Occasionally instruments are adopted without reference to the Legal Committee, such as the Ballast Water Convention.[176]

There are also two committees of lesser importance: the Technical Co-operation Committee is concerned with the implementation of technical co-operation projects in which the IMO participates and any other matters related to its activities in this field. It was first established in 1969 as a subsidiary body of the Council,[177] but since 1984 has had a permanent

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existence by virtue of an amendment to the 1948 Convention.[178] The Facilitation Committee was created in 1972[179] as a focal point for the IMO's work in eliminating unnecessary formalities and bureaucracy in international shipping. It too was a subsidiary body of the Council until the entry into force in 2008 of the IMO Convention amendment that elevated it to the same status as the other Committees.

The IMO's Secretariat with its headquarters in London[180] consists of the Secretary-General and some 300 staff who service the meetings of the various organs and committees[181] as well as the diplomatic conferences at which IMO convention texts are finalised for adoption. The Secretary-General serves as the depositary of these conventions.

(c) IMO Conventions as multilateral treaties

Although the law of treaties applies equally to bilateral and multilateral treaties, the latter are a relatively new phenomenon.[182] The dynamics of multilateral negotiations with many States taking part means that in the drafting of the treaties clarity often has to be sacrificed.[183] The IMO is somewhat unusual among international organisations in that it first works through its own Legal Committee to develop and draft its conventions, and then convenes diplomatic conferences at which the draft texts will be refined and ultimately adopted.

The IMO has the reputation of being among the least politicised of the UN specialised agencies and political considerations rarely interfere with the negotiation of conventions in the Legal Committee or have a disproportionate impact on their largely technical content. (The continuing impasse at the time of writing on how shipping should play its part in combatting climate change in terms of to which State greenhouse gas emissions from the operation of ships should be attributed[184] is, and it must be hoped will remain, an exception.) Once the Legal Committee has developed a text as far as it can, it reports to that effect to the Council, which then calls a diplomatic conference, at which the final remaining points of disagreement – usually the more political ones such as the precise figures for liability limits – are resolved and

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the treaty is formally adopted.[185] Although the Rules of Procedure at international conferences may provide for the resulting treaty to be adopted by a vote,[186] in multilateral negotiations it is generally preferable to adopt texts by consensus where possible, usually defined as the absence of a formal objection, since that maximises the chances of States going on to become party to the treaty, albeit at the cost of dilution of many of its provisions to forestall objections.

(d) Becoming party to IMO Conventions – "final clauses"

A special set of provisions in multilateral treaties known as final clauses governs such mechanical matters as the requirements for entry into force.[187] Under customary international law, as codified in the Vienna Convention on the Law of Treaties, there are two basic modes for expressing consent to be bound, one involving a single step and the other two steps. The two- step procedure is more common for multilateral treaties and is used in the IMO. It consists of signature, followed by ratification.[188] The second step, ratification, is the one by which the State establishes on the international plane its consent to be bound vis-à-vis all other ratifying States. Usually some time elapses between signature and ratification, to permit States to decide whether they wish to or can enact internal laws so as to put the treaty into operation domestically, or consult their legislature where the internal constitutional arrangements require this. This is done in the UK by tabling in Parliament all treaties signed subject to ratification under section 20 of the Constitutional Reform and Governance Act 2010, replicating and replacing the long-standing Ponsonby Rule which was no more than a conventional practice and was not required by law.

Treaties are typically left open for signature for a year or two, though the period can be shorter. By Article 18 of the Vienna Convention, which is considered to be a codification of the pre-existing customary rule, the effect of signature subject to ratification is that the State is obliged to refrain from acts which would defeat the object and purpose of the treaty, unless it makes clear that it will not ratify it. This obligation continues after ratification if the

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treaty is not yet in force, until entry into force actually occurs or it lapses because entry into force is "unduly delayed". Signature not subject to ratification, sometimes known as definitive signature, is the one-step process, but this is more common for bilateral treaties.[189]

After the treaty closes for signature, the process reverts to a single step, in this case called accession: this allows States to become party to the treaty even if they did not take part in its original negotiation.

In multilateral treaties a certain number of ratifications or accessions is required before a treaty comes into force for any party. IMO final clauses often say these must in addition account for a given proportion of world shipping tonnage.[190] Alternatively, entry into force may also be on a particular date as stipulated in the treaty.

The IMO conventions adopted by this process, most of which have been amended or supplemented by protocols (some of them many times) not separately listed, are enumerated in Box 8.1. In addition, the IMO serves as the secretariat to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter[216] and its 1996 Protocol.[217]

The texts of these conventions are available from the IMO, which also as the depositary maintains status lists indicating which States are party to which conventions. Since, under Article 102(1) of the Charter of the United Nations, treaties are supposed to be registered with the Secretariat and published by it, they also appear, once they have entered into force, in the United Nations Treaty Series, which can be accessed online free of charge.[218]

There are relatively few IMO conventions still not in force: the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances,[219] the 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments[220] and the 2009 Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships.[221]

Relevant conventions negotiated elsewhere than in the IMO include the 1974 Convention on a Code of Conduct for Liner Conferences,[222] the 1978 United

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Box 8.1 Selected IMO Conventions in force

- Convention on Facilitation of International Maritime Traffic[191]
- International Convention on Load Lines[192]
- International Convention on Tonnage Measurement of Ships[193]
- International Convention relating to Intervention on the High Seas in the case of Oil Pollution Casualties[194]
- International Convention on Civil Liability for Oil Pollution damage[195]
- Special Trade Passenger Ships Agreement[196]
- Convention relating to Civil Liability in the Field of Maritime Carriage of nuclear Materials[197]
- International Convention on the establishment of an International Fund for Compensation for Oil Pollution damage[198]
- International Convention for Safe Containers[199]
- Convention on the International regulations for Preventing Collisions at Sea[200] (COLreG)
- International Convention for the Prevention of Pollution from Ships[201] (MArPOL)
- International Convention for the Safety of Life at Sea[202] (SOLAS)
- Convention relating to the Carriage of Passengers and their Luggage by Sea[203]
- Convention on the International Maritime Satellite Organization[204]
- Convention on Limitation of Liability for Maritime Claims[205]
- International Convention on Standards of Training, Certification and Watchkeeping for Seafarers[206]
- International Convention on Maritime Search and rescue[207]
- Convention for the Suppression of Unlawful Acts Against the Safety of Maritime navigation[208]
- International Convention on Salvage[209]
- International Convention on Oil Pollution Preparedness, response and Co-operation[210]
- International Convention on Maritime Liens and Mortgages[211]
- Convention on the Arrest of Ships[212]
- International Convention on Civil Liability for Bunker Oil Pollution Damage[213]
- International Convention on the Control of Harmful Anti-fouling Systems on Ships[214]
- Nairobi International Convention on the Removal of Wrecks[215]

Nations Convention on the Carriage of Goods by Sea[223] and the 1986 United Nations Convention on the Conditions for Registration of Ships,[224] all negotiated in the UN Conference on Trade and Development (UNCTAD), while the 2008 UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea[225] was the work of the UN Commission on

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International Trade Law (UNCITRAL). The 1993 International Convention on Maritime Liens and Mortgages[226] and the 1999 Convention on the Arrest of Ships[227] were negotiated under the joint auspices of IMO and UNCTAD.

Amending treaties is often a problem for international law because it is normally more difficult to gain governments' attention and legislative time for amendments than for the original treaty negotiations, with the result that they typically take a very long time to enter into force, and even then bind only the parties to them,[228] while as between a State party to the amendment and a State only party to the original treaty, it is the latter that remains in force. The IMO has, however, pioneered a "tacit acceptance" procedure for technical amendments, which allows these to come into force after a specified period for all parties other than those that specifically object to them. This is why it has been possible to amend some of the IMO Conventions, notably those on safety of life at sea and the collision regulations, many times. Substantive amendments are still subject to the Vienna Convention rules, however, the 2002 Protocol to the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea[229] and the 2010 Protocol to the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances[230] being examples.

(e) IMO as the "competent international organization" in UNCLOS

Being in some respects a framework convention, UNCLOS in many of its provisions does not itself set out binding rules but instead incorporates by reference those made by what it refers to as the "competent international organization(s)" in various fields, which it never names. In the field of navigation and pollution from ships, IMO is universally regarded as the body meant by this phrase.[231] In the territorial sea in general, the coastal State is free to prescribe sea lanes and traffic separation schemes as it sees fit, and need only take into account the IMO's recommendations.[232] In waters where the interests of unimpeded navigation have required special regimes, by contrast – that is, straits used for international navigation and archipelagic

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sea lanes – the coastal or archipelagic State must refer its proposals to the IMO for adoption, which in turn may adopt only such sea lanes and traffic separation schemes as are agreed with that State.[233] The Assembly in 1997 delegated the Maritime Safety Committee to act on the IMO's behalf in these matters.[234] Traffic separation schemes, of which there are many, are notified to the shipping community by means of Circulars in the COLREG.2 series available on the IMO website.[235] The only instance to date of archipelagic sea lanes is the partial designation by Indonesia.[236] The Philippines was also understood to have been working for some years on bringing a designation to the IMO, but subsequent indications suggest that it has had second thoughts about the utility of doing so.[237] The effect of archipelagic sea lanes remaining undesignated is that the right of archipelagic sea lanes passage may continue to be exercised through all routes "normally used for international navigation".[238]

The "generally accepted international regulations" emanating from IMO's work are given indirect legal force by UNCLOS where mentioned in the context of rules to be complied with, including, it would seem, by non-parties to the relevant IMO conventions.[239] Thus the rules on safety of navigation are incorporated by reference on such matters as traffic separation schemes in straits and archipelagic sea lanes,[240] as well as the rules on the construction, design, equipment and manning of ships and the prevention of collisions at sea.[241] Of the numerous provisions of this type in Part XII on protection of the marine environment, Article 211 on pollution from ships is particularly significant – the essence of the scheme established by this article is that the coastal State may make and enforce pollution regulations in its EEZ in order to implement the rules formulated through the IMO, but may not ordinarily have more stringent ones.[242] For any defined area within its EEZ where the coastal State nevertheless has reasonable grounds for believing that these rules are inadequate for the special circumstances of that area, and that special mandatory measures (other than design, construction, manning and equipment standards) for preventing pollution are necessary because of oceanographic or ecological conditions, the coastal State may submit scientific and technical information to the IMO, which within 12 months of the receipt of the communication must determine whether the conditions do

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in fact warrant such measures. If so, the coastal State may adopt the special regulations pro- posed, though they become binding on foreign ships no earlier than 15 months from the original communication.[243] The IMO has grouped this provision procedurally with similar ones in other instruments within its process for establishing what it calls Particularly Sensitive Sea Areas, not necessarily confined to EEZs, in which special rules apply (each set of rules being unique to each such area).[244] The IMO's website lists several such areas including the Great Barrier Reef off Australia, the Florida Keys, Western European Waters, the Canary Islands, the Galapagos Archipelago and the Baltic Sea.[245]

Finally, the single mention of the IMO by name in UNCLOS occurs in Annex VIII, making it responsible for drawing up and maintaining a list of experts in the field of navigation including pollution from vessels by dumping, who are available to serve on special ad hoc arbitral panels that States parties may constitute to decide disputes in this field if they so elect.[246] To date, how- ever, Annex VIII has never been invoked.

5. THE UNCLOS ARTICLE 292 PROMPT RELEASE PROCEDURES

Under Article 220 of UNCLOS, a coastal State may detain and prosecute a foreign ship voluntarily present in one of its ports for violating pollution laws in its territorial sea or EEZ, or may inspect ships in the territorial sea for such violation there and, where the evidence so warrants, institute legal proceedings against the ship, which may include its detention.[247] Detention may also occur in the case of "clear objective evidence" that a ship has in the EEZ "committed a violation . . . resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone".[248] This is subject to Article 226(1)(b), which requires that, if the investigation indicates a violation of international environmental rules, "release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security".[249]

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This in turn is subject to Article 292, whose paragraph 1 provides that, if the detaining State is alleged not to have complied with any provision in UNCLOS for the prompt release of a ship and its crew,[250] the question may be submitted to any court or tribunal agreed on by the parties or, failing such agreement within ten days from the detention, to ITLOS. Paragraph 2 adds that the application may be made only by or on behalf of the flag State, in other words the flag State need not take part in the proceedings, but must give its consent to them if they are to be admissible. By paragraph 3, the court or tribunal must deal without delay with the application for release – but only with the question of release, without prejudice to the merits of the case before any domestic forum against the ship, its owner or its crew.

There have been several such prompt release cases taken to ITLOS under this procedure, which made up the bulk of its judicial activity in its first decade, though the last such case was in 2007.[251] Although they all concern fishing vessels,[252] the principles enunciated apply equally to detentions arising from pollution incidents. In *The Camouco*, ITLOS set out the criteria by which the reasonableness of any bond such as that required under Article 226(1)(b) would be judged:

> [F]actors . . . relevant in an assessment of the reasonableness of bonds or other financial security . . . include the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form.[253]

In the next case, *The Monte Confurco*, the majority judgment noted that under UNCLOS Article 292, ITLOS "is not an appellate forum against a decision of the national court", but added that "nevertheless . . . the Tribunal is not precluded from examining the facts and circumstances of the case to the extent necessary for a proper appreciation of the reasonableness of the bond".[254] In doing so, it criticised the French court of first instance's assumption that half the catch seized by the French authorities was taken illegally in the EEZ, stating that the information before it "does not give an

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adequate basis to assume" this. The majority thus found that the bond fixed by the French court (FF56.4 million) was not reasonable, and substituted a total of FF18 million.

It is submitted, however, that this reasoning is questionable, and the dissenting opinions were more persuasive. Judge Anderson, who dissented on all substantive points, took the view that the assumption that the seized fish had been caught in French waters was not unreasonable.[255] Judge Jesus thought that ITLOS had intervened in the merits contrary to Article 292(3).[256] Judge Mensah, though not dissenting, agreed that the majority had "come perilously close" to trespassing upon the merits, and criticised the direct approach taken by ITLOS in assessing the facts, forming a view on the merits different from that of the French court and so finding its bond unreasonable, overlooking the possibility that the bond the latter had imposed could be "reason- able" within the meaning of Article 73 of UNCLOS without necessarily being the exact amount that ITLOS itself would have imposed:

> The Tribunal is, of course, entitled to disagree with the actual figure chosen by the court of first instance. This is because there is no single correct figure in the circumstances of the case . . . [This] does not mean that the basis of computation adopted by the court of first instance is "inconsistent" with the facts.[257]

Although the outcome in *The Monte Confurco* might appear to suggest that, in effect if not in name, belying the passage quoted above, an appeal to ITLOS is indeed possible from a decision of a domestic court as to bond, a salutary lesson to litigants tempted to try that is given by the 2001 case of *The Grand Prince*. The facts here were that Belize, notified by France of its vessel's arrest for illegal fishing, cancelled its registration and sent a diplomatic Note to France to that effect. Later, however, the Belizean registry stated in a letter to France's Honorary Consul in Belize that:

> while we were in the process of cancelling ex-officio the vessel's status, the owners

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requested an opportunity to defend themselves of the accusations by submitting an appeal to [ITLOS]. Under this context and Belize being a [party to UNCLOS] we considered fair to allow the affected party to file its petition. . . . Depending on the result of this court proceeding we will decide whether or not to enforce our decision to delete the vessel from our records.[258]

Treating the earlier Note as conclusive, a narrow majority found the ship as at the date on which the application was made did not in fact have Belizean nationality, so that ITLOS lacked jurisdiction to hear it.[259] Nine judges dissented jointly, arguing that the official documents issued by Belize subsequent to the Note indicated that the deregistration was not definitive, and had been suspended.[260]

Overall, however, the subsequent prompt release decisions indicate that ITLOS and Article [292] are still a very worthwhile avenue for shipowners to pursue should the occasion arise. In *The Volga*, ITLOS by majority found unreasonable the bond set by Australia for release of a Russian-flagged fishing vessel because it included an amount of A$1 million as a bond securing compliance with a condition of release, being the installation and operation of a satellite-based vessel monitoring system (VMS) to allow for tracking of the *Volga*. This was based on its interpretation of Article 73 of UNCLOS as not allowing for the imposition of non-financial conditions for releasing a ship, such as the VMS bond and disclosure of its beneficial ownership which the Australian authorities had also demanded.[261] Nonetheless, in this case for the first time ITLOS was prepared to set a bond equal to the full value of the ship,[262] disregarding an argument on behalf of the shipowner that its own case law dictated a going rate for bonds of about 25 per cent of the ship's value.

Although forfeiture of the ship involved is more commonly a penalty for fisheries than for pollution offences, ITLOS has shown itself prepared to go behind the wording of the coastal State's forfeiture law. In *The Juno Trader*[263] ITLOS treated the ostensibly definitive forfeiture of a ship under the law of Guinea-Bissau as reversible as long as proceedings of some kind to overturn it were still on foot. On the other hand, in *The Tomimaru*,[264] the flag State

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(Japan) and owner delayed too long before invoking Article 292, by when the last possible window of remedial opportunity in the Russian courts had closed, and the application was as a consequence declared without object. This stands to reason, as a ship is released to its owner or a nominated representative, and if the owner is by then the respondent, any application by the former owner becomes futile.

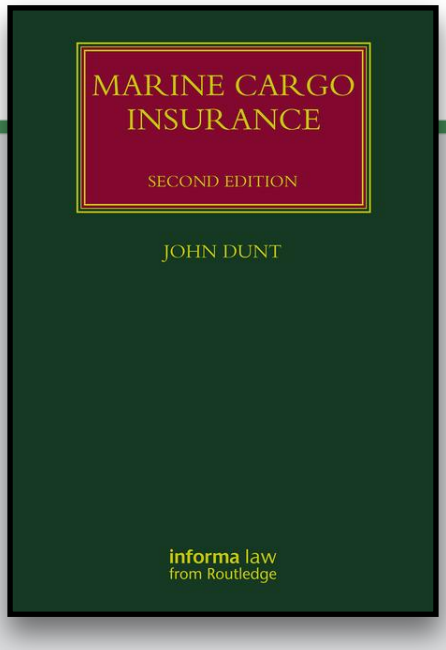
Since detention of the ship rather than of the crew is the necessary condition for its invocation, the Article 292 procedure was not available to assist the master of the Prestige, controversially detained by the Spanish authorities after her sinking in 2002.[265] Even so, this seems insufficient to account for the forbearance of shipping interests from using this procedure. Since the prompt release procedure has lived up to its name and the reputation of ITLOS as an international court capable of applying and developing the public international law of the sea is now well established, the imbalance may begin to be redressed in the coming years.

CHAPTER

6

ALL RISKS AND EXCLUSIONS

BY JOHN DUNT



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by John Dunt.

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ALL RISKS AND EXCLUSIONS

Excerpted from *Marine Cargo Insurance, 2nd edition*

History and nature of all risks cover: burden of proof

8.1 All risks cargo insurance does not cover every untoward eventuality that may befall the cargo during its journey. "All risks" is a term of art subject to implied limitations that restrict the cover to loss of or damage to the cargo caused by a fortuitous external accident or casualty.[1] Moreover, it is the practice to exclude certain risks from all risks cover.[2] Accordingly, this chapter discusses the limitations on all risks,[3] which derive from the fortuitous nature of the cover, and then considers the general exclusions, that is, wilful misconduct, delay, insolvency, and accidents with nuclear weapons and devices. Although these exclusions are common to all risks and most types of cargo insurance, it is convenient to consider them in the context of all risks as this is the most widely used form of cover. There are also exclusions of war, strikes and terrorism, but as the practice is to provide limited cover for these exclusions they are considered separately in Chapter 10 of *Marine Cargo Insurance, 2nd edition*. At the end of this chapter there follows a consideration of the seaworthiness and fitness requirements of the carrying vessel, container or conveyance, requirements which are also common to cargo insurance generally. Before examining these matters we consider a number of preliminary issues specific to all risks. Firstly, the history of all risks cover, secondly, the origins of the all risks concept in the context of the inter-relationship between inevitability of loss and fortuity and, thirdly, the burden of proof where cargo is insured on all risks terms.

The history of all risks cargo cover

8.2 All risks is a relatively modern concept as marine cargo insurance was for many centuries underwritten on the basis of specific or named perils such as perils of the seas, fire, thieves, jettison and barratry.[4] In 1908 deliberations began in order to introduce a standard form of cargo insurance, but when the Institute Cargo Clauses were first adopted in 1912 the

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insurance was still against named perils.[5] Although insurances against "all risks" were being effected before the Great War, it was only in the years immediately following that war that "all risks" cover became increasingly popular with merchants and bankers. Traditional insurers were reluctant to extend cover to all risks but by the 1950s this cover had become a normal everyday feature of cargo insurance, with widespread use of brokers' clauses giving all risks cover, and it was considered desirable that there should be standardised clauses.[6] As a result the Institute Cargo Clauses (All Risks) were introduced on 1 January 1951. These Clauses were amended in 1958, and again in 1963, the primary object of the 1963 amendments being to remove the uncertainty which had arisen as a result of the judgment in *John Martin of London Ltd* v. *Russell*.[7] The result of that amendment was the introduction of the well-known Institute Cargo Clauses (All Risks) 1/1/63. These Clauses remained in use until 1982 in the London market and were still used by the Japanese and Korean marine cargo insurance markets until about July 2009 when those markets adopted the revised Institute Cargo Clauses of 2009. The 1963 All Risks Clauses were used with two forms of named perils cover, the Institute Cargo Clauses (WA) 1/1/63 and the Institute Cargo Clauses (FPA) 1/1/63.[8]

8.3 In 1982 the Institute Cargo Clauses (A) were introduced in conjunction with two new sets of clauses for named perils, the Institute Cargo Clauses (B) and (C). The SG Form of policy, as described earlier in this book, was abandoned.[9] The new all risks clauses were designated the "(A)" clauses in view of the limitations and exclusions on "all risks".[10] In 2009 the revised Institute Cargo Clauses extended the duration of the insurance and modified the exclusions in the cover for insufficiency of packing, insolvency or financial default of the carrier and unseaworthiness and unfitness of the vessel or conveyance for the carriage of the cargo. The main effect of the revised Clauses of 2009 is to moderate the exclusions that had been introduced in the 1982 Clauses, thus returning the all risks cover broadly to that which had been provided by the 1963 Clauses.

Origins of the all risks concept: inevitability of loss and fortuity

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8.4 The earliest reported case in which there was judicial comment on the phrase "all risks" long preceded the standard all risks clauses and appears to be *Jacob* v. *Gaviller*.[11] In that case a policy underwritten in 1900 insured a fox terrier on a voyage to India on a standard marine policy form with the following additional clause:

> *"This insurance is against all risks, including mortality from any cause, jettison, and washing overboard . . ."*

It was held that the words "all risks", unlike the time-honoured phrase "all other perils, losses and misfortunes" added to the other risks mentioned earlier in the policy. It was not necessary to describe the extent of the additional cover. This was first addressed in *Schloss Bros* v. *Stevens*[12] where Walton J held that the words "all risks" were intended to cover "all losses by any accidental cause of any kind occurring during the transit".[13] He added: "There must be a casualty".[14] This approach was approved and developed by the House of Lords in *British & Foreign Marine Insurance Company Limited* v. *Gaunt*[15] where Lord Sumner said:[16]

> *"There are, of course, limits to "all risks". They are risks and risks insured against. Accordingly the expression does not cover inherent vice or mere wear and tear . . . It covers a risk, not a certainty; it is something, which happens to the subject-matter from without, not the natural behaviour of that subject-matter, being what it is, in the circumstances under which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself."*

The limits on all risks identified by Lord Sumner[17] may be analysed on a scale starting with inevitability of loss, which is not a risk, and ending with inherent vice, which may be just as capricious in its incidence as perils of the seas.[18] Inevitability of loss, which is considered below[19] is not in the nature of a risk, as the loss is certain and must occur. Next there is ordinary wear and tear which also happens without any fortuity, such a loss being "ordinary" and not

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accidental. However, inherent vice, which comes next and last on the scale, is capricious in its incidence in that it may or may not occur. This causes particular problems with the concept of inherent vice which are discussed later in this chapter.[20] Finally, Lord Sumner mentions losses brought about by the assured's own act. Such losses fall into a category of their own, and only share the characteristic of not being fortuitous because the assured brings about the loss himself, and it is therefore not accidental so far as he is concerned.[21]

8.5 Inevitability of loss, also described as "known certainty of loss",[22] falls outside the concept of risk. For example, in *F. W. Berk* v. *Style & Co Ltd*[23] it was held that the poor condition of the bags in which the cargo was packed was such that "it could be said to be certain that they would not hold their contents".[24] However, known certainty of loss is a troublesome concept to be treated with caution as the circumstances of each voyage will vary, most obviously with different weather conditions, but also with different stowage aboard different vessels quite apart from other unanticipated variables. It must be rare indeed that the loss is a known certainty.[25] Moreover, the proximate cause rule mitigates against pre-shipment circumstances being identified as the cause of the loss. The rule is generally applied so as to identify the loss as occurring at the time when the goods are physically damaged or lost to the assured during the voyage or transit. Thus, where it was argued that the adventure was doomed from the start, as a result of a fraud preconceived before the voyage had begun, that was not treated as known certainty of loss.[26]

8.6 As indicated above,[27] inherent vice may be as capricious in its incidence as a fortuitous risk such as perils of the seas.[28] Thus inherent vice is not inevitable, and is insurable, but rarely so in practice. On those rare occasions where there is express insurance cover for inherent vice[29] it is unclear whether this covers loss that is inevitable or only extends to the risk of losses from inherent vice which, due to a combination of weather and other circumstances, may, or may not, arise during the voyage.[30] Where the assured knows a loss is inevitable that would clearly be a matter material to the risk that would need to be disclosed, but there may be circumstances

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where a loss is, in fact, inevitable but this is unknown to the assured.[31] This type of loss may be covered by an insurance covering inherent vice but the point has been left open.[32]

The burden of proof under all risks insurance

Evidence of fortuitous or accidental losses

8.7 Under an all risks policy it is not necessary to show which particular peril operated, as would be the case in a policy against specific named perils, such as fire.[33] It is sufficient if the assured presents evidence reasonably showing that the loss was due to a fortuitous external accident or casualty.[34] In *Theodorou* v. *Chester*[35] it was held that the assured under an all risks cargo policy was required to disprove any reasonably possible counter-theory put forward by the insurer designed to show that the loss was not fortuitous. The assured will succeed if the only possible conclusion the court can arrive at is that for some unexplained reason, in some unexplained way, which it is not for the assured to prove, there was a casualty.[36]

8.8 In practice it is difficult to show a fortuitous cargo loss by inference from a trading pattern, that is by showing that a number of consignments were shipped in closely comparable conditions and the goods suffered damage on only one or a few occasions. For example, in *Noten BV* v. *Harding*,[37] where a consignment of gloves suffered wet damage, it was argued by the assured that the damage had occurred in only a small minority of similar voyages and that this demonstrated that the loss was not caused by the natural behaviour of the leather but by a fortuity. At first instance, Phillips J indicated that where a combination of circumstances only rarely combine with the inherent characteristics of the goods carried, so as to result in damage, it may be possible to identify a fortuity.[38] However, the Court of Appeal stressed that it can only be right to infer a fortuity if the conditions affecting each consignment are established to be comparable.[39]

All risks and exclusions

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8.9 The Institute Cargo Clauses (A) cover all risks[40] and exclude losses that occur without any accident, that is to say, ordinary leakage, ordinary loss in weight or volume, ordinary wear and tear41 and inherent vice.[42] As explained above,[43] in order to establish an all risks loss the assured must prove a fortuitous external accident or casualty. It might therefore be said to follow that the assured must disprove ordinary losses including inherent vice. On the other hand, it is clear law that insurers have the burden of establishing specific exclusions.[44] In *The Cendor MOPU*[45] it was common ground between the parties that it was for the insurers to prove that the loss was proximately caused by inherent vice or nature of the subject-matter insured.[46] At first instance Blair J said that, "the cover being all risks the claimants are only required to show that the cause of the loss was accidental . . . once the claimants discharge that burden, the burden is then on the insurers to make out the exclusion relied on".[47] However, if the assured establishes a fortuitous external accident or casualty, to prove the claim, does that not preclude the operation of an "ordinary" loss, such as wear and tear? In *British & Foreign Marine Insurance Company* v. *Gaunt*[48] Lord Sumner said that the assured "need only give evidence reasonably showing that the loss was due to a casualty, not to certainty or to inherent vice or to wear and tear".[49] Similarly, in *E. D. Sassoon & Co Ltd* v. *Yorkshire Insurance Company*[50] Scrutton LJ treated *Gaunt* as authority for the proposition that under an all risks policy it was sufficient to prove that "it [was] something that happened externally and not the condition of the goods them- selves".[51] More recently, Pelletier JA in the Federal Court of Appeal of Canada in *Feuiltault Solutions Systems Inc* v. *Zurich Canada*[52] said that "proof of such a fortuity necessarily renders the exclusion for inherent vice superfluous".[53] He pointed out that the insurers had the burden of proof on specific exclusions and accordingly concluded that "it is necessary to treat the exclusions for non-fortuitous losses (inherent vice, wear and tear, . . .) as an undertaking by the insurer to assume the burden of proving that the loss was not fortuitous, thereby relieving the insured of the obligation to do so".[54] In the circumstances he held that the court below "erred in law in imposing on the insured the burden of proving that the loss was caused by a fortuity".[55] This, with respect, surely goes further than necessary and does not represent English law. The effect of

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allocating the status of exclusions to the losses, as set out in Clauses 4.2 and 4.4 of the Institute Cargo Clauses (A), means that the burden of proof is on insurers,[56] but the assured retains the initial burden of showing a fortuitous external accident or casualty. So far as "ordinary" losses due to leakage, loss in weight and wear and tear are concerned, once a fortuity has been established that normally precludes the relevance of the exclusions because proof of a fortuity requires proof that something out of the "ordinary" has occurred, while the common theme of the exclusions of "ordinary" losses is that insurers are not liable for what occurs in the ordinary case nor for the ordinary action of the wind and waves.[57] The more difficult case in practice is inherent vice because inherent vice may be just as capricious in its incidence as damage caused by fortuitous losses, such as perils of the seas.[58] The current edition of *Arnould* states that[59]

> *"If the goods are shipped sound and arrive damaged, and the damage is of such a kind as to raise a presumption of some external cause, there is prima facie evidence of a loss by an insured peril, and the burden is on the underwriter to prove that the loss in fact occurred in some way for which he is not liable".*

In practice the nature of the damage to the cargo is the key factor. When Lord Sumner said[60] that the assured must show that the loss was not due to wear and tear or inherent vice he meant no more than that the assured must, in *Arnould*'s words, present a claim showing cargo damage "of such a kind as to raise a presumption of some external cause".

The limitations on all risks

When do the limitations apply? "Unless the policy otherwise provides"

8.10 Before discussing losses due to wear and tear, ordinary leakage and breakage, inherent vice and like matters, this section considers how the policy should be construed, in any particular case, to determine whether or not such losses are covered. The starting point is section 55(2)(c) of the

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Marine Insurance Act 1906 which provides:

> *"Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats and vermin . . ."*

On occasion cargo insurers *expressly* agree to undertake liability for these losses. For example, the Institute Coal Clauses cover "fire, explosion or heating, even when caused by spontaneous combustion, inherent vice, or nature of the subject-matter insured".[61] In *Overseas Commodities* v. *Style*[62] there was express cover for inherent vice provided by the following words:

> *". . . against all risks of whatsoever nature and/or kind. Average irrespective of percentage. Including blowing of tins. Including inherent vice and hidden defect."*

Such express cover for inherent vice leads to few problems. More difficult issues arise where the insurance contract does not provide cover for inherent vice in express terms but such cover arises by implication on the construction of the contract. In this context the issue is to deter- mine whether, in terms of the statute, the contract "otherwise provides".

8.11 It has been held that the insurance contract "otherwise provides" where the phrase "any cause whatsoever", or similar wording using the word "whatsoever", is used and the insurance will therefore extend to inherent vice. For example, in *Biddle Sawyer & Co* v. *Walter Peters*[63] the Insurance Certificate stated that the insurance was:

> *". . . against all risks of whatsoever nature from whatsoever cause arising, including condemnation and blowing of tins or condemnation of meat."*

Ashworth J held that[64] underwriters would have been liable for blowing of tins even if caused by inherent vice. Similarly, in *Dodwell & Co Limited* v. *British Dominions General Insurance Co Limited* [65] the words "including risk of leakage from any cause whatever" were held to include the risk of leakage

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due to inherent vice.[66]

8.12 The courts have not limited the phrase "unless the policy otherwise provides" to express provisions so providing, nor, it seems, to necessary implication. A very broad view has been taken and the insurance will "otherwise provide", in terms of the 1906 Act, if looking at the contract as a whole the intention is to cover inherent vice or one of the other limitations on all risks. In *Soya GmbH Mainz KG* v. *White*[67] shipments of soya beans were insured against the risks of heating, sweating and spontaneous combustion under the standard London market HSSC (Heating Sweating and Spontaneous Combustion) Clause, which provided:

> *"This insurance is to cover against the risks of Heat, Sweat, and Spontaneous Combustion only."*

The facts, as summarised by Lord Diplock,[68] were that the soya beans, which arrived in a heated and deteriorated condition, had a moisture content which – though this was not known to the assured and the insurers – made them subject to the risk that deterioration might take place in the course of a voyage. The deterioration was in consequence of heating and sweating, the occurrence of which was unpredictable and the exact nature of which was unknown. This amounted to "inherent vice" and the issue in the House of Lords was whether the HSSC Clause covered that risk. Lord Diplock held that "spontaneous combustion" can only refer to a chemical reaction which takes place inside the goods themselves[69] and that "sweat"[70] meant the exudation of moisture from within the goods. Accordingly "heat", in this context, was apt to include heating of the cargo as a result of some internal action taking place inside the cargo itself. He accordingly held that the standard HSSC policy did "otherwise provide" so as to displace the rule of construction laid down in section 55(2)(c). He disapproved the passage in *Arnould*,[71] to the effect that the defence of inherent vice can only be excluded by express words or by necessary inference, saying that:[72]

> *"The question whether particular kinds of inherent vice are covered is simply one of construction of the policy concerned."*

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Accordingly, the test is simply whether the policy "otherwise provides" – that does not have to be a "necessary" inference but merely the natural construction looking at the policy as a whole. If cover is granted for spontaneous combustion and heating (in the context of inherent vice) then the intention is to cover inherent vice.

8.13 The position appears to be that, if cover is provided that is inconsistent with an exclusion of inherent vice, because the loss could only arise from inherent vice, then the policy "otherwise provides" in terms of section 55(2)(c) of the 1906 Act. This may give rise to difficulty as some losses, such as spontaneous combustion, only arise from inherent vice, while other losses, such as certain types of internal heating in other commodities or liquefaction of certain cargoes, frequently, but not always, are attributable to inherent vice. Other cargo problems, for example, mould or mildew, may result from inherent vice or from bad ventilation or even ingress of water affecting the cargo. It is submitted that the insurance is only intended to "otherwise provide" in relation to the first category, where the losses are inconsistent with the cover, as in the case of spontaneous combustion. The court should be slow to assume that the policy "otherwise provides" in cases where inherent vice is frequently but not always the cause of the loss.

Ordinary wear and tear, breakage, leakage and loss in weight

"Ordinary wear and tear"

8.14 The Institute Cargo Clauses, Clause 4.2, provide that, in no case shall this insurance cover:

> *"ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject-matter insured."*

The Marine Insurance Act 1906 section 55(2)(c) says nothing of loss in weight or volume but limits losses from both "leakage" and "breakage" in the

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following terms:

> *"Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage . . ."*

This section of the book considers "ordinary wear and tear" following which there is a brief examination of why "ordinary breakage" is not excluded by the Institute Cargo Clauses. "Ordinary leakage" and "ordinary loss in weight or volume" are then considered. The general approach to these limitations on cover, where there has been a fortuitous external accident or casualty, was considered by the Supreme Court in *The Cendor MOPU*[73] and is examined above in the context of the burden of proof.[74]

8.15 The exclusion of wear and tear is identified by Lord Sumner in *British & Foreign Marine Insurance Company Limited* v. *Gaunt*[75] as one of the limitations upon all risks. This limitation is rarely applicable to cargo insurance written on a voyage basis because it normally implies deterioration over a significant period of time, for example, a barge which sinks because she is getting too old to float any longer and has got tired.[76] Thus the exclusion is limited to debility occurring over a passage of time, such as plating simply wasting away through rust, and does not encompass defects of design, rather than wear, that lead, for example, to cracking.[77] In so far as cargo is insured on a voyage basis, and the time for the voyage is relatively limited, it is rare for wear and tear to occur during the voyage though a notable example did occur during the prolonged voyage considered in *The Cendor MOPU*.[78] In this case a jack-up oil rig was insured under the terms of the Institute Cargo Clauses (A) of 1 January 1982 for carriage aboard a barge from Galveston, Texas to Malaysia. It was noted in the pre-voyage survey that the three legs used to jack up the rig might not have sufficient fatigue life to undertake the full tow as they contained so-called pinholes (used for the jacking process) which were known to be subject to fatigue cracking. About seven weeks after leaving Galveston the tug and barge arrived at Saldanha Bay just north of Cape Town where it was discovered that there was a considerable amount of cracking around the pinholes and repairs were effected. Subsequently, after the voyage continued, the starboard leg was lost

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just north of Durban and, as a result, the following evening the other two legs fell off in quick succession. The insurers defended the claim on the basis of inherent vice, as discussed below,[79] but wear and tear was also considered by the courts. It is to be noted that the insurance claim was for the loss of the legs: there was no claim for the cost of repairs in respect of fatigue cracking that was bound to occur by the normal working of the wind and waves during the voyage. In the Court of Appeal, Waller LJ contrasted the severe metal fatigue and cracking suffered by the legs, i.e., wear and tear, with the leg-breaking wave that the judge held was the cause of the loss of the first leg, which led in turn to the loss of the other two legs, which was an insured fortuitous loss.[80] In the Supreme Court, Lord Mance SCJ, held that the cracking was the simple product of the fatigue life of the legs and did not involve any fortuitous external accident or casualty – furthermore it was a risk that was expected as likely to materialise during the voyage which it cannot sensibly have thought that insurers would take on.[81] While not attempting any exact definition, he said that "ordinary wear and tear and ordinary leakage and breakage would . . . cover loss or damage resulting from the normal vicissitudes of . . . of handling and carriage. . .".[82]

8.16 In practice, where second-hand machinery, which has already sustained wear and tear, is insured it may be necessary for the assured to disclose the fact that the machinery is second- hand so that, if damage occurs, the pre-existing damage from wear and tear can be distinguished from any fortuitous damage occurring during the voyage.[83]

Ordinary breakage

8.17 It is to be noted that section 55(2)(c) of the Marine Insurance Act 1906, but not Clause 4.2 of the Institute Cargo Clauses, excludes "ordinary . . . breakage". This is understood to be because insurers do not wish to rely on "ordinary breakage" as a self-standing exclusion and will only seek to decline claims for "breakage" where there is evidence of insufficiency of packing on which they could separately rely.[84] Arguably, insurers could nevertheless rely on the statutory limitation in section 55(2)(c) in relation to "breakage" but it is

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submitted that the obvious omission of "breakage" from the Institute Cargo Clauses, as compared to the exclusion of "ordinary leakage", is a sufficient indication of an intention to "otherwise provide" and not to rely on the Act.[85]

Ordinary leakage and ordinary loss in weight: "paper losses"

8.18 The exclusions of "ordinary leakage" and "ordinary loss in weight or volume" are imposed by Clause 4.2 of the Institute Cargo Clauses. The limitation imposed by the Marine Insurance Act 1906 section 55(2)(c) is simply "ordinary leakage", but it may be that "ordinary loss in weight or volume" is an analogous limitation. Bulk cargoes, such as oil cargoes, can be the subject of substantial shortage claims, as a relatively small percentage shortage of oil carried by a super-tanker can result in a significant claim. These limitations may therefore have an important impact in practice, particularly in relation to oil shortage claims.

8.19 In general, the courts have approached ordinary leakage and ordinary loss in weight or volume on the basis that, firstly, insurers do not intend to cover that percentage of loss which normally occurs in certain types of trades. This approach was confirmed in *The Cendor MOPU* [86] by Lord Mance SCJ who, while not attempting any exact definition, said that "ordinary leakage and breakage would . . . cover loss or damage resulting from the normal vicissitudes of . . . handling and carriage. . .".[87] Secondly, it has been held that very clear words are needed to make cargo underwriters liable for paper losses without any physical loss of the cargo itself. As Lord Atkin put it, underwriters "were insuring against casualties but not of arithmetic".[88]

8.20 Although the courts are also reluctant to hold that normal leakage is covered, they will do so where express wording (e.g., "from any cause whatsoever") is used and the insurance contract thus "otherwise provides". In *Dodwell & Co Limited* v. *British Dominions General Insurance Company Limited*,[89] the risk covered was leakage in barrels of oil carried from China to the United Kingdom. There were two shipments insured on different terms on different vessels. The first consignment was insured against the risk of "leakage" and it was held that this made the insurers liable only for the

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extra leakage due to the sea transit. Based on the evidence given by average adjusters this was fixed at 5%, so the insurers were only responsible for the difference between that 5% and the 12% leakage actually sustained on the first consignment. By contrast, the second consignment was insured by policies which provided:

> *"Including risk of leakage from any cause whatever."*

Bailhache J held that, having expressed themselves in this way, the insurers must be bound by their own chosen expression which he said "clearly includes all leakage to which these barrels of oil were subjected". Accordingly, the insurers had to pay for the whole of the leakage proved, including the 5% normal leakage. It is to be noted, however, that this was still actual leakage of the oil even though it was normal for the trade in question.

8.21 In *Maignen & Co* v. *National Benefit Assurance Company*[90] the insurance was on hogs- heads of burgundy being carried from Beaune to Boulogne and thence to London. The policy included "leakage and breakage however caused irrespective of percentage". It was argued that the leakage was inevitable; that the casks were inadequate, and that the loss was due to either inevitability or insufficiency of packing. Grear J found on the facts that the wine was put into oak barrels of the usual strength and that the loss arose from something which happened during the transit. However, he disallowed some loss due to the inherent character of the article, saying that this loss, which was the normal loss, was not payable by underwriters.

8.22 In *De Monchy* v. *Phoenix Insurance Company of Hartford & Another*[91] the insurance was on turpentine carried from Florida to Rotterdam insured against "leakage from any cause in excess of 1%". The terms of the insurance included the following:

> *"Where barrels with contents are weighed at a port of shipment and destination, loss, if any, due to leakage shall be ascertained by a comparison of the gross shipped and gross landed weights."*

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There then followed a formula to be applied where the barrels with contents were weighed at the port of shipment, and the contents only at destination, so as to make a fair allowance for the tare for each barrel. The evidence was that turpentine is very volatile, and substantial leakage could take place without any external sign. It was argued on behalf of the assured that the shortage in weight, achieved by comparing the weights at loading and at discharge, was an agreed formula that meant that they were covered against "leakage from any cause, in excess of 1%". Insurers objected that this was not "leakage" and argued that there had been an artificial leakage, due merely to calculations, and that no real leakage had taken place. The House of Lords held that, as a matter of fact, leakage had taken place and held in favour of the assured for the amounts in excess of 1% holding that, "when a percentage of normal waste is agreed to, it binds".[92] Viscount Sumner said:[93]

> *"The loss insured and proved I take to be an actual escape of turpentine, not a mere change in bulk owing to reduction of temperature."*

A similar approach was adopted by Lord Atkin who said:[94]

> *". . . it appears to me that such physical loss is on a proper construction of the policy to be taken to be the result of leakage; and for any amount over 1% the assured will recover . . .*

There was therefore proved an actual physical loss, and the plaintiffs in the action are entitled to recover the excess over 1% of that actual physical loss."

8.23 The courts continue to look to determine whether there was an actual physical loss. In *Coven SpA* v. *Hong Kong Chinese Insurance Co*[95] shipments of broad beans were insured for a voyage from China to Italy on the following terms:

> *"Covering All Risks, War Risks including shortage in weight but subject to an excess of one per cent of the whole shipment."*

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The assured argued that "shortage of weight" was itself a peril insured against and recovery was not limited to circumstances where there was physical loss of or damage to the goods. Clarke LJ held that this was a typical marine cargo policy concerned with insuring physical loss and that it would be surprising if it insured a measurement error.[96] Adopting this approach, he concluded that the words "shortage in weight" did not provide cover for a paper loss but merely limited the cover for shortage in weight to losses in excess of 1%, that being the normal loss. He concluded that the parties cannot have intended to insure goods which never existed, at least in the absence of clear terms, saying:[97]

> *"I accept that it would be possible to insure against a measurement error, and that there may indeed be commercial reasons why a receiver might want such cover, but it would be a most unusual type of marine cargo cover and clear terms would be required to effect it. This was essentially a marine cargo policy against loss of and damage to cargo. Moreover it provided cover in respect of beans which existed and not in respect of beans which did not exist. The insured would have no insurable interest in such goods as required by clause 11.1 of the Institute Clauses and the insurance attached from the time the goods left the warehouse or place of storage as provided by clause 8.1 of those clauses."*

Inherent vice

Inherent vice: limitation or exclusion?

8.24 Clause 4.4 of the Institute Cargo Clauses provides that in no case shall the insurance cover:

> *"Loss damage or expense caused by inherent vice or nature of the subject matter insured".*

This exclusion reflects the wording of the Marine Insurance Act 1906 section 55(2)(c) which states that, "unless the policy otherwise provides, the insured is not liable for . . . inherent vice or nature of the subject-matter insured". In *The Cendor MOPU*[98] Lord Clarke SCJ refers in positive terms to Professor Bennett's

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suggestion[99] that the losses referred to in section 55(2)(c) of the Marine Insurance Act 1906 for which "the insurer is not liable" take effect as a clarification on the scope of cover, rather than as true exclusions.[100] In similar vein Lord Mance SCJ says:[101]

> *". . . clause 4.4 on the face of it simply makes clear the continuing relevance in the context of all risks cover of the limitation on cover against perils of the sea provided by section 55(2)(c). There seems to me some oddity in treating clause 4.4 as leading to a fundamentally different result from that which would have applied had section 55(2)(c) alone been in question."*

The concern of Lord Mance SCJ was that if there had been two concurrent causes in *The Cendor MOPU* then the effect of treating Clause 4.4 as a true exclusion would have meant that the loss was not covered[102] whilst if Clause 4.4 was merely a limitation on cover there would still be insurance cover.[103] In the light of Lord Mance SCJ's comments cited above ("there seems to be some oddity . . ."), *Arnould* takes the view that Clauses 4.2 and 4.4 of the Institute Cargo Clauses are general limitations on the scope of cover and are not true exclusions, i.e., "exceptions in the proper sense of that word",[104] even though they are reproduced as express inclusions in the clauses.[105] However, this remains very much an open question.[106] There was no consideration in *The Cendor MOPU* of the significant difference between the wording of section 55 of the 1906 Act and the general exclusions in the Institute Cargo Clauses[107] which may well be an indication that the Institute Cargo Clauses "otherwise provide" within the opening words of section 55 so as to displace the "default setting of that section".[108] In the circumstances, there is a strong case for the view expressed by Bennett,[109] albeit prior to the decision of the Supreme Court in *The Cendor MOPU*, that

> *"The question of characterisation of matters falling within section 55(2)(b) and (c) may arise also where the policy wording renders some or all of such matters the subject of express provision. It then becomes a question of contractual interpretation as to whether the policy wording transforms such matters from exception clarifying scope of cover to exclusion. The better view, it is suggested, is that the various terms headed 'exclusions' in the Institute Cargo Clauses that*

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> *address many of the matters falling within section 55(2)(b) and (c) do affect such a transformation, so that insurers will not be liable for losses concurrently caused by a covered peril and falling within the relevant terms."*

This passage must now be qualified to the extent that where a loss is caused, at least in part, by a fortuitous external accident or casualty it follows that there is no inherent vice.[110] As Lord Clarke SCJ said in *The Cendor MOPU*:[111]

> *"The sole question in a case where loss or damage is caused by a combination of the physical condition of the insured goods and conditions of the sea encountered in the course of the insured adventure is whether the loss or damage is proximately caused, at least in part, by perils of the seas (or, more generally, any fortuitous external accident or casualty). If that question is answered in the affirmative, it follows that there was no inherent vice, thereby avoiding the causation issues that arise where there are multiple causes of loss, one of which is an insured risk and one of which is an uninsured or excluded risk."*

Accordingly there is no room for the dual cause analysis in respect of inherent vice. However, as inherent vice is "excluded" under the Institute Cargo Clauses the burden of proof still lies on insurers if they wish to rely on inherent vice.[112]

Inherent vice defined

8.25 What is inherent vice? In *Soya GmbH* v. *White*[113] Donaldson LJ, in the Court of Appeal, adapted the "definition" enunciated by Lord Sumner in *Gaunt*[114] so that it read:[115]

> *"A loss by inherent vice is one which is proximately caused by the natural behaviour of the subject- matter insured, being what it is, in the circumstances in which it was expected to be carried."*

Donaldson LJ went on to say that this was in line with the common

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understanding of the exception of inherent vice in contracts of affreightment and that it seemed to be both right and natural that the concept should be treated similarly in the context of both carriage by sea and marine insurance.[116] In the House of Lords, in the same case, Lord Diplock said:[117]

> *"This phrase (generally shortened to "inherent vice") where it is used in s. 55(2)(c) refers to a peril by which a loss is proximately caused; it is not descriptive of the loss itself. It means the risk of deterioration of the goods shipped as a result of their natural behaviour in the ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty."*

These definitions are seen as being somewhat broader than the traditional view of *Arnould* which limited inherent vice to cases where the loss was "solely due to the nature or condition of the insured property".[118] By extending inherent vice to cover the containerisation of the goods,[119] and their packing or preparation,[120] a new and wider role may have been created for this exclusion than that contemplated by the 1906 Act.[121]

8.26 Examples of inherent vice, as set out in the second edition of *Arnould on Marine Insurance*122 included fruit becoming rotten, or flour heating, or wine turning sour, not from external damage but entirely from internal decomposition. Spontaneous combustion of certain types of coal is a recognised problem as is the heating of soya beans. Discoloration in a cargo of fish[123] is perhaps less common but nevertheless constitutes an example of inherent vice.

Inherent vice and causation

8.27 In considering the definition of inherent vice, the key issue identified by Lord Diplock is to establish whether or not there has been the "intervention of any fortuitous external accident or casualty". The distinction which is to be made is between damage that originates within the goods themselves and damage that occurs as a result of "any" fortuitous external cause. Although easy to state, the rule is not always straightforward to apply

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in practice. The first and essential consideration is causation, that is, whether there has been any fortuitous external cause. If there has, this precludes inherent vice.[124]

8.28 In *C.T. Bowring & Co Ltd* v. *Amsterdam London Insurance Co Ltd*,[125] ground nuts were imported from China to Rotterdam and Hamburg and were damaged by heating and by "sweat" from the ship's holds. The originating cause of both types of damage was excessive moisture within the groundnuts. It was held that the heating damage to the ground nuts was caused by inherent vice as it originated from within the ground nuts. However, with regard to the "sweat" damage, it was held by the court that the sweat, albeit that it may have originated from within the groundnuts, once it had evaporated onto the ship's side, where the moisture condensed, the sweat had taken on a life of its own so that the damage was to be treated as from an external cause.

8.29 In older cases, the "proximate" cause rule was applied on the basis that the operative cause was the last cause in point of time.[126] Accordingly, where there was an accident caused by perils of the seas, for example, a storm, which triggered damage to the goods because of fault in packaging or stowage, it was the insured peril (of the seas) that was treated as the proximate cause. However, in recent cases, a more common sense view is taken of the predominant cause and there has been a shift that may favour insurers. For example, in *T.M. Noten BV* v. *Harding*,[127] a cargo of gloves was shipped in containers from Calcutta, during the monsoon period, and out-turned in Rotterdam in a severely damaged and mouldy condition. Phillips J., at first instance,[128] held that as the damage was caused as a consequence of the moisture in the gloves condensing on the inside of the top of the container and falling onto the gloves, the damage was from an external cause. This followed the decision in the *C.T. Bowring* case[129] described above. However, in the Court of Appeal it was held that the proximate cause of the damage was the water within the gloves themselves and that this was therefore a loss by reason of inherent vice. Bingham LJ said:[130]

> *"[Counsel] who appeared for the [assured] in this appeal, accepted that if the damage complained of had been caused by excessive moisture in the gloves, but*

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without the intervening process of condensation on the roof of the containers, the position would have been different. But he said it was a crucial fact that the moisture condensed on the container roofs before dropping down on the gloves.

I do not for my part think that this answer given by the [assured] would appeal to the common sense of the business or seafaring man. He would not understand how the water which had caused the damage could be regarded as coming from a source external to the goods, but would on the uncontradicted findings regard the gloves as the obvious and sole source of the water. He would, I think, regard the suggested distinction based on the intermediate migration of moisture to and condensation of moisture on the roofs of the containers as owing more to the subtlety of the legal mind than to the common sense of the mercantile."

This approach was followed by the British Columbia Court of Appeal in *Nelson Marketing International Inc* v. *Royal and Sun Alliance Insurance Co of Canada*.[131] In this case, shipments of laminated flooring were damaged by moisture absorbed by the flooring in the course of manufacture. During the ordinary course of the voyage, the moisture evaporated and condensed, damaging the laminate. There was no external fortuitous occurrence and the damage was attributed to the nature of the subject-matter insured.[132] In *Mayban General Insurance BHD* v. *Alstom Power Plants Ltd*[133] this reasoning was taken one important step further when it was held that the claim failed by reason of inherent vice where a large transformer carried on deck was unable to withstand the ordinary incidents of the carriage. That decision was overruled by the Supreme Court in the case of *The Cendor MOPU*, which it is now necessary to analyse in some detail.

8.30 In *Global Process Systems Inc* v. *Syarikat Takaful Malaysia Berhad (The Cendor MOPU)*,[134] a jack-up oil rig was carried, under tow, by barge from Galveston in the United States to Lumet in Malaysia. The rig had three massive tubular steel legs to which the working platform was fixed by openings cut into the legs so that the platform could be jacked up. These openings were known to be subject to fatigue cracking when the legs were under stress. The rig was carried on the barge with its legs jacked-up, so that the legs extended some 300 feet into the air. Whilst the barge was being

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towed off Durban, the starboard leg broke off and fell into the sea, which increased the stresses on the other two legs, which broke off shortly thereafter. It was decided by the court that the loss of the three legs resulted from metal fatigue around the openings in the legs, and the loss occurred during weather conditions that were within the range expected for the voyage in question. The judge also found that the rig was not fit for that voyage. Although it was not appreciated at the time, the loss of the legs was "very probable" though not "inevitable". It was common ground that fatigue cracking was bound to occur in the area of the openings cut into the legs. This type of cracking could not, therefore, have formed any claim under the insurance policy and such cracking that occurred during the earlier part of the voyage was not the subject of an insurance claim.[135] Contrasted with this routine cracking, which was bound to occur, the loss of the legs, although "very probable" was found by the trial judge not to be inevitable as it required, in addition, a "leg-breaking" wave or "final straw" stress that fractured the weakened steel all around each leg.[136] The rig was insured as cargo under a policy incorporating the Institute Cargo Clauses (A) 1/1/82 which, as we have seen, cover "all risks of loss of or damage to the subject-matter insured", but exclude "loss, damage or expense caused by inherent vice or nature of the subject-matter insured".

8.31 The Supreme Court concentrated on Lord Diplock's formulation in the *Soya* case.[137] Lord Mance SCJ pointed out that the reference to the "ordinary course of the contemplated voyage" in the phrase "ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty" was not intended to mean that the loss could not be accidental if the weather conditions were foreseeable. The phrase was, as Lord Mance SCJ put it, used "as a counterpoint to a voyage on which some fortuitous external accident or casualty occurred".[138] The *Mayban* approach, in so far as it was based on the assumption that inherent vice applied if the goods were unable to withstand the voyage conditions to be con- templated was, therefore, rejected. Lord Mance SCJ continued:[139]

> *". . . there is no apparent limitation in Lord Diplock's qualification 'without the intervention of any fortuitous external accident or casualty' – in other words, on the*

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> *face of it, anything that would otherwise count as a fortuitous external accident or casualty will suffice to prevent the loss being attributed to inherent vice."*

Subsequently, Lord Mance SCJ went on to say:[140]

> *"While not myself attempting any exact definition, ordinary wear and tear and ordinary leakage and breakage would thus cover loss or damage resulting from the normal vicissitudes of use in the case of a vessel, or of handling and carriage in the case of cargo, while inherent vice would cover inherent characteristics of or defects in a hull or cargo leading to it causing loss or damage to itself – in each case without any fortuitous external accident or casualty."*

From this ruling, even where goods are unfit to withstand the ordinary incidents of the voyage, and the loss is very probable, the loss is still covered where there is a fortuitous external accident or casualty, for example, due to rough weather. It is submitted that the rules for identifying inherent vice as the cause of the loss under English law involve the following:

(1) If the loss is inevitable and certain to occur *and* if it arises as a result of inherent characteristics of the cargo, there is no cover.[141]

(2) If the loss is solely caused by inherent vice, without the intervention of any fortuitous external accident or casualty, and the inherent vice originates from within the cargo itself, there is no cover.[142]

(3) If the loss is predominantly caused by inherent vice, even though the inherent vice only manifests itself due to the ordinary conditions experienced during the voyage, there is no cover if the cause of the loss originates within the cargo itself and is not triggered by any fortuitous external accident or casualty. So, where gloves containing excess moisture were containerised and the containerisation triggered condensation that damaged the gloves, it was held that the loss was due to inherent vice.[143]

(4) Where goods are unable to withstand the ordinary incidents of the voyage and encounter weather conditions that are no more than would be contemplated, such as rough weather, the loss is considered fortuitous as long

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as it is triggered by anything accidental, even if the loss turns out, in fact, to have been very probable.[144]

The decision of the Supreme Court has limited the circumstances in which insurers can rely upon inherent vice by emphasising that any fortuitous external accident or casualty under an all risks policy will preclude a finding of inherent vice.[145] This leaves the defence of inherent vice to apply, as it did traditionally, to cases of cargo, such as soya beans, ground nuts etc., that are subject to natural deterioration entirely from within themselves. The Supreme Court decision, with respect, also importantly restores cargo insurance coverage in those cases where cargo is damaged by rough weather at sea, which surely constitutes one of the most fundamental reasons for purchasing such insurance.[146]

Inherent vice and containerisation: moisture and condensation damage

8.32 Moisture damage to cargoes carried by container[147] is of general concern and deserves closer consideration. Historically, the issue of moisture had been raised in a number of cases that preceded containerisation. In *Whiting* v. *New Zealand Insurance Company Ltd*[148] a number of consignments of paper hats were imported to London from Japan in late 1929. The insurance covered perils of the seas and damage by fresh water. Most of the hats arrived sound both that year, and during the previous 20 years, but claims arose on a number of cases of hats which were found to be mouldy on arrival in London. It was held, on the evidence of the wooden packing cases which were produced in court, that the moisture damage was due to wet damage to the goods on the quay in Japan and, as such, was recoverable under the policy whether the wet damage was caused by seawater or by freshwater. Commenting on the legal effect of moisture, Roche J said:[149]

> *"Whatever the cause for the mould I am satisfied that it was an external cause.*
>
> *It is suggested that it might have been moist atmosphere. If it was that I think it would not be a matter which would render the [insurers] liable. Moist atmosphere is not an accident or peril that is covered. It is more or less a natural test or incident which the goods have to suffer and which the underwriter has not insured*

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against."

A little later Roche J acknowledged that the moisture caused the mould but explained that, as it came from an outside source, namely wet damage on the quay, it was covered, saying:[150]

> *"I think there was wet on the quay which affected these cases and from the cases went into the goods themselves in the form of moisture. I do not mean in the form of running water. The wet which affected the cases would set up that moist atmosphere which is shown to encourage the growth of this fungus, mould. Moisture of that sort originated in most of the cases through fresh water. Standing in pools on the quay is a peril which is insured against. Accordingly, I hold that the [insurers] are liable for damage occasioned by that cause."*

8.33 The same distinction had been made by Wright J in *C. T. Bowring & Co Ltd* v. *Amsterdam London Insurance Co Ltd*[151] which concerned consignments of ground nuts imported from China to Rotterdam and Hamburg. There was damage by heating and sweat on discharge. It was maintained by the insurers that the heating was due to inherent vice "namely the fact that the ground nuts, when shipped, were not sufficiently dry and were so moist that they were unable to endure, without damage, the ordinary incidents of an ordinary voyage, of this type".[152] The policies covered against "sweating and/or heating when resulting from external cause". This put the onus on the assured to show the loss was from an external cause.[153] Wright J cited the judgment of Lord Sumner in *Bradley* v. *Federal Steam Navigation Co*,[154] in a dispute under a contract of carriage by sea where he said that the shipowners were not called upon to bear damage to a cargo of apples that went rotten when "they were not fit to make the voyage in the ordinary way". He accordingly concluded that the damage to the ground nuts was caused by inherent vice as it originated from within the ground nuts which were shipped in an exceedingly moist condition and were unable to make the voyage in the ordinary way.[155] How- ever, the position with regard to the "sweat" damage was in a different category. The damage here was again from moisture, but from the ship's hold. Wright J said:[156]

> *"The external cause, to my mind, is the moisture which condenses on the ship's side*

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or on the ship's beams. Where that moisture comes from it is impossible to say. It may come from the moist air which comes down the ventilators in the tropics; it may come from ordinary condensation, precipitation of the moisture in the air, when there are alternations of heat and cold, but wherever it comes from it is moisture; it is water – sweat water it is called sometimes. It is impossible to trace the origin of that sweat water to the goods in question here. In any case, the sweat water has gone, as it were, into the universe on its own, even if it has come from those particular goods that are insured. It has set up a life of its own and has achieved an identity of its own; and I think it has merited the appellation of an external cause whether the sweat water, which I take it is forming inevitably in every ship on all these voyages, happens to drop on any particular bag or on any of the [assured's] bags. To what extent it happens to drip on those bags is, I think, fortuitous, and a matter of chance (using that word broadly) and a casualty."

8.34 This passage acknowledges that the moisture may even have "come from those particular goods that are insured", but explains that the loss comes nevertheless from an external source. As such, the water has "set up a life of its own" or gone, as it were, "into the universe of its own". This view was treated as rather too subtle by the Court of Appeal in the more recent decision of *TM Noten BV* v. *Harding*,[157] a case of carriage of goods in a container. In this case a cargo of gloves was shipped in containers from Calcutta during the monsoon period and arrived in Rotterdam in a severely damaged and mouldy condition. At first instance it was held[158] that as the damage was caused as a consequence of the moisture in the gloves condensing on the inside of the top of the container and falling on to the gloves, the damage was from an external cause. However, in the Court of Appeal it was held that the proximate cause of the damage was the water within the gloves themselves and that this was therefore a loss by reason of inherent vice. This approach suggests that containers are to be treated as part of the packing of the goods rather than being part of the transportation system in which the goods are carried.[159] By contrast, as we have seen, where goods were damaged by water originating from within the goods, which had condensed on to the side of the hold in a ship, that is, by sweat damage, it was held that this loss was from an external cause.[160] In *TM Noten BV* v.

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*Harding*161 Bingham LJ said:162

> *"[Counsel] who appeared for the [assured] in this appeal accepted that if the damage complained of had been caused by excessive moisture in the gloves, but without the intervening process of condensation on the roof of the containers, the position would have been different. But he said it was a crucial fact that the moisture condensed on the container roofs before dropping down on the gloves.*
>
> *I do not for my part think that this answer given by the [assured] would appeal to the common sense of the business or seafaring man. He would not understand how the water which had caused the damage could be regarded as coming from a source external to the goods, but would on the uncontradicted findings regard the gloves as the obvious and sole source of the water. He would, I think, regard the suggested distinction based on the intermediate migration of moisture to and condensation of moisture on the roofs of the containers as owing more to the subtlety of the legal mind than to the common sense of the mercantile."*

This approach was followed by the British Colombia Court of Appeal in *Nelson Marketing International Inc* v. *Royal & Sun Alliance Insurance Co of Canada*.163 In this case, shipments of laminated flooring were damaged by moisture absorbed by the flooring in the course of manufacture. During the ordinary course of the voyage, the moisture evaporated and condensed, damaging the laminate. There was no external fortuitous occurrence and the damage was attributed to the nature of the subject-matter insured.164

Insufficiency of packing

Insufficiency of packing: a form of inherent vice?

8.35 The material in which goods are customarily carried, for example bags165 or wooden packing cases,166 normally forms part of the subject-matter insured. In *Brown Brothers* v. *Fleming and Others*167 where "228 cases [of] whisky" were insured for carriage from Glasgow to Singapore it was held that, "the straw in which the bottles were packed and the labels upon the bottles [were] part of the subject-matter of the insurance just as [were] the bottles and corks".168 In these circumstances the question arises whether

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a failure of the packing material to withstand the ordinary incidents of the voyage amounts to inherent vice of the subject-matter insured.

8.36 The earliest reported case which treats inadequate packing as an example of inherent vice is said to be *Dodwell & Co Ltd* v. *British Dominions General Insurance Company Limited*[169] where barrels of oil were insured against the "risk of leakage from any cause whatsoever" and it was held that this included ordinary leakage. In *F. W. Berk* v. *Style*[170] this was treated as an example of cover for inherent vice,[171] though it seems, with respect, to be an example of ordinary leakage.[172] *Wilson Holgate & Co Ltd* v. *The Lancashire & Cheshire Insurance Corporation Limited*[173] has also been treated[174] as an example of packing being considered inherent vice. In that case a cargo of palm oil was shipped from Singapore to Liverpool in barrels or casks. When the casks arrived at Liverpool they were in a shocking state as to a comparatively small proportion of them – 107 out of a total of 657. The defence was that the insurers were not liable because the loss was due to inherent vice, owing to the barrels in which the oil was shipped being old, leaky and frail and unable to carry it. Bailhache J concluded that the cause of the damage was bad stowage and that the barrels were in sufficiently good order when the consignment left Singapore. However, in the course of his judgment he said:[175]

> *"But it is conceded, and must be conceded, that if the damage in this case and the loss were due to the insufficiency of the casks and barrels in which the oil was packed, that would not be a casualty and the defendants would not be liable, because they do not insure against things that must happen, but only against casualties that may happen."*

These remarks, which were *obiter* and were directed to a defence of lack of fortuity, give little or no support for the proposition that inadequate packing amounts to a form of inherent vice. However, there are two judgments of Sellers J in the 1950s that do directly address the point. The first is *F. W. Berk & Co Ltd* v. *Style*[176] where there was a finding that the cargo was packed in faulty and inadequate bags which leaked because they were insufficient to endure the ordinary contemplated handling and carriage.[177] Sellers J held

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that the subject-matter insured included the bags and that "this therefore amounted to inherent vice", in the "language used in marine insurance".[178] There was no consideration in the judgment of whether this was an extension of the concept of inherent vice, and Sellers J also concluded that there was a separate defence, inevitability of loss, as he said that it could be said to be certain that the bags would not hold their contents.[179] A few weeks later, in *Gee & Garnham* v. *Whittall*[180] Sellers J came to a similar decision regarding a consignment of kettles for Woolworths which were inadequately packed in defective wooden cases or crates. He said that "the damage in the bulk of the cases was due to the inadequate packing . . . and, inadequate packing, of course, brings the case under the plea of inherent vice".[181] In none of these cases was it suggested that to treat bad packing as inherent vice was unusual or questionable. However, the fifteenth edition of *Arnould*[182] considered unfitness of packing as an unjustifiable extension of the concept of inherent vice. Subsequently, this passage in *Arnould* was disapproved by Donaldson LJ in *Soya* v. *White*[183] and in *Mayban General Assurance BHD* v. *Alstom Power Plants*.[184] Moore-Bick J again said that bad packing "can properly be regarded as an aspect of inherent vice". Although this troubling decision was over- ruled in *The Cendor MOPU*,[185] it may survive as some authority in support of the view that bad packing is a form of inherent vice.[186] The academic commentators are not at one on the point. The editors of *Arnould* maintain their position that the judgments of the 1950s do not really support the position that damage caused by bad packing is a form of inherent vice[187] but, at the same time, recognise that "whether or not bad packing can generally be said to fall within the scope of inherent vice . . . seems to be an open question".[188] Bennett[189] states that, "Despite the criticisms of Arnould, it is clear that at common law inherent vice encompasses both packaging and the cargo packed". Rose[190] is equally adamant that, "Inherent vice also includes the necessary packing of the goods: both the adequacy of the material and the method of packing".[191]

8.37 If bad packing is an aspect of inherent vice this raises a question as to the relationship between the inherent vice exclusion in Clause 4.4 of the Institute Cargo Clauses, and in section 55(2)(c) of the Marine Insurance Act 1906, and the, in some respects, parallel exclusion of insufficiency of

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packing in Clause 4.4 of the Institute Clauses. This inter-relationship is particularly important in light of the decision in *The Cendor MOPU*[192] from which it is clear that the inherent vice exclusion does not impose any requirement that the goods be fit for the insured voyage[193] while, as discussed below,[194] the wider packing exclusion does impose a strict requirement of fitness "to withstand the ordinary incidents of the insured transit". So far as the 1906 Act is concerned, the answer must be that, as Clause 4.3 covers packing, the policy "otherwise provides" in terms of the 1906 Act and the inherent vice exclusion does not impact on the express packing requirement in the Institute Clauses.[195] So far as the Institute Cargo Clauses are concerned, as a matter of construction, the intention is clear that packing and containerisation should be regulated by the provisions of Clause 4.3 (insufficiency of packing and preparation) and not by the inherent vice exclusion in Clause 4.4.[196]

Insufficiency of packing under the Institute Cargo Clauses

8.38 There may be cases where the packing is not part of the subject-matter insured,[197] and, in any event, an assured may not associate bad packing or preparation with inherent vice. Accordingly, in January 1982, the Institute Cargo Clauses introduced, for the first time, an express exclusion of insufficient packing or preparation in the following terms:

> *"4. In no case shall this insurance cover:*
>
> > *4.3 Loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured (for the purpose of this Clause 4.3 'packing' shall be deemed to include stowage in a container or liftvan but only when such stowage is carried out prior to attachment of this insurance or by the Assured or their servants)."*

This clarified the need for sufficient packing but extended the exclusion to cases where the poor packing took place during the currency of the insurance risk in circumstances analogous to bad stowage. It also made clear that it was not only packing but also insufficiency or unsuitability of preparation of the

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subject-matter insured (e.g., lack of inhibitors to prevent corrosion) that was excluded.[198] The result, in practice, was the use in the London market of brokers' clauses making insurers liable for loss arising from bad packing or preparation of the cargo, at least where the assured was not responsible for the packing or preparation.[199] The revised Institute Cargo Clauses[200] make significant changes and read as follows:

> *"4. In no case shall this insurance cover:*
>
> > *4.3 Loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured to withstand the ordinary incidents of the insured transit where such packing or preparation is carried out by the Assured or their employees or prior to the attachment of this insurance (for the purpose of these Clauses 'packing' shall be deemed to include stowage in a container and 'employees' shall not include independent contractors)."*

The revised insurance now covers bad packing or preparation following the attachment of the insurance unless it is carried out by the assured or their employees. Where the bad packing or preparation takes place in the warehouse or factory before the attachment of the insurance there is no cover regardless of whether the packing is carried out by the assured or by third parties. The insurers' approach in such circumstances is that the loss, though not necessarily inevitable, is analogous to a loss by inherent vice. An issue arises in practice as to what amounts to the use of third party packers and what constitutes packing or preparation "carried out" by the assured or their employees. How are the words "carried out" to be understood? If the assured or their employees give detailed instructions to third party packers it may be that in extreme cases such packing is "carried out" by the assured if, looking at the facts, the assured have control of the packing methods and supply the materials. Alternatively, it could also be argued for insurers, though this was not the intention, that giving detailed instructions on the packing is itself "preparation" carried out by the assured.

8.39 The proposals for the more limited packing and preparation exclusion in the revised Institute Cargo Clauses gave rise, at the time, to

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concerns amongst traditional underwriters that this would open the door to the use of cheap and inadequate packers and to a consequent increase in cargo claims. However, if the assured knowingly exposes the goods to an enhanced risk that would be a matter for disclosure as material to the risk.[201] Although there may be difficulties under an open cover of showing a duty to disclose prior to any individual declaration, if it is the assured's habit to use inadequate packers that would, at least, be disclosable on renewal of the insurance contract. Finally, it may be noted that the revised Institute Clauses retain the insurable interest requirement so that the assured will generally benefit from a successful transit where the goods arrive sound at their destination.

8.40 An issue arises in relation to the extended duration of the insurance and how this interacts with the new packing arrangements. The duration of the insurance cover has now been extended by the revised Institute Cargo Clauses to attach the insurance when the subject- matter insured is "first moved" for the purposes of leaving the warehouse on the insured transit.[202] If the goods are removed from their place of storage in a warehouse to be prepared for carriage, any defective preparation carried out by third party packers which caused loss would not be a covered risk because the goods have been first moved for "packing" and not for loading. The terms of the revised Clause 8.1 of the Institute Cargo Clauses emphasise that the movement of the goods only attaches the insurance when the movement is "for the purpose of the immediate loading into or onto the carrying vehicle or other conveyance for the commencement of transit".

8.41 Where, as is commonly the case, goods are stowed in containers, the position under the revised Institute Cargo Clauses is the same as for cargo packed more conventionally. The term "packing" is deemed to include stowage in a container. Accordingly, any loss of or damage to the cargo is excluded if it is caused by insufficiency or unsuitability of the container where the stowage is carried out prior to the attachment of the risk. Similarly, if the packing is carried out by the assured, insufficiency or unsuitability of the container will be a defence if the assured or their employees stow the container, whether this is done before or after the attachment of the

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insurance. The revised Clauses do not change the exclusion with regard to containers which remains the same as it was in the 1982 Clauses with some revisions of the drafting intended to allay the criticisms of the previous Clause 4.3.[203] In effect the exclusion in the revised Clauses has been amended to bring the position with regard to the packing and preparation of cargo into line with the exclusion that prevailed with regard to containerisation.

What amounts to insufficiency of packing or preparation?

8.42 The material words of exclusion 4.3 are, "insufficiency or unsuitability of packing or preparation of the subject-matter insured to withstand the ordinary incidents of the insured transit". In the Australian case of *Helicopter Resources Pty Ltd* v. *Sun Alliance Australia Ltd (The Icebird)*[204] the meaning of the words "packing" and "preparation" was explored in some detail in the judgment of Ormiston J in the Supreme Court of Victoria. In this case, the claim was for storm damage inflicted on four helicopters stowed in the ship *Icebird*. The damage occurred during a Force 12 gale on a voyage from Hobart to the Antarctic base at Casey. The insurers alleged insufficient packing and preparation in that the helicopters were not properly lashed and secured by the assured's employees to the pontoons in the hold upon which they were to be carried.[205] Ormiston J., in relation to "packing", said:

> *"Without wishing to preclude the possibility that packing or preparation may in exceptional cases occur on board a vessel, the clause is directed to those steps which are necessary to prepare the cargo for the loading process, not the very acts which result in the cargo being stowed on board."*

After discussing the position regarding containers, Ormiston J continued:

> *"The word 'packing' should otherwise be confined to the placing of an outer covering over the cargo or the placing of the cargo in a box or a similar container specifically designed for the transportation of that cargo."*

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This case was followed by the Canadian Federal Court of Appeal in *Feuiltault Solution Systems Inc* v. *Zurich Canada*[206] where a consignment of book-binding machines was carried from Canada to Germany in containers and suffered corrosion damage. The assured's employees used pieces of pressure-treated wood to immobilise the machines within the containers. The corrosion of the cargo was caused by condensation in the containers due to the high moisture content of this pressure-treated wood. Furthermore it appears that protective wrapping could have prevented the loss. In giving the reasons for the judgment Pellitier JA said[207]

> *"I understand . . . that the exclusion applies to the steps taken by the insured to protect the cargo from the ordinary incidents of carriage, including stowing cargo in a container and taking steps to immobilise it in the container. By necessary implication, I also understand this exclusion to refer to the suitability of the materials used by the insured for these purposes."*

It was held that the loss was excluded because the wood used to secure the machinery was packing material which was damp and therefore "unsuitable". Furthermore, it seems that the exclusion would have applied as the failure to apply protective wrapping amounted to "insufficiency". In *Alstom Limited* v. *Liberty Mutual Insurance Company (No. 2)*[208] the insurers argued, based on Ormiston J.'s description of "packing" in *The Icebird*, that internal bracing of the core assembly within the sealed tank of a transformer could not be packing. However, the Federal Court of Australia rejected this saying that Ormiston J.'s remarks were *obiter* and not intended to be exhaustive. It was held that it was appropriate to take into account a wide range of factors such as "the goods in question, the nature and function of the materials used to protect the goods, and the circumstances in which the materials were deployed".[209] In this context the lack of internal bracing used to secure the core assembly within the transformer amounted to insufficiency or unsuitability of packing.[210]

8.43 The meaning of "preparation" was considered separately by Ormiston J in *The Icebird*[211]

where he said:

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> *"The word 'preparation' in sub-clause 4.3 is clearly wider in its connotation but it is also directed to those steps taken to making an item ready for transportation before it is taken and placed on board the vessel, in the course of the process of loading and stowing the cargo. Whereas the word 'packing' may be con- fined to the placing of goods in some form of outer covering, whether peculiar to the item shipped or of a more general kind, the word 'preparation' contemplates that there may be other acts which may be necessary to prepare cargo for loading and stowing on board a vessel . . . The removal, adjustment and securing of some mechanical part may be required for an item to be shipped 'in bulk' and there are many and various other ways in which cargo is prepared for transportation without it being packed. But in each case the sub-clause is directed to those acts done before the cargo is loaded and stowed on board."*

This passage stresses that "preparation" like "packing" will normally precede loading. It also highlights that there may be many different methods of "preparation" applicable in different trades. It is submitted that, for example, the use of moisture inhibitors would be included within the "preparation" of the cargo and that failure to use such inhibitors would amount to lack of preparation and that moisture losses thus caused would be excluded from cover.

The standard: "to withstand the ordinary incidents of the insured transit"

8.44 The words "to withstand the ordinary incidents of the insured transit" were added to the revised Institute Cargo Clauses in 2009.[212] This phrase was drawn from the *dictum* of Donaldson LJ in *Soya* v. *White* [213] where he said that in contracts of affreightment inherent vice meant "... the unfitness of the goods to withstand the ordinary incidents of the voyage ...", citing *Scrutton on Charterparties*.[214] This standard was applied in *Mayban General Insurance BHD* v. *Alstom Power Plants Ltd*[215] where it was held that a large transformer carried on deck was unable to "withstand the ordinary conditions of the voyage"[216] due to the failure to protect it by adequate packing which it was said was a form of inherent vice.[217] This case was over-ruled in *The Cendor MOPU*[218] so far as inherent vice is concerned, but the

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revised Institute Cargo Clauses were redrafted before the decision of the Supreme Court in that case. The Clauses still incorporate the standard of "to withstand the ordinary incidents of the insured transit". In these circumstances, what is the effect of the additional words? *The Cendor MOPU* made it clear that there is no warranty, under either the Marine Insurance Act 1906 or the Institute Cargo Clauses, that the goods themselves are fit for the voyage.[219] However, as discussed above,[220] Clause 4.3 (packing) is a self-standing exclusion and quite separate from the inherent vice exclusion in Clause 4.4, and this must be the case whether or not insufficient packing is a form of inherent vice. Accordingly, the fact that there is no warranty of fitness for the cargo contrasts with the packing requirement under Clause 4.3 as the additional words ("to withstand the ordinary incidents. . .") require that the packing be fit to protect the goods for the insured voyage. In the circumstances, where the goods are insufficiently packed to "withstand the ordinary incidents of the insured transit" and the loss is caused by that insufficiency the exclusion will apply. Clause 4.3 therefore makes clear that the concept of packing and preparation under the Institute Cargo Clauses is intended to be the same as in carriage of goods (in which field bad packing etc remains a sub species of inherent vice) and that the range of risks for which the packing or preparation must be suitable is "the ordinary incidents of the insured transit".[221] On the facts of *Mayban* the loss would still be excluded because the damage in that case to the cargo was caused by the cargo not being packed to be able to withstand the ordinary incidents of the transit. The test is whether the main or predominant cause of the loss was a peril of the seas (or other all risks peril) or, on the other hand, the insufficiency of packing for the voyage. Accordingly, if the predominant cause was the packing defect then the loss would be excluded. In a case where there are two predominant concurrent causes, the *Wayne Tank*[222] principle would apply and the exclusion would prevail.[223] The result is a rigorous requirement for packing which is often ameliorated by special clauses moderating the obligation with a privity requirement, that is to say, that the insurer is only relieved of liability if the assured was aware that the packing was inadequate. These clauses are now considered.

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Insufficiency of packing: fault or privity of the assured

8.45 The strictness of the packing exclusion in Clause 4.3 of the Institute Cargo Clauses is frequently tempered in practice by special packing clauses which limit the exclusion to cases where the packing defects or insufficiency have arisen through the fault or privity of the assured. In *European Group Ltd & Others* v. *Chartis Insurance (UK) Ltd*224 it was an express term of the policy that underwriters would not use insufficiency of packing as a defence where the packing was "carried out by a party other than the Assured or the insufficiency or unsuitability arose entirely without the Assured's privity or knowledge". A similar clause was analysed by the Federal Court of Australia in *Alstom Limited* v. *Liberty Mutual Insurance Company (No. 2)*.225 In this case the insurance was underwritten on terms of the Institute Cargo Clauses (A) 1/1/82 with the packing exclusion modified by the following clause:

> *"Unsuitability of Packaging Clause*
>
> *Any packaging or external preparation of the interest insured is deemed to be sufficiently packed and prepared if:*
>
> *(a) The packing and external preparation is in accordance with the usual custom or trade of the Insured's custom or*
>
> *(b) Any insufficiency or unsuitability of packing or external preparation has not arisen through fault of or with the knowledge and consent of the Insured."*

Two large transformers were manufactured in India where they were to be factory tested, "seaworthy packed", and supplied f.o.b. Mumbai for shipping to Freemantle in Australia. The transformers were found to be damaged on arrival in Australia due to the absence of internal wooden bracing of the core coil assembly within the steel containers for the transformers. The Court found that the failure to apply internal bracing to secure the core coil assembly during the voyage from Mumbai to Freemantle amounted to insufficiency or unsuitability of packing within the meaning of Clause 4.3 of

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the Institute Clauses. A question therefore arose as to whether the assured could rely upon the Unsuitability of Packaging Clause set out above. The underwriters raised two contentions. Firstly, they argued that as the policy was drawn in wide terms and covered the shipper of the goods, who were responsible for the insufficiency of the packing, the fault of these shippers was the fault of the "assured" for the purposes of the Unsuitability of Packaging Clause. The Australian Court, following English authorities,[226] held that the policy was not a joint policy, where the fault of one assured would have prejudiced another assured, but a composite policy where each of the assureds had a separate right to claim. This conclusion was confirmed by the particular wording of the policy in this case.[227] The second issue raised was whether the fact that the buyers had instructed an agent to monitor the manufacture of the machines meant that they were aware of or at fault with regard to the insufficiency of packing. In this respect the Australian Court, on the basis of the case of *Com- pania Maritima San Basilio SA* v. *Oceanus Mutual Underwriting Association (Bermuda) Limited (The Eurysthenes)*,228 held that the wording of the Packing Clause with regard to fault should be equated with "privity"[229] and that, in the circumstances, the packing defects had to be carried out with the "knowledge and consent" of the assured. In this context knowledge and consent meant that the assured cargo owner had to have had actual knowledge of the facts that rendered the packing insufficient or to have turned a blind eye to whether those facts had that consequence.[230] On the facts of the *Alstom* case the agent in India who monitored the manufacturing process did not have that type of actual knowledge and therefore the assured recovered despite the insufficiency of packing.

Rats and vermin

8.46 The Marine Insurance Act 1906 section 55(2)(c) states:[231]

> *"Unless the policy otherwise provides, the insurer is not liable . . . for any loss proximately caused by rats or vermin."*

There is no equivalent exclusion in the Institute Cargo Clauses, nor are rats

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and vermin mentioned by Lord Sumner in his judgment in *British & Foreign Marine Insurance Co* v. *Gaunt*,[232] which examined the limitations on all risks cover.[233] However, the 1906 Act reflects the fact that losses due to the action of rats and vermin were not traditionally treated as perils of the seas, for example a ship's bottom destroyed by rats was held not to have been destroyed by perils of the seas,[234] and similarly a ship's bottom damaged by vermin.[235] The exclusion in the Act uses the words "loss proximately caused by rats or vermin" which gives more emphasis to the word "proximately" than in the exclusions of wear and tear, ordinary leakage and breakage, and inherent vice. This emphasis may be explained by the case of *Hamilton, Fraser & Co* v. *Pandorf & Co*[236] where the question before the court was whether, in a seaworthy ship, the gnawing by rats of some part of the ship, so as to cause seawater to come in and cause damage to the cargo, was a danger and accident of the seas. It was held that the loss was not proximately caused by the rat but was caused by a peril of the seas, that being the immediate cause of the loss.[237] There may be a distinction between the action of rats and vermin that occurs over the course of time, and is equivalent to wear and tear, also excluded in the same section of the Act, and a sudden ingress of water into a ship caused by rats attacking a particular pipe or other vital part of a seaworthy ship.

8.47 Although rats are still a potential problem at sea,[238] cargo is more particularly exposed to infestation damage by insects which, it is submitted, are "vermin" within the terms of the exclusion.[239] It seems clear that under the old form of policy,[240] or a policy against specific perils, such as policies underwritten on terms of the Institute Cargo Clauses (B) and (C), there is no cover for such infestation unless, exceptionally, it leads to ingress of water.[241] However, where the Institute Cargo Clauses (A) are used, which is usually the case, the position regarding cover for infestation is not entirely clear. The policy covers "all risks" but customarily[242] does not expressly "otherwise provide", in terms of section 55(2)(c) of the Marine Insurance Act 1906, so far as rats and vermin are concerned. Although the position is uncertain, the better view is that "all risks" covers the risks of rats and vermin and, therefore, infestation where there is loss of or damage to the cargo from an external cause.[243] Ultimately it is a question of construction of the policy as a

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whole.[244] Losses caused by rats and vermin are fortuitous and accidental losses falling within the term "all risks". The limitation imposed by the Act on such losses is notably absent from the Institute Cargo Clauses where there are exclusions of the other relevant matters referred to in section 55(2)(c). This omission from the scheme of the exclusions in Clause 4 of the Institute Cargo Clauses is a strong indication that the policy "otherwise provides". In short, the absence of the exclusion is indicative of an intention to cover this type of loss under an all risks policy written on the terms of the Institute Cargo Clauses.

General exclusions

Wilful misconduct

Wilful misconduct defined

8.48 The Institute Cargo Clauses exclude "loss damage or expense attributable to the wilful misconduct of the Assured".[245] This reflects the Marine Insurance Act 1906 section 55(2)(a), which provides as follows:

> *"The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;"*

A loss directly caused by misconduct of the assured could never be an insured loss, not only because it would not be fortuitous, but more fundamentally, because it would be a fraud on the insurers. Accordingly, an assured cannot recover on his insurance where he has deliberately caused a loss as it would be against public policy to allow recovery.[246] Moreover, it would appear to be a breach of the duty of good faith.[247] This exclusion may be seen therefore as declaratory, and, in particular, as codifying the special rule of causation which applies in cases of wilful misconduct. In this context, it is not merely losses

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proximately caused by the wilful misconduct of the assured that are excluded but also those more widely "attributable" to such misconduct.[248]

8.49 The essential elements of wilful misconduct are, firstly, that the assured intended to achieve loss of or damage to the subject-matter insured (or that he was recklessly indifferent to whether such loss or damage was caused) and, secondly, that his immediate purpose was to claim on his insurance.[249] The defence is open to insurers where the assured has deliberately exposed the subject-matter insured to an insured peril for the purpose of accomplishing a loss.[250] For example, it would amount to wilful misconduct if an assured cargo owner deliberately exposes cargo to inevitable damage on the voyage in an endeavour to claim on the policy for such loss or damage rather than to complete the voyage.[251]

8.50 The defence of wilful misconduct is commonly relied on in hull cases, where scuttling is alleged. There are examples in cargo cases, most notably in *The Salem*, where a "gigantic ship was used for a gigantic fraud" which consisted of scuttling the ship with part of the cargo still on board.[252] However, scuttling by the shipowners will not discharge the insurers of the cargo unless the scuttling is preceded by a change of voyage taking the cargo off risk.[253] The examples of wilful misconduct and fraud in cargo cases more often take the form of attempting to insure cargo which does not exist at all.[254] This difference in the nature of wilful misconduct may arise because the assured cargo owner generally has little control over his cargo once the voyage has commenced and any misconduct prior to attachment of the risk will usually give rise to other defences, such as inherent vice. In *Forder* v. *Great Western Railway Company* [255] it was suggested that it would be wilful misconduct, in the context of a carriage contract, if the person in charge of loading knew that the mode of packing would be injurious and nevertheless allowed it to be adopted. Accordingly, it may be suggested that if a cargo owner knowingly, or recklessly, adopts a method of packing that is injurious to the goods, intending to create an insurance claim, then wilful misconduct will be an additional defence to any insufficiency of packing or inherent vice defence already available.[256]

8.51 It has been suggested[257] that it would be wilful misconduct if the

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assured shipped goods to a country where their importation was prohibited by law with the result that the goods were destroyed or confiscated by the customs authorities.[258]

Wilful misconduct distinguished from lack of due diligence

8.52 In some cases there may be a fine line between negligence of the assured, which is covered, and wilful misconduct which is not.[259] For example, in *Papadimitriou* v. *Henderson*[260] a vessel insured against war risks was captured by insurgents during the Spanish Civil War when she failed to put back into port despite warnings of the danger. Wilful misconduct was alleged but rejected by the court as the assured had not deliberately exposed the vessel to capture.

8.53 It may be stressed at this point that mere negligence, not amounting to wilful misconduct, is generally covered under the insurance though there may be circumstances, in particular, after a loss, where the assured has a duty to avert or minimise that loss.[261] When the policy provides that the assured must take all reasonable steps to avoid the occurrence of a loss, a provision sometimes inserted in cargo policies,[262] such clauses have been construed as requiring the assured only to avoid recklessness.[263] In *Crow's Transport Ltd* v. *Phoenix Assurance Co Ltd*,[264] a case of a haulier's policy covering their liability for goods in transit, there was a requirement that the insured "shall take all reasonable steps to safeguard the property insured from loss and damage". The haulier's manager received gramophone records from the Decca Record Company at his London office and left them unlocked in a basement from where they were stolen whilst he was out for a short lunch break. It was held that the manager acted "reasonably" albeit that there had been two other thefts at the premises, one of Decca records, though not from the basement. The judge pointed out that the condition in the policy only required "reasonable" steps to be taken not "all possible or all practical steps".[265]

8.54 A loss which the assured "brings about by his own act" is the last of the limits on all risks enumerated by Lord Sumner in *Gaunt*.[266] As

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dishonesty of the assured can never be a covered risk it may be the case that Lord Sumner had in mind action by the assured that deliberately exposed the goods to harm but was not dishonest, for example, neglect to pay warehouse dues exposing the goods to risk of sale under a court order. If the assured deliberately exposes his goods to obvious risk, for example, by leaving them uncovered and exposed to the elements so that they suffer wet damage, this might also fall within Lord Sumner's words. It may be that such action would qualify as "recklessness" and would therefore amount to wilful misconduct as defined under English law.[267] An alternative defence would be that such a loss, which the assured brings about by his own act, is not an all risks loss. It is submitted, however, that this should not be allowed to encroach on the principle that, in the absence of express terms, negligence is no defence for insurers.

The position of the innocent c.i.f. buyer

8.55 As cargo policies are commonly assigned under c.i.f. contracts the question arises whether an innocent assignee of a cargo policy who, as buyer of the cargo and insurance, takes the policy unaware of wilful misconduct by the seller, nevertheless takes the assignment of the policy subject to any wilful misconduct defence by the insurers. Where the insurance is assigned, the Marine Insurance Act 1906 section 50(2) provides that the insurers are entitled to make any defence arising out of the contract which they would have been entitled to make if the action had been brought in the name of the person by, or on whose behalf, the policy was effected. However, this is not necessarily the end of the analysis as the claimant may not be merely an assignee but also an assured in his own right. As discussed earlier in this book, London market cargo open covers are often widely drawn with a view to giving the original assured named in the policy the right, as agent, to insure his customer, typically a c.i.f. buyer, as an assured in his own right.[268] Moreover, the revised Institute Cargo Clauses define the "Assured" to include the "person claiming indemnity either as the person by or on whose behalf the contract of insurance was effected or as an assignee".[269] This constitutes the c.i.f. buyer not merely an assignee but also an additional assured in his

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own right within the rules set out by Colman J in *National Oilwell* v. *Davy Offshore*.[270]

8.56 The question whether the innocent c.i.f. buyer can recover as an assured in his own right, and not as an assignee, depends on whether the cargo policy is joint or composite. Where mortgagor and mortgagee of a ship were insured it was held that the mortgagee's interest was separate, Viscount Cave saying:[271]

> *"But in this case there is no difficulty in separating the interest of the mortgagee from that of the owner; and if the mortgagee should recover on the policy, the owner will not be advantaged, as the insurers will be subrogated as against him to the rights of the mortgagee."*

8.57 As different interests (mortgagor or mortgagee) were involved that was a composite policy. Where the assured has the same interest, the policy is said to be joint. Under a cargo policy, both seller and buyer have the same interest, ownership of the goods. Their interest is in that sense joint and, on this basis, the c.i.f. buyer's claim as assured under a cargo policy would seem to be tainted with the fraud of the seller. However, the seller and the buyer are not owners of the cargo at the same time. Accordingly, there is much to be said for the view that the innocent buyer should not be prejudiced by the wilful misconduct of the seller. The c.i.f. buyer as assured in his own right has the benefit of a separate contract carved out of the open cover in his favour.[272] The special position of the interest of the c.i.f. buyer may give scope for developing the law in such a way that the position of the non-fraudulent buyer is not affected. There is some support for this approach in the non-marine case of *Direct Line Insurance plc* v. *Khan*.[273] In this case after an oral hearing Simon Brown LJ and Mance LJ allowed leave to appeal, *inter alia* on the basis that the law might be developed in such a way in relation to joint ownership of a house.[274] Although the conventional view of cargo insurance is that the buyer takes subject to the seller's fraud, or wilful misconduct, it is submitted that as the buyer is an assured in his own right there is scope for the development of the law in favour of the innocent c.i.f. buyer either on the basis of a separate contract or a separate interest. If the

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claim is payable, in theory the insurers could exercise rights of subrogation in the buyer's name against the seller,[275] though in practice this is unlikely to avail them if the seller is a rogue who, as likely as not, has disappeared.

Delay

8.58 The Delay Exclusion in the revised Institute Cargo Clauses now reads as follows:

> *"4. In no case shall this insurance cover*
>
> *4.5 loss damage or expense caused by delay, even though the delay be caused by a risk insured against . . ."*

This wording reflects, in some respects,[276] the Marine Insurance Act 1906 section 55(2)(b) which is as follows:

"Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against . . ."

What are cargo insurers seeking to achieve by this exclusion? There is no doubt that cargo under- writers do not wish to be responsible for losses on goods by reason of their having passed their sell-by date. The example usually given to illustrate this rule is delay in delivery of a consignment of diaries or calendars which are rendered useless. Thus seasonal goods that arrive intact, but are worthless, due to the delay, cannot be the subject of a valid cargo insurance claim.[277] The same reasoning applies to other less dramatic forms of loss of market so that a collision may delay a voyage and the price of a bulk cargo may have fallen by the time of its arrival. Losses in market, where the cargo arrives sound and undamaged, are not recoverable even though the delay is caused by insured perils either under all risks clauses, such as the Institute Cargo Clauses (A), or by named perils under the (B) and (C) Clauses. These are clear cases. Beyond them the exclusion of delay is so linked with causation that it is dealt with in Chapter 7 where the

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revision to the current Institute Cargo Clauses, by reason of the omission of the word "proximately", is explained and examined in some detail.[278]

Insolvency and financial default

The revised exclusion: 2009

8.59 The revised Institute Cargo Clauses exclude insolvency and financial default as follows:[279]

> *"4. In no case shall this insurance cover:*
>
> *4.6 Loss damage or expense caused by insolvency or financial default of the owners managers charterers or operators of the vessel where, at the time of loading of the subject-matter insured on board the vessel, the Assured are aware, or in the ordinary course of business should be aware, that such insolvency or financial default could prevent the normal prosecution of the voyage.*
>
> *This exclusion shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract."*

This exclusion is limited to insolvency or financial default of the sea carriers, defined as the "owners managers charterers or operators of the vessel". The historical reasons for this are discussed below but in these days of extensive storage risks and cover for land transits, it may be noted that neither losses from failure of warehouse-keepers, or other bailees, or of land carriers, are excluded.

8.60 The exclusion only applies where, at the time of loading, the assured are aware, or ought in the ordinary course of business to have been aware, that the insolvency or financial default could prevent the normal prosecution of the voyage. The insurers would therefore have to prove, firstly, that the insolvency caused the loss and, secondly, knowledge by the assured,

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meaning the *alter ego* or governing mind of the assured if a company.[280] These may prove to be formidable obstacles for insurers. Additionally, where the claimant is an assignee, as will commonly be the case, who has bought in good faith under a binding contract, the exclusion does not apply. The operation of the exclusion has been narrowed in the revised Institute Cargo Clauses to only the most clear cases where the assured themselves have knowingly employed a sea carrier of doubtful financial standing or viability. The exclusion does not apply at all to an assignee who has bought in good faith under a binding contract.[281]

Historical background to the exclusion

8.61 The exclusion of insolvency and financial default was introduced for the first time in 1982 in response to a number of losses sustained by the London insurance market. Those losses had occurred where owners of sub-standard tonnage became insolvent and abandoned the voyage, frequently without any marine casualty, and, as often as not, as a result of engine breakdowns where the vessel's machinery was inadequately maintained.

8.62 There was some doubt in the market as to whether an all risks cargo policy covered losses arising from insolvency. However, the decision of Goddard LJ in *London & Provincial Leather Processes* v. *Hudson*[282] held that where the assured was wrongfully deprived of his goods as a result of a conversion there was an all risks loss even if the conversion resulted from the insolvency of the third party to whom the assured had entrusted the goods.[283] It therefore appeared that where insolvency led not merely to delay in the voyage, which would be excluded,[284] but to a loss of the goods or the adventure,[285] that loss would be covered under an all risks policy. Moreover, the expense of forwarding the goods to destination, to avoid a loss of the adventure, was arguably covered under a cargo insurance as sue and labour.[286]

8.63 The London market were not comfortable with this as they felt that losses arising from insolvency were in the nature of a commercial risk

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which should not be the business of cargo insurers concerned with loss of or damage to the cargo from major sea perils, or, at least, theft, malicious damage or the like. There was even a suggestion that an all risks cargo insurance covering insolvency contravened the Lloyd's Regulations prohibiting, at that time, the writing of financial risks. The result was that the Institute Cargo Clauses (1/1/82) introduced an insolvency exclusion which excluded, "loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel".[287]

Forwarding charges

8.64 A major concern was, and continues to be, forwarding charges. In practice, it often happens that a poorly maintained vessel suffers an engine breakdown or fire, puts into port, and is unable, due to the financial circumstances of the owner or charterer, to continue the voyage. In the circumstances cargo interests incur expense, in terms of sue and labour, by for- warding their goods to their intended destination. Where this arises from insolvency it is dealt with specifically in the Forwarding Charges Clause, Clause 12, which was also introduced in 1982, in parallel with the insolvency exclusion, and which now reads as follows:[288]

> *"Forwarding Charges*
>
> *Where, as a result of the operation of a risk covered by this insurance, the insured transit is terminated at a port or place other than that to which the subject-matter is covered under this insurance, the Insurers will reimburse the Assured for any extra charges properly and reasonably incurred in unloading storing and forwarding the subject-matter insured to the destination to which it is insured."*

This positive confirmation of sue and labour cover is, however, subject to the following exclusion:

> *"This Clause 12, . . . shall be subject to the exclusions contained in Clauses 4, 5, 6 and 7 above, and shall not include charges arising from the fault negligence*

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insolvency or financial default of the Assured or their employees."

The first part of the Forwarding Charges Clause really does no more than clarify the position that such charges are recoverable as sue and labour in order to avert a loss of the adventure. The real purpose of the Forwarding Charges Clause was to trigger the insolvency exclusion under Clause 4.6 which, as we have seen, excluded "loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel". For good measure, and in an abundance of caution, the Forwarding Charges Clause also excludes charges arising from the insolvency of the assured themselves.

The Institute Commodity Trades Clause exclusion of insolvency

8.65 The insolvency exclusion in the 1982 Clauses immediately met with resistance from brokers and assureds in the London insurance market.[289] As a result of difficulties involving the Trade Associations, the Joint Cargo Committee introduced Clause JC93 in November 1982[290] amending the exclusion in Clause 4.6 in favour of the assured. The amending clause read as follows:

"In no case shall this insurance cover loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel where the Assured are unable to show that, prior to the loading of the subject-matter insured on board the vessel, all reasonable practicable and prudent measures were taken by the Assured, their servants and agents, to establish the financial reliability of the party in default."

8.66 When soundings were taken with the commodity trades, despite the softening of the clause in favour of the assured, the Trade Associations continued to argue that special conditions prevailed in some trades and that further protection for the assignee of the insurance was necessary. In particular, the point was made that an assignee could be, and in many trades

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would be, innocent of any knowledge of the solvency of the owners, managers, charterers or operators of the vessel.

8.67 It was also argued that the words "arising from" (in the phrase "arising from insolvency or financial default of the owners, managers" etc) were intended by insurers to exclude not only losses directly caused by insolvency but also losses *indirectly* arising from insolvency. *O'May on Marine Insurance*[291] takes the view that "arising from" and "caused by" both mean "proximately caused by" as does *Arnould*.[292] Goodacre in *Marine Insurance Claims*[293] takes the view that "arising from" is wider than "caused by" and it is submitted that Goodacre's views, though not supported by authority, probably reflect the market understanding.[294] Accordingly, the Trades Clauses version of the insolvency exclusion substituted the words "caused by" for the words "arising from" to clarify the position that the proximate cause rule was to apply, that is to say, that only losses proximately caused by insolvency would be excluded.

8.68 The brokers on the London insurance market continued to resist the insolvency exclusion in its unamended form or as amended by JC93. In recognition of this, and the reasonable expectations of the ordinary assured, the revised Institute Cargo Clauses have now adopted in its entirety the version of the insolvency clause from the Institute Commodity Trades Clauses, more favourable to the assured, which makes it clear that it is only losses proximately caused by insolvency that are excluded. Moreover, in line with the Commodity Trades Clauses, the revised Clauses do not exclude claims made by an innocent assignee who has bought or agreed to buy the subject-matter insured in good faith under a binding contract.[295]

Accidents with nuclear weapons and devices

8.69 The revised Institute Cargo Clauses exclude accidents with nuclear weapons and devices by Clause 4.7, which provides as follows:

> *"4. In no case shall this insurance cover:*
>
> *4.7 loss damage or expense directly or indirectly caused by or arising from the*

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use of any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter."

This exclusion has been described as "rather curious",[296] as it is limited to accidents with nuclear weapons and devices and makes no attempt to exclude other nuclear accidents, for example, at a nuclear power station.[297] The Clause was first introduced in 1982 with a view to excluding *any* "use" of nuclear weapons – as the use of nuclear weapons in the context of war risks was, and is, excluded under Clause 6.1 which excludes war. The new exclusion in 1982 was presumably intended to cover other "uses" of nuclear weapons with the words "arising from the use" to be read widely in terms of causation to include accidents with nuclear weapons when being tested.[298]

8.70 In the revised Institute Cargo Clauses two alterations were introduced. Firstly, the causative link between the peril and the loss was widened by use of the words "directly or indirectly". Secondly, the words "any weapon of war" were amended to read "any weapon or device" so as to exclude a dirty bomb or other device not strictly used in war, but, for example, by terrorists. This was to take account of hazards not contemplated in 1982. In practice, these revisions are unlikely to be of significance as, in most cases, there are paramount exclusions imposed on cargo insurers worldwide at the insistence of the reinsurance markets. These exclusions are now briefly considered and explained.

8.71 In 1990 the London marine insurance market introduced a paramount exclusion for nuclear accidents known as the Radioactive Contamination Exclusion Clause (1/10/90). This exclusion was modified and extended in the Extended Radioactive Contamination Exclusion Clause (1/11/02). More commonly today it is overtaken by the even more widely drawn Radioactive Contamination, Chemical, Biological, Bio-Chemical and Electromagnet Weapons Exclusion Clause (10/11/03), commonly known as "CL370".[299] This Clause is now in general use worldwide by cargo underwriters as a result of pressure from reinsurers concerned about aggregation of cargo risks in the context of a terrorist attack. As the purpose of these Clauses is to exclude terrorism, these exclusions are dealt with in

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more detail in the context of war and terrorism risks in Chapter 10.[300]

Unseaworthiness, unfitness and classification requirements

8.72 The condition of the ship in which the cargo is to be carried is controlled by cargo insurers in two ways. In the first place, it is common for insurers to incorporate the Institute Classification Clause which seeks to ensure that cargoes are carried in suitable vessels by imposing dual requirements: firstly, that the vessels used by the assured for carriage of the cargo are classed by a recognised Classification Society and, secondly, that the vessels do not exceed certain age limits. Secondly, within the Institute Cargo Clauses themselves, insurers impose exclusions in relation to losses arising from unseaworthiness or unfitness where that unseaworthiness or unfitness is known to the assured. It is recognised that the assured can determine whether a vessel is classed, and her age, as a matter of public record, but it has long been understood by cargo underwriters that in many, though not all cases, the assured may not be aware of, or have any control over, the particular state and condition of the vessel which carries his cargo, albeit the vessel may be classed with a recognised Classification Society. To a large extent, insurers recognise that in cases of unseaworthiness the insurance claim should be paid and a subrogated recovery action taken against the carriers.[301] However, an exception applies where the assured is (or ought to be) aware of the poor condition of the ship. Where the assured is aware, or, in terms of the clause "privy" to such poor condition, the exclusion comes into play. This section of the book now considers the unseaworthiness and unfitness exclusion in the Institute Cargo Clauses and then turns to the classification requirements commonly imposed under the Institute Classification Clause.[302]

Unseaworthiness and unfitness

Historical background to the exclusion

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8.73 The unseaworthiness and unfitness exclusions in the Institute Cargo Clauses are drafted in the light of the implied warranties[303] in the Marine Insurance Act 1906. These warranties, in respect of cargo, are twofold. The Marine Insurance Act 1906 section 39(1) provides:

> *"In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured."*

With regard to cargo insurance there is a further warranty in section 40(2) of the 1906 Act which provides:

> *"In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy."*

These warranties were recognised by cargo insurers as too strict bearing in mind that a cargo owner in modern times would generally not have detailed knowledge of the condition of any particular vessel, whether classed or not. Accordingly, it was the custom to waive the strict warranty of seaworthiness with the succinct phrase:[304]

> *"The seaworthiness of the vessel as between the Assured and Underwriters is hereby admitted."*

The meaning of this provision, albeit succinct, was not entirely satisfactory.[305] However, the more fundamental difficulty with the Clause, in the eyes of insurers, was the unconditional nature of the waiver of the unseaworthiness warranty. In the 1980s, during the review of the Institute Cargo Clauses, concern was expressed that the Seaworthiness Admitted Clause enabled assureds to knowingly charter sub-standard tonnage to gain the benefit of lower freight rates. Insurers were at that time facing a significant increase in cargo claims resulting from poor and unseaworthy vessels. These concerns by

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insurers resulted in a new clause introduced in the 1982 Clauses which excluded losses arising from unseaworthiness and unfitness where the assured or their servants[306] were aware of the unseaworthiness or unfitness at the time of loading. The warranties of unseaworthiness and unfitness were waived but only conditional upon the assured not being aware of the unseaworthiness or unfitness.

8.74 This new Unseaworthiness and Unfitness Clause met with little favour when negotiations were entered into with the Commodity Trades Associations in the early 1980s.[307] As a result a much "softer" version of the Clause, which was more lenient to the assured, was adopted. This Clause made the waiver of the warranties unconditional. It also made it clear that the innocent assignee of the policy, who knew nothing of the unseaworthiness, was entitled to claim. Bearing in mind the importance of c.i.f. contracts, this was a significant concession. As the revised Institute Cargo Clauses are based on that Clause, with some modifications in favour of the assured, the current Clause may now be considered.

The revised unseaworthiness and unfitness exclusion

8.75 The revised Institute Cargo Clauses, Clause 5, provide as follows:

"5.1 In no case shall this insurance cover loss damage or expense arising from

5.1.1. unseaworthiness of vessel or craft or unfitness of vessel or craft for the safe carriage of the subject-matter insured, where the Assured are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein

5.1.2. unfitness of container or conveyance for the safe carriage of the subject-matter insured, where loading therein or thereon is carried out prior to the attachment of this insurance or by the Assured or their employees and they are privy to such unfitness at the time of loading.

5.2 Exclusion 5.1.1 above shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract.

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5.3 The Insurers waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination."

This complex Clause calls for some detailed analysis. It opens with the words "arising from" to describe the causative link between the unseaworthiness, or unfitness, and the loss. This probably means "caused by" triggering the normal rules of causation but the position is not entirely clear.[308] The first part of the Clause (Clause 5.1.1) reflects the twin warranties of seaworthiness in the 1906 Act, first that the vessel should be seaworthy, and second that it should be fit for the safe carriage of the cargo. The exclusion, unlike the warranties, is then limited to cases where the assured are "privy",[309] to the unseaworthiness or unfitness at the time of loading.

8.76 The second part of the Clause (Clause 5.1.2) deals with unfitness of containers or conveyances for the carriage of the goods and runs in parallel with the insufficiency of packing exclusion in Clause 4.3. The exclusion in Clause 5.1.2 applies where loading is carried out (1) prior to attachment of the insurance or (2) by the assured or their employees and they are privy to the unfitness at the time of loading. This provision originated in the Institute Commodity Trades Clauses 5/9/83 (ICTC). Somewhat surprisingly, the equivalent exclusion in Clause 5.1.2 of the ICTC is wider than the exclusion in the Institute Cargo Clauses (A) 1/1/82 in that the ICTC excludes loss or damage due to unfitness where loading is carried out by the assured or their servants and there is no obligation upon the insurers to show privity. The insurers are therefore able under the ICTC, but not the ICC (A), (B) or (C) 1/1/82, to decline claims if the assured's employees load the goods into a defective lorry or container but are unaware of any defects. This anomaly has been resolved in the revised Clauses which provide wider cover and insurers must now show that the assured or their employees were aware of the defects or they cannot decline the claim.

8.77 The revised Institute Cargo Clauses also introduce the provision, originating from the ICTC, that insurers are relieved from liability if the loading into an unfit container or vehicle is carried out prior to attachment of

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the insurance – an exclusion not present in the 1982 version of the (A), (B) and (C) Clauses. In so far as stowage into a container constitutes "packing" under the insufficiency of packing exclusion (Clause 4.3) there is probably little or no significance in this difference between the revised and the 1982 Clauses as loading in a defective container will, in any event, be excluded as it is deemed to be insufficiency of packing. In theory there could be a difference where a "conveyance" is loaded, typically a lorry, as this is not deemed "packing" for the purposes of Clause 4.3. However, loading upon a lorry will rarely if ever be carried out prior to attachment of the insurance. This is particularly the case with the new attachment of insurance provisions which normally attach the risk effectively from the shelf, well before the loading on the vehicle.[310]

8.78 The exclusion of losses caused by unseaworthiness or unfitness is qualified by a "privity" obligation. This reflects the obligation in section 39(5) of the Marine Insurance Act 1906 where "privity" requires subjective knowledge or, at least, choosing to ignore the obvious facts, sometimes called "casting a blind eye".[311] Gross negligence is not enough.[312] The term "Assured" is limited to the assured as an individual (not his employees) or to the *alter ego* of the company where the cargo owner is a corporate body.[313] This limits the knowledge to those people constituting the directing mind of the company.[314] In respect of unfitness under Clause 5.1.2 (but not unseaworthiness under Clause 5.1.1) insurers wished to widen the net so the disqualifying knowledge was extended beyond the directing mind of the "Assured" to other employees. Accordingly, insurers extended the exclusion to cases where "employees" were privy to the unfitness of the container or conveyance. The distinction was made because the classification of a vessel is a matter of public knowledge, as is her age, and could be known by the senior management of the assured, but the condition of a container or vehicle would only be known by more junior management at the warehouse, factory or other place where the goods were loaded on the lorry or into the container. An "employee" would include an employee of the assured but not a chartering agent or freight-forwarder not in the assured's employment.[315]

8.79 The revised Institute Cargo Clauses provide that the exclusion

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relating to unseaworthiness and unfitness of vessel or craft does not apply at all to an assignee of the insurance who has bought or agreed to buy the subject-matter insured in good faith under a binding contract.[316] This provision originates from the ICTC, as the Trades Associations were insistent that an innocent

c.i.f. buyer should not be prejudiced by unseaworthiness or unfitness of which he was not aware. The revised Clauses have retained the words "binding contract" as used in the ICTC which are intended to prevent a seller overcoming the exclusion by assigning the insurance to a third party after the loss.[317] These words may also apply to a buyer who is able to avoid the purchase contract, which is not "binding" because the seller was in breach of that contract by providing an unseaworthy vessel. If this is right the buyer as assignee under a non-binding contract would be obliged to seek recovery from the seller and be unable to recover from cargo insurers.

8.80 Finally, Clause 5.3 waives the implied warranties of unseaworthiness and unfitness.[318] This is clearly necessary as the existence of the implied warranties would preclude any claim where the vessel was unseaworthy which would defeat the purpose of the more limited restrictions on cover represented by the exclusions in Clauses 5.1.1 and 5.1.2. The waiver is no longer conditional on absence of privity as is the case in the 1982 Clause. The reason for this is as follows. The implied warranties of seaworthiness and fitness, which must be exactly complied with, discharge underwriters from liability from the date of the breach, whether or not the warranty is "material to the risk".[319] Under the 1982 Clauses this draconian rule applies if the assured or their servants are aware that the vessel is unseaworthy or unfit, or that the vessel, before or after loading, had become unseaworthy or unfit. Under the 1982 Clauses insurers are discharged from any loss of or damage to cargo whether or not the loss arises from that unseaworthiness and the breach of warranty discharges insurers whether or not the warranty is material to the risk, that is, whether or not the breach of warranty is in any way causative of the loss. It was considered that this went beyond what is needed to protect insurers and an unconditional waiver of the warranties has therefore been adopted. For example, a ship may technically

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be unseaworthy due to an insufficient number of crew and the assured, if charterer, might be aware of that at the time of loading. It was no longer considered reasonable to exclude loss or damage wholly unconnected with that unseaworthiness as where the cargo is damaged on discharge by shore labour. A loss caused by the unseaworthiness, for example a collision due to lack of watchkeepers, would, however, be excluded if the assured were aware of that unseaworthiness.

8.81 The Clause has been improved as insurers are not able to shelter behind technical unseaworthiness not causative of any loss, and "privity" only applies to the assured who had knowledge of the unseaworthiness or unfitness that caused loss of or damage to cargo.

The Institute Classification Clause 01/01/2001

8.82 It is convenient at this point to deal with the Institute Classification Clause 01/01/2001[320] which also relates to the seaworthiness of the vessel in which the insured cargo is carried. Where cargo is insured for a particular voyage on a known vessel on a facultative, or one-off basis, the insurers can satisfy themselves as to the ownership, classification and age of the ship. However, cargo insurance is commonly underwritten on the basis of open covers under which the assured is entitled to declare cargoes for shipment on various vessels.[321] In order to monitor the condition of the vessels declared by the assured, and to vary the premium and other terms in the light of the age and condition of any ships that fall below acceptable standards, classification and age requirements are almost invariably imposed by cargo insurers in most forms of open cargo covers.[322] In common with similar clauses, the Institute Classification Clause imposes two requirements: first, a class requirement,[323] and second, an age limit. This section of the book considers each requirement in turn, and then the situation where a vessel falls outside the parameters but may still be covered under the insurance at an additional premium or on varied terms, the "held covered" type provision.

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The classification requirement

8.83 The first part of the Institute Classification Clause deals with the classification requirement and reads as follows:

Institute Classification Clause 01/01/2001

"QUALIFYING VESSELS

1 This insurance and the marine transit rates as agreed in the policy or open cover apply only to cargoes and/or interests carried by mechanically self-propelled vessels of steel construction classed with a Classification Society which is:

1.1 a Member or Associate Member of the International Association of Classification Societies (IACS), or

1.2 a National Flag Society as defined in Clause 4 below, but only where the vessel is engaged exclusively in the coastal trading of that nation (including trading on an inter-island route within an archipelago of which that nation forms part).

Cargoes and/or interests carried by vessels not classed as above must be notified promptly to underwriters for rates and conditions to be agreed. **Should a loss occur prior to such agreement being obtained cover may be provided but only if cover would have been available at a reasonable commercial market rate on reasonable commercial market terms.**"

What is the result if a vessel fails to qualify under the classification requirement? The previous version of the Clause[324] opened with the words "The marine transit rates agreed for this insurance apply only to cargoes and/or interests . . .". This wording had led to misunderstandings as to whether a failure of the vessel to comply with the Classification Clause meant that the cargo was off risk or merely that the premium rate was no longer agreed. In so far as there had been these doubts as to the position, the opening words of the Classification Clause issued on 01/01/2001 were modified to read:

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"This insurance and the marine transit rates as agreed in the policy or open cover apply only to cargoes and/or interests . . ."

The addition of the word "insurance" makes it clear that the insurance itself, and not merely the rate of premium, is subject to compliance with the requirements of the Clause. Legally, this was the effect of the previous Clause. In the Singapore Court of Appeal it was held that there was no contract of insurance if the vessel did not qualify and was outside the held covered provisions that appeared in the previous Clause.[325] The result would be the same under the current Classification Clause and English law, in which connection it may be noted that English law is now specifically provided for in the Clause.[326] It had been the practice to list the classification societies acceptable to insurers, but in 2001 this was revised in favour of accepting all the major societies, whether full members or associate members of IACS, the International Association of Classification Societies.[327] Where a vessel is engaged exclusively in coastal trading there are special provisions that, in addition, allow classification with National Flag Societies.[328] The Classification Clause then has a held covered type provision which provides for the situation where a vessel does not fall within the class requirements. This provision is discussed below.[329]

The age limitation

8.84 The second part of the Clause deals with the age limitation in the following terms:

"AGE LIMITATION

2 Cargoes and/or interests carried by Qualifying Vessels (as defined above) which exceed the following age limits will be insured on the policy or open cover conditions **subject to an additional premium to be agreed.**

Bulk or combination carriers over 10 years of age or other vessels over 15 years of age unless they:

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2.1 have been used for the carriage of general cargo on an established and regular pattern of trading between a range of specified ports, and do not exceed 25 years of age, or

2.2 were constructed as containerships, vehicle carriers or double-skin open-hatch gantry crane vessels (OHGCs) and have been continuously used as such on an established and regular pattern of trading between a range of specified ports, and do not exceed 30 years of age."

The default limit is 10 years for bulk or combination carriers, or 15 years for other vessels. However, if the "other vessels" are on a regular liner route, as defined in paragraph 2.1, the limit is extended to 25 years. A further extension to 30 years is allowed in the special cases of containerships, ferries, and OHGCs (double-skin open hatch gantry crane vessels) as long as they also are operated on a regular liner route.[330]

The held covered type provision

8.85 The most important of the changes introduced by the Institute Classification Clause 2001,[331] from a legal point of view, is the new formula for "held covered".[332] It was provided in the earlier Institute Classification Clause 1/8/97 that cargoes carried on vessels that did not fall within the scope of that Clause were "held covered subject to a premium and on conditions to be agreed". This provision catered for situations where an assured discovered that the vessel in which his cargo was being carried fell outside the normal requirements of the Clause either as to the Classification Society, or age, or both. The Working Party reviewing the Institute Classification Clause 1/8/97 were concerned that the words "held covered" could imply to some assureds a guarantee that cover would be available in all cases. That, however, was not the meaning of "held covered" in English law which requires two pre-conditions, first prompt notice,[333] and second, the availability of cover at a reasonable commercial market rate[334] and

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reasonable commercial market terms.

8.86 The prompt notice requirement is expressly set out in the Classification Clause in relation to the classification requirements and, as a matter of law, also applies as a requirement in respect of the age limitation.[335] The effect of failure to give prompt notice is spelt out in Clause 5 of the Classification Clause as follows:

> "PROMPT NOTICE
>
> 5 Where this insurance requires the assured to give prompt notice to the Underwriters, the right to cover is dependent upon compliance with that obligation."

A failure to give prompt notice therefore bars the right to an extension of cover.

8.87 The second pre-condition is that cover must be available at a reasonable commercial market rate and on reasonable commercial market terms. If these are not available the held covered type clause cannot operate.[336] If, for example, the vessel is such that there is no possibility that a prudent underwriter would be prepared to underwrite the risk at any reasonable premium then the assured is not entitled, as of right, to insurance cover. In *Nam Kwong Medicines & Health Products Co Ltd* v. *China Insurance Co Ltd* [337] the vessel concerned, *Pacifica*, was not classed with an approved Classification Society and it was held that the risk to cargo carried on the vessel was not insurable at a reasonable premium. A similar decision was reached in the Court of Appeal in Singapore in *Everbright Commercial Enterprises Pte Ltd* v. *AXA Insurance Singapore Pte Ltd (The Serena I)*.[338] In this case the vessel was not classed; was registered under a Belize flag of convenience; not listed in Lloyd's Register, and insured for P&I risks with a non-existent P&I Club.[339] A similar decision was reached that, in the circumstances, a reasonable commercial rate of premium would not have been available for insuring the cargo for the voyage in question.[340] The rule

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of English law is now reflected in the Classification Clause by the words:

> *"Should a loss occur prior to such agreement being obtained cover may be provided but only if cover would have been available at a reasonable commercial market rate on reasonable commercial market terms."*

The "Drafting Notes" prepared by the Joint Cargo Committee at the time the 2001 Clause was issued included the following guidance:

> *"It was felt that there had been misunderstandings in some quarters as to what was meant by 'held covered' and that some elaboration would be helpful. Evidence of 'market terms' would require an exercise to establish what terms might be obtainable in the market place i.e. from a representative sample of underwriters active in the class of underwriting cargo business. The fact that one under- writer might quote for a risk generally regarded as unacceptable by such a representative sample of underwriters, would not be evidence that the risk could be insured at a 'reasonable commercial market' rate/terms. The collective view of such a sample would represent the market position."*

It is submitted that this represents English law on held covered and the legal position under the equivalent provision in the Institute Classification Clause 2001.

8.88 Where the vessel is classed with a qualifying society but exceeds the age limits, only an additional premium, and not additional terms, need be agreed. This requirement is introduced by the words "at an additional premium to be agreed" which apply where the vessel carrying the cargo exceeds the age limits. This also requires that a reasonable premium be available at market rates[341] though this requirement is not spelt out in the Clause.

8.89 The effect of these provisions is to provide a safety net to assureds for their cargoes in the event that the carrying vessel declared by them does not satisfy the requirements as to class and age specified in the first two sections of the Institute Classification Clause 2001. The safety net

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enables the assured to obtain cover subject to prompt notice and the availability of cover at reasonable commercial market rates and terms.