Third Edition

Cases & Materials on the Carriage of Goods by Sea

Martin Dockray

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PREFACE

The aim of this book is to provide a convenient selection of cases and standard form documents for law students. It tries to provide a supplement rather than a substitute for lectures and textbooks.

Katherine Reece Thomas has again very kindly undertaken the revision of Chapter 17, dealing with general average. As in earlier editions, judgments which consider the reason for a rule or which analyse previous case law have been preferred to those which do not. With regard to style, place names and the names and offices of judges are generally reproduced as originally reported and without note of subsequent changes. Matter omitted is generally indicated by ellipses, whatever the length of the omission. In reproducing cases and other materials, the following are not generally specifically noted: (a) omission of original footnotes; (b) original typographical errors, whether corrected or not; (c) the length and nature of omissions; (d) alterations or substitutions in the form of citations.

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CHAPTER 1

INTRODUCTION

The law of carriage by sea is a distinct part of English law but this is not because the field is regulated by a separate maritime code. It is true that the subject does include some special rules which have no direct counterpart in other areas of domestic law. Nevertheless, for the most part, English law relating to the carriage of goods by sea consists only of the application of general common law ideas, together with a small number of important statutes. The basis of the subject is the law of contract. It also draws on the laws of tort, bailment, agency, property and equity.

But if only familiar principles of general law are involved, how can the law of carriage be said to be distinct? One answer can be found in the way in which general legal ideas have been adapted to meet the special features of the sea trade. One feature of this business is its international nature; this produces a great desire for international uniformity in maritime law. This desire has been satisfied in a few areas of the law of carriage of goods, although not always by the same means: inter-governmental agreements resulted in the Hague and the Hague-Visby Rules (see Chapter 10); international agreement amongst interest groups produced the York-Antwerp Rules (Chapter 17). The widespread use of standard form documents as the basis of most carriage contracts (see the examples reproduced in the Appendix) also has something of a unifying effect.

A second obvious feature of the shipping industry is that contracts for the carriage of goods by sea fall to be performed in special and often hazardous conditions in which it is practically impossible for one party to supervise the work of the other from day to day. This factor was clearly instrumental in the development of the sea carrier's general duties, including the duty to provide a seaworthy ship (Chapter 4) and the duty not to deviate from route (Chapter 5), as well as in relation to general average (Chapter 17). It also influenced those parts of the law dealing with the shipper's duty to disclose the dangerous nature of goods shipped, the master's powers of jettison and other extraordinary powers conferred on the master in the event of an emergency.

A third notable feature is that shipping is directly dependent on other commercial activities. Contracts for the carriage of goods by sea are not made in commercial isolation. They are typically entered into in order to sell goods or to give effect to a previous sale. This means that contracts for sea carriage are often of direct interest to persons such as buyers or lenders as well as to the original parties to the contract. Third parties may become involved in the carriage of goods in other ways. Even when a cargo remains in the ownership of a single shipper throughout an ocean voyage it is quite possible that the whole or part of the contract (loading or discharging the cargo, for example) may actually be performed by someone other than the party who originally contracted to carry and deliver. This leads to complex questions about who can sue and who can be sued. In the absence of a statute dealing with the particular problem, in English law satisfactory answers to these questions often involve the creative application of ideas drawn from contract (for example, implication of a contract or of a term), tort (for example, recognition or denial of a duty of care), bailment (terms of bailment) or the law of evidence or of damages.

The endemic use of standard forms has already been mentioned. This use amounts in itself to an important feature of the sea trade. It means that much of the law in this area consists of settled interpretations of common clauses and decisions about the terms which can be implied into contracts of carriage in the absence of express agreement. One consequence of the addiction to the use of standard forms is that judicial decisions on the interpretation of standard terms are of wide interest in the shipping industry, which pays marked attention to the law reports. But the wide use of certain forms also means that a judicial decision which disturbs an accepted construction of a document may retrospectively affect many transactions entered into on the basis of that previously accepted meaning. This may influence the willingness of the courts to reverse a settled interpretation. But so too does the knowledge that shipping circles show no reluctance to make amendments to standard forms in order to avoid anything seen as an unsatisfactory precedent.

So much for some of the special features of the trade. Can these special features be proved to have influenced the form of what is mostly judge-made law? It would not be easy to show this in some branches of the common law. But the problem is not so great in the case of the law of carriage by sea. For there is a long tradition of looking at this subject as more than a closed set of technical rules. This means that it is not difficult to collect examples of judgments which determine the law only after consideration of the policy that makes the most sense in the special context in which maritime contracts are performed. The well known decision in *Behn v Burness* (1863) 3 B & S 751 Exchequer Chamber (Chapter 11) is a clear example. Other examples from the same chapter include *McAndrew v Adams* (1834) 1 Bing NC 31, Common Pleas and *Bentsen v Taylor* [1893] 2 QB 274, CA. These are not isolated instances. Other examples could be found in every chapter.

As background to the key judgments, the remainder of this chapter sketches the outlines of some of the more common varieties of contract for the carriage of goods by sea and compares the basic features of two major types of shipping service: liner shipping and chartered or tramp operations. The chapter concludes with a review of the ways in which both contracts for carriage by liner and charterparties are made.

1 CHARTERED SHIPPING

UNCTAD, *Charter Parties*, report by the Secretariat of UNCTAD, 1974, New York: UN

A Contracts of affreightment

20 Cargo vessels are usually under contracts by which the shipowner, in return for a sum of money – the freight – agrees to carry goods by sea, or to furnish the services of a vessel for the purpose of such carriage. Such contracts, commonly called contracts of affreightment, encompass a heterogeneous mass of maritime agreements, comprising such differing types as contracts for the lease of a vessel (bare boat or demise charters), voyage and time charterparties, and bills of lading . . .

21 A brief review of the various types of contract is made below.

(1) Bare Boat (Demise) Charters

22 A special type of contract of affreightment consists of an agreement by which a person for a period of time takes over the possession and control of the vessel in return for a certain hire payable to the shipowner. Such a contract, which is in the nature of a lease (*locatio rei*), is commonly known as a bare boat or demise charter, and the person to whom the vessel is leased is named the bare boat or demise charterer. Under this type of contract, the charterer mans and equips the vessel and assumes all responsibility for its navigation, management and operation; he thus acts as the owner of the vessel in all important respects during the duration of the charter.

23 Bare boat chartering has been used in connection with government shipping activities, particularly in time of war or other emergency, or during pilgrimage seasons. In the private sector, bare boat chartering is less common than other types of contract of affreightment. It is sometimes used, however, where a shipowner or ship operator wishes to operate ships or supplement his fleet for a period of time without incurring the financial commitments of actual ownership, but at the same time requires to have full control of the chartered vessel, including control of its navigation and management. Further, bare boat chartering is sometimes employed in connection with the financial arrangements for purchase of the vessel on instalment terms; the bare boat charter then serves as a 'hire/purchase' contract, by which the owner/seller retains formal ownership and thereby security in the vessel until the full purchase price is paid.

(2) Contracts of Carriage

24 As distinct from the bare boat charter, there is a category of contracts of affreightment which may be classified as contracts of carriage. These are contracts under which the owner, broadly speaking, undertakes to perform a carrying service with a vessel that is equipped and manned by him, and for the navigation and management of which he remains responsible throughout the performance of the contract. This category includes contracts for voyage and time chartering.

25 Voyage and time chartering consists in the employment of tramp vessels (ie vessels not employed on scheduled routes) and involves, generally, the engagement of the entire vessel for one or several voyages, or for a period of time. Voyage chartering is adaptable in any commercial situation where the movement of a shipload of cargo from one point to another is required. Typically, the need for chartering a vessel on voyage terms emanates from a contract of sale of goods under which the charterer – either in his capacity as seller if the contract is on cif terms or as buyer if on fob terms – undertakes to arrange and pay for the transport of the goods. Time chartering, on the other hand, is used where the charterer desires to operate a vessel for a period of time without undertaking either the financial commitments of ownership or the responsibilities of navigation and management of the vessel; it is common, for example, for an operator who finds himself temporarily short of tonnage to supplement his fleet by taking a vessel on time charter. The relevant contracts are called respectively voyage charterparties and time charterparties, or merely voyage charters and time charters.

B Voyage and time charterparties

(1) Distinctive Features

26 Under a voyage charterparty the owner undertakes to provide a vessel for the carriage of specified goods on one or several voyages between named ports (or within certain ranges of

loading and discharging places), while under a time charterparty the owner undertakes to place the use of the vessel at the charterer's disposal for a period of time during which it is agreed that the charterer may freely employ the vessel for his own account.

27 Apart from the divergent manner in which the duration of the contract is determined – for one or several voyages, or for a period of time – voyage and time charterparties are distinguishable in several other respects.

28 As regards the charterer's partaking in the operating of the vessel, each provides fundamentally different regulations.

29 Under the voyage charterparty, it is true that the charterer's task is not confined to delivering and receiving the cargo: he is also in various ways directly involved in the marine adventure. For example, under the rules of laytime and demurrage, he assumes responsibility for delays in the loading and discharging ports; furthermore, he sometimes undertakes the performance of the loading and discharging operations; in certain respects, also, the charterer assumes the risks for hindrances and obstacles preventing the vessel from performing the contract voyage. However, the actual operation of the vessel is no concern of his – this is in all important respects left to the owner.

30 The situation is quite different under a time charterparty, when the contract entitles the charterer during the stipulated period to direct the vessel on such voyages and to load it with such cargoes as he may wish, subject to such limits or restrictions as are set out in the contract. This right of direction is laid down in the so-called 'employment clause' which usually prescribes: 'the master to be under the orders of the charterer as regards employment agency or other arrangements'. The time charterer thus takes a substantial part in the operation of the vessel . . .

31 One result of the time charterer's partaking in the operation of the vessel is that he assumes the costs which are directly incidental to the various voyages on which he directs the vessel. He has, as a rule, to bear the costs for bunkers, port charges, towage, etc, which, under a voyage charterparty, are borne by the owner.

32 The fact that the time charterer is in charge of important operational functions is, moreover, reflected in the system often found in time charterparties of allocating on the charterer liability for damages ensuing (eg) 'from the Master, Officers or Agents signing Bills of Lading or other documents or otherwise complying with such orders [of the charterer], as well as from any irregularity in the Vessel's papers or for overcarrying goods'.

33 Another point of difference is the basis for calculating the freight. As a rule, the freight, under a voyage charterparty, is fixed in proportion to cargo size or in the form of a lump sum for the voyage, while under a time charterparty it is fixed in proportion to the time occupied.

34 There is a close connection between the basis for the freight calculation and the allocation of the loss-of-time risk. Under a voyage charterparty, the freight calculation takes no account of the time to be consumed by the performance of the voyage, and the risk of loss of time at sea is therefore in principle borne by the owner. Under a time charterparty, on the other hand, where the freight is directly related to the time during which the vessel is used by the charterer, loss of time is normally for the charterer's account. There are however, important exceptions to this main rule, entailing a certain redistribution of this risk as between the

parties. Under a voyage charterparty, part of the risk of delay in loading and discharging ports is transferred to the charterer through the provisions on laytime and demurrage. And the time charter reallocates on the owner some of the loss-of-time risk by means of the so-called 'off-hire' clause (sometimes called 'suspension of hire', 'breakdown' or 'cesser of hire' clause), which, briefly stated, provides that the charterer shall not be required to pay freight (hire) for such time as is lost to him in consequence of circumstances attributable to the owner or the vessel.

35 From the above discussion it may be seen that the type of charter, whether voyage or time charter, bears no direct relationship to the duration of the charterparty, although by common usage in the past the term 'long-term charter' generally implied a time charter. However, it is not uncommon to fix a vessel on a time charter basis for one specific voyage only and for the carriage of a specific cargo. In such a fixture, called a trip charter, the important feature of the time charter is still there: the charterer has to pay hire according to the time spent in performance of the voyage, although the period is determined by the duration of the contract voyage(s). Conversely, some charters on a voyage basis resemble time charters in that their duration is related to periods of time. Such charters may be of two types: consecutive voyage or long-term freighting contracts. Consecutive voyage contracts are concerned with as many voyages as a specified vessel can perform during a certain period, which may be stated as, say, three consecutive voyages (between ports A and B) or three months in consecutive voyages.

36 In long-term freighting contracts, the ship operator undertakes to carry quantities, generally large, of a specified product on a particular route or routes, over a given period of time, using ships of his own choice which are not specified in the contract. The use of this type of carriage contract has increased rapidly in recent years.

37 Consecutive voyage contracts are classed as voyage charters; long-term freighting contracts also resemble voyage charters in certain respects. Certain special problems may result from the use of those types of contract, as, for example, the question of the divisibility of a consecutive voyage contract so as to permit the cancellation of one or more voyages.

(2) Subchartering

38 It is customary to stipulate in both voyage and time charterparties that the charterer has the right of subletting the whole or part of the vessel, subject to the charterer remaining responsible to the owner for the due fulfilment of the original charterparty. This right is of considerable importance to the charterer since it gives him a certain freedom to utilise the vessel in the way that is most economical to him. Subletting frequently occurs in practice; the charterer may have chartered the vessel for the sole purpose of making a profit by rechartering or otherwise subletting it; or he may find that the cargo which he intended to ship is not available or, alternatively, that he is not in a position to utilise the vessel for the original intended purpose, in which case he will seek other employment for it in order to be covered for the freight which he is due to pay to the owner. He may also find, because of a rise in freight market rates, that it is more profitable for him to recharter the vessel than to utilise it in the way originally intended.

39 Where the contract for subletting is embodied in a charterparty, two independent charterparties will be running concurrently, placing the original charterer in a dual position: as

against the owner of the vessel his position remains that of a charterer, whilst as against the subcharterer it is in effect that of an owner.

40 Thus, the voyage or time charterer may not only be the user of the services provided by the shipowner; he may also and often does himself act, simultaneously, as the supplier of the same services by means of the chartered vessel.

2 LINER SHIPPING

As the above extract suggests, a charterparty may be the type of contract which is most appropriate where shiploads of cargo are involved. But where smaller quantities such as a container load are concerned, a shipper is more likely to contract with the operators of a shipping service (a line) which regularly visits the ports in which the shipper is interested. In liner shipping the terms of the contract are traditionally printed on the bill of lading, which is a receipt for the goods issued by the carrier. At the end of the voyage the carrier will demand that this receipt be produced and surrendered. In this way, the bill of lading operates like a cloakroom ticket. However, this is a ticket which can be transferred by the shipper to someone else. Often it will be a buyer or sub-buyer of the goods from the shipper who will eventually produce the bill of lading and claim delivery from the carrier.

Although a bill of lading may itself be a contract (or evidence of a contract) of affreightment, there is in practice no rigid distinction between operations governed by charterparties and those in which a bill of lading makes an appearance. Where a vessel is under charter it very often happens that bills of lading are issued. If a vessel is voyage chartered to carry the charterer's own goods, the charterer may want a bill of lading in order to be able to prove, if a dispute arises, that goods were delivered to the carrier. And if the charterer wishes to be able to sell the goods before retaking possession from the carrier, he will want the receipt to be in the transferable form of a bill of lading. Moreover, if a vessel is being operated by a charterer who wishes to trade with it and make a profit by carrying goods belonging to other shippers, it is almost inevitable that bills of lading will be issued to those shippers. The following extract summarises the basic features of the bill of lading.

UNCTAD, *Charter Parties*, report by the Secretariat of UNCTAD, 1974, New York: UN

324 The bill of lading is, as a rule, issued to the shipper when the goods have been loaded on board, either by the master as the owner's (the carrier's) representative, or on the master's behalf by the vessel's agents. If the vessel is chartered, the shipper may be, but is not necessarily, identical with the charterer.

325 The issuing of a bill of lading is generally preceded by a contract of affreightment made at an earlier stage, as, for instance, a charterparty or, in liner trades, an agreement concluded in connection with the booking of space in the vessel.

326 The bill of lading describes the goods and confirms that they have been received on board; it states further to whom the goods are to be delivered at the destination, and it contains a

reference to the freight (which may be pre-paid or payable on delivery of the goods); it also contains the other conditions attaching to the carriage either by reproducing them in full, as is the practice in liner trades, or, in some cases, by referring to the terms of the charterparty, where the bill of lading is issued under it.

327 As to the specific functions of the bill of lading, it follows from the above description that the document serves as a receipt for the goods. As regards shipments on liner vessels, it furthermore evidences the contract of affreightment concluded prior to its issuing. When it is issued in respect of a shipment made under a charterparty, the bill of lading will, in general, only acquire the function of evidencing the contract of affreightment if it is held by a third party; in the hands of the charterer it is merely a receipt for the goods.

328 Besides being a receipt for the goods and – depending on the circumstances – evidence of the contract of affreightment, the bill of lading constitutes a document of title to the goods. This quality is of great importance since it not only enables the consignee armed with possession of the document to take delivery of the goods at the destination, but also makes it possible while the goods are in transit to pass ownership in them by endorsement and transfer of the document to a buyer. As a document of title, the bill of lading moreover serves as a basis for documentary credits in international trade . . . For the charterer, whether he is the seller or the buyer of goods or the shipper of goods not yet sold, the bill of lading will therefore often serve as the necessary instrument for carrying through the commercial purpose of the transport.

3 COMPARISON OF LINER AND CHARTERED SHIPPING

Kendall, C and Buckley, J, *The Business of Shipping*, 6th edn, 1994, Centreville, Maryland: Cornell Maritime Press
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LINER SERVICE AND TRAMP SHIPPING

Merchant shipping, considered from the standpoint of types of service provided, may be divided into two major categories: *Liner Service* and *Tramp Shipping*. While there are some similarities, the differences in the theory and techniques of management of these two types of marine transportation are notable. The service rendered, the geographic area covered, the operating problems, the relationship between vessel owner and vessel user, and the actual employment of the ship vary markedly between the two categories. It is important, therefore, to be aware of those areas where the management procedures are congruent; it is equally significant that the differences be comprehended.

Liner Service

1 Sailings are regular and repeated from and to designated ports on a trade route, at intervals established in response to the quantity of cargo generated along that route. True liner service is distinguished by the repetition of voyages and the consistent advertising of such voyages. Once the service is established, the operator must conform, within narrow time limits, to the published schedule. Although the frequency of sailings is related directly to the amount of business available, it is general practice to dispatch at least one ship each month. Vessels engaged in liner service may be owned or chartered; it is the regularity and repetitious nature of the operation, rather than the proprietorship, which is crucial.

2 Liners are common (public) carriers, required by law to accept without discrimination between offerors any legal cargo which the ship is able to transport. Some liner operators stipulate the minimum quantity of cargo which must be presented by a single shipper; so long as the limitation is reasonable, this is permissible. In the break-bulk trades, cargo usually is varied, and is called either 'general' or 'package'. In the container trades, the shipper fills and seals the container before it is delivered to the carrier. This sealed container is placed aboard the ship as a single unit. Small shipments are consolidated by the carrier or a third party, who loads these 'less than container lots' (LCL) into containers which are sealed by the party loading for the voyage, and opened by the carrier or a third party at the port of discharge, where

Tramp Shipping

1 Sailings under voyage charters are based on cargo commitments that vary with the vessel's employment, and are usually different for every voyage. There is no expected repetition of voyages as a normal part of tramp operation. Each trip is scheduled individually, subject to the requirements of the cargo to be carried and the particular route to be followed. In certain trades, such as oil and coal, owners often agree to make a number of repetitive voyages carrying the same commodity. These 'consecutive voyages' are arranged expressly to fit the charterer's convenience, and do not establish a 'liner service'.

Sailings under time charters may be for a single voyage between major geographical areas, or may be repetitive, transporting the same commodity such as coal or grain or lumber; or may take the form of a long trading voyage consisting of a series of legs on which different cargoes are lifted; or may be placed in the liner service operated by the charterer. The time chartered vessel may be subchartered to other persons for voyages to be accomplished within the time limits imposed by the charter.

2 Tramps are contract (private) carriers, and normally carry full shiploads of a single commodity, usually in bulk. In most cases there is only one shipper, but two or more shippers of the same kind of cargo occasionally may use a single ship.

the lots of cargo are distributed to the consignees. *[Note: under English law, few if any shipping lines are common carriers today.]*

3 Goods carried in liner service ships usually are of higher value than the cargo hauled in tramps, and are charged higher freight rates. All shippers of a given item moving in a specified ship pay the same freight rate, which always includes handling (stevedoring) costs. In break-bulk operation, the variety of cargo and the number of shippers require procedures to assure that what is accepted for transportation is delivered in like good order to the consignee at the port of discharge. Containers, except refrigerator units, do not require individual attention beyond being secured aboard ship. In both break-bulk and container services, cargo requiring special care (such as refrigerated meats and fruits) is accepted but is assessed a higher freight rate than less sensitive items.

4 Freight rates in the liner services are stabilised by setting identical charges for all shippers of the same item aboard a certain ship. Rates may vary, however, from one sailing to another, but increases are announced in advance. Rates are compiled into detailed listings ('freight tariffs') which are made available to shippers on demand.

On many trade routes, two or more carriers serving the same range of ports will form an association (known either as a 'conference' or a 'rate agreement') for the purpose of stabilising rates and regulating competition between these carriers. The rates established by the association are binding uniformly on all the members, although independent action is permitted. In the United States, these agreements and rate structures are subject to review by the Federal Maritime Commission . . .

3 Cargoes carried in tramps generally are those which can be transported in bulk ('homogeneous cargoes') and have low intrinsic value. Typical cargoes are coal, ores, grain, lumber, sugar, and phosphate rock. The cost of loading and unloading the ship in most cases is paid by the charterer, but this is subject to negotiation between shipowner and charterer. Freight rates for tramps reflect the fact that movements frequently are from a single port of loading to a single port of discharge, with minimum expense involved in the care of the cargo while it is in transit.

4 Freight rates . . . for tramps vary according to the supply of and demand for ships. The charterers' position is always strong, and rates are low, when there are few cargoes being offered and many ships are competing for the business. The shipowners' position is always strong, and rates are high, when there are plentiful cargoes and a scarcity of ships. In either case, competition among owners is always keen . . .

Abrupt changes in the level of charter rates are evident whenever there is a major event of international significance, as, for instance, the outbreak of a war, a major crop failure, or widespread strikes in a particular country.

Freight tariffs are not compiled by the owners of vessels engaged in tramping, and no associations exist for the purpose of setting

rates and stabilising competition. Summaries showing the trends in charter hire are published frequently and include specific quotations of the rates at which ships have been chartered.

5 A liner-service company issues a standard (or uniform) contract of carriage or bill of lading. Regardless of the size of the shipment, or the number of different commodities or items comprising a given lot of cargo, the provisions of the contract apply equally to all shippers who use any one vessel. These provisions are not subject to negotiation, but are unilaterally imposed by the carrier. Only in very exceptional cases will a senior executive of the common carrier alter the terms of the bill of lading to accommodate an individual shipper.

5 The owner of a tramp ship must negotiate a separate contract (charterparty) for every employment of its vessel. The terms of the charterparty vary from ship to ship, depending upon the bargaining abilities of owner and charterer, and the general trend of the market. The terms of the agreement are applicable only to the ship named in the charterparty. Although the basic charterparties are printed and follow a set form, they may be changed in any manner desired by the contracting parties. Since the changes apply to a particular ship for a particular voyage or a period of time, the alterations are not publicised widely.

6 Services – frequency of sailings and ports of call, as well as the capabilities of the ships themselves – are adjusted to meet the demands of shippers. Many liner operators arrange their schedules to meet minimum needs during the year, and then augment sailings when seasonal increases occur. Changes in liner service often are influenced as much by political and technological considerations as they are by economic factors. Drastic changes in established liner operations are infrequent; carriers' intentions, especially relating to withdrawals from the route, usually are well publicised in advance. This is essential to the dependability of the liner trade.

6 Services, as well as rates, are determined by negotiation between shipowner and charterer, and reflect the specific requirements of the contracting parties. Regular and repeated voyages on the same route are not part of tramp operation, and therefore no conferences exist. Supervision in the public interest by a regulatory authority is unnecessary; the natural working of the laws of supply and demand assure adequate control.

7 Liner service vessels often reflect in their design the special requirements encountered in their employment. Refrigerated fruit and meat carriers, roll-on/roll-off vessels, break-bulk general

7 Most tramp ships are intended for worldwide service, and are of moderate size and draft. Although used primarily to transport cargoes in bulk, many of these tramps have one or more 'tween decks and

carriers and container ships are operated on most sea routes, depending upon the demand for these specialised capabilities. Because very nearly identical cargoes move in all the dry-cargo break-bulk liners on a given route, the capabilities of these ships are similar, regardless of ownership . . .

Container ships began transoceanic service in 1966, and today are found on all trade routes. They range in size from less than one thousand 20-foot containers to over four thousand containers and are among the fastest ships in the world. Owing to their regular schedules and established berths in fixed ports, many liner service vessels are not self-sustaining.

sufficient booms or cranes to permit them to carry assorted general cargo on a self-sustaining basis. Very large bulk carriers, designed to carry iron ore or coal, are now tramping on many trade routes. Compared to container ships, some of which are available for charter to liner-service companies, the conventional tramp is still simpler in design and less expensive to build.

8 Liner-service companies may have a large and somewhat complex organisation in the shore establishment, especially in the home office. Normally there are several divisions defined by function: traffic, operations, financial, and managerial, each with appropriate staff. Outport offices may duplicate this organisation on a smaller scale. Liner service operations entail personal contact with shippers, maintenance of an active cargo-handling terminal, and processing a great amount of detail work inherent in general cargo service on a repetitive schedule.

8 Tramp owners usually have small staffs in the home office, with little division of functions. No traffic department is needed; charters are negotiated by telephone, cable, or fax . . . Face-to-face contact with charterers is unusual. Because agents are employed to service the ships in ports of call and are paid on a fee basis for each task performed, there is no need for an operating department. Instead the home office may send supervisory personnel to oversee the functions of the agents. Some owners contract with firms specialising in ship management to do everything except negotiate contracts. Stevedoring is very rarely the responsibility of the shipowner, and therefore no terminal department is included in organisation of the home office.

9 Procurement of cargo is the responsibility of the traffic department, which includes salesmen ('solicitors') to call on regular as well as prospective shippers. Advertising is extensive and continuous, and major efforts are made to disseminate information concerning the capabilities of the line. Arrival and departure times of ships are widely publicised. Shippers are assisted in the

9 Procurement of cargo is handled through brokers who represent the tramp shipowner in negotiations with other brokers representing cargo interests. There is no advertising and no promotional activity. Ship movements normally appear only in the newspaper listings of vessels which have arrived or sailed.

development of markets for their goods as a means of increasing cargo offerings.

10 Passengers sometimes are carried in cargo liners. By international agreement the number is limited to 12.

10 Passengers are not carried aboard tramp ships, and no provision for their accommodation is made in the vessels' design.

4 SHIPPING WITH A LINE

The last extract referred to the way in which contracts to carry goods by sea are made in break-bulk liner shipping. In the past, contracts were often made both informally and indirectly. The judgment in *Heskell v Continental Express (*1950) 83 LlL Rep 438 contains a description of a process in which no contract was concluded until goods were loaded or accepted for loading. Having learned from an advertisement or otherwise of a date and place of sailing, a shipper would forward his goods to the dock or berth. At the docks, a dock receipt or a mate's receipt would be given in exchange for the goods. The shipper or his agent would then prepare a draft bill of lading in the form used by the particular line and deliver it to the shipowner or his agent. Meanwhile the various consignments of what might be a very mixed cargo would be loaded and stowed on board, the location of a particular parcel depending on its size, shape and other properties, including density and packing as well as on the order in which its port of discharge would be reached in the course of the voyage. A good deal of manual labour was needed to stow break-bulk cargo on a liner. After loading, the draft bill of lading would be checked against the earlier receipt, signed by the master or more often an agent employed by the shipping line and issued to the shipper or his agent in exchange for the freight. In these circumstances, the contract between shipper and carrier depended on the contents of advertisements, and on any public and private statements, trade practice and prior dealings, as well as on the terms printed on the bill of lading.

Containers and computers have changed all this. Probably the most noticeable physical change in UK liner shipping since *Heskell* has been that conventional break-bulk services to many destinations have been replaced by container shipping. A typical general purpose container is manufactured to the International Standards Organisation's agreed dimensions of 8ft in width by 8ft 6in high by 20ft in length; it is made of steel and capable of carrying up to 24 tons weight. Other lengths (for example, 40ft), heights and materials are also used. Refrigerated and other non-standard containers are available, including open top, half-height, ventilated containers and tank containers for liquids.

The vessel on which such a container is loaded is also likely to be very different from the type of general purpose liner in use when *Heskell* was decided. Today's liner is likely to be specially designed for carrying containers; a fully or partly cellular container ship uses a cell guide system to enable quick mechanical stowage of containers either by shore-based cranes or possibly by the ship's own gear.

From the point of view of a shipper who wants to move either a full container load (FCL) or less than full container load (LCL), it has been said that containers have a number of advantages. Goods shipped move faster and are better protected from damage and theft; a container can be sealed before the start of a journey. It may not then be necessary for the contents to be touched until the seal is broken when the box is opened at its destination.

Containerisation has also resulted in the development of integrated transport services in which carriers are willing to contract to carry from door-to-door or from terminal-to-terminal, and not simply from port-to-port. When a shipper reserves space with a carrier for door-to-door transport of his goods, a container can be delivered to the shipper's own premises where it can be packed ('stuffed') and later collected for delivery by road to a container terminal where it will be stored until loaded on board ship. Carriers who offer this multimodal type of transport service are often referred to as Combined Transport or Through Transport Operators. As a matter of terminology, some parts of the UK shipping industry use 'combined transport' to refer to a contract under which the carrier contracts as a principal to carry out the performance of the whole of a transport by two or more modes of transport, while in 'through transport' the carrier contracts as principal in respect of one stage of a journey but only as the agent of the owner of the goods to arrange all other stages. It is, however, important to appreciate that many bills of lading do not recognise this distinction and use the terms 'through'/'combined' transport indiscriminately.

Containers also have advantages from the point of view of the sea carrier. Mechanical handling is quicker and cheaper than traditional methods of loading and stowing. Quicker handling means that container vessels need to spend less time in port and can spend more time at sea so that their productivity is improved. Container ships are faster, more sophisticated and more expensive than their break-bulk counterparts. High costs are involved in building the necessary shore facilities and in providing enough ships of the right size to take advantage of economies of scale and yet at the same time provide the frequent and regular service needed by shippers. This is one reason why some shipowners have chosen not to operate independently in containerised liner trades but instead to amalgamate with others or to join consortia which operate the vessels owned by their members. This development has itself given rise to new and difficult questions of legal liability for loss or damage to goods both as between consortium members and shippers on the one hand and as between consortium members themselves on the other.

A number of other important changes have also occurred since *Heskell* was decided. In UK outbound liner shipping, the mate's receipt is now a comparative rarity. Export cargo to be carried by a line is forwarded for shipment accompanied by a Standard Shipping Note or a Dangerous Goods Note (see Appendix) prepared in several copies by or on behalf of the shipper. A copy of the Shipping Note is signed and returned to the shipper to acknowledge receipt. And it is now common for the bill of lading to be prepared by the carrier by computer from details supplied when the shipper reserved space on a vessel.

An alternative to a bill of lading is also available. A sea waybill is also a receipt for goods issued by a carrier and may contain evidence of the terms of a contract of affreightment in much the same way as a bill of lading. But unlike a bill of lading, a sea waybill does not have to be presented at destination in order to obtain delivery of the goods. Delivery is made to a nominated consignee against proof of identity. A sea waybill may be used in preference to a bill of lading if, for example, it is likely that goods which have been shipped will reach their destination before a bill of lading (as on short sea routes in Europe) and if the shipper does not need a bill of lading in order to obtain payment for or to transfer the title to the goods while they are in the possession of the carrier (see the specimen in the Appendix).

5 THE CHARTERING PROCESS AND THE CHARTER MARKET

UNCTAD, *Charter Parties*, report by the Secretariat of UNCTAD, 1974, New York: UN

(1) The Chartering Process

A Bargaining position of contracting parties

52 Charterparties are contracts that are negotiated in a free market governed by the prevailing factors of the shipping supply and demand situation. Characteristically, conditions in the freight market are constantly changing, at one stage favouring owners and at another charterers. The state of the market at a particular time is an important factor influencing the bargaining position of the contracting parties.

53 The actual structure of the shipping industry has also an effect on the bargaining position. In chartering, the offer of shipping services in response to an inquiry for shipping space is made by tramp vessel owners who, lacking regular customers, need continuously to find such employment for their vessels as they can under prevailing market conditions. The shipowner's position is not then generally one of domination and the voyage or time charterer is frequently in a position to negotiate the contract on an equal footing, depending on the state of the market at the time.

54 In some trades, it is not unusual for the charterer to occupy the more powerful position in terms of share of the market and financial strength. Charterers, whether appearing in the voyage market or in the time charter market, are often, through their own organisations, in command of large cargo tonnage, as in some of the grain, coal and ore trades. This concentration of bargaining strength on the cargo shipping side appears to have been growing in recent years. To counter this development, shipowners are forming joint ventures in which owners are chartering their vessels to a jointly owned ship-operating company that, in turn, charters the vessels to shippers. A variety of arrangements as regards the management of individual vessels and other matters are possible in the formation and operation of such shipping pools.

B Standard charterparty forms

55 Voyage and time charterparties are, as a rule, concluded on the basis of standard contract forms, and such documentation therefore plays a role of considerable importance in present chartering practice.

56 A brief account follows of the development of standard charterparty forms, of the organisations dealing with their issue and of the different types in common use, following which some general aspects of these documents are discussed.

The Development of Standard Charterparty Forms

57 It was in the nineteenth century that shipowners and charterers first concerned themselves with the drafting of standard charterparty forms. Such forms were originally drafted and employed by individual contracting parties, but joint action was later undertaken by

groups of shipowners and charterers. An early development began with parties involved in chartering in particular trades co-operating on the joint issue of agreed documents. The establishment in 1862 of the Mediterranean and Black Sea Freight Committee may be cited as an example; this organisation, composed of shipowners, merchants and brokers, issued several standard charterparty forms for the grain trade from the Black Sea and the Mediterranean.

58 In the present century, two organisations have played, and still play, a significant role in the development of internationally utilised standard forms, namely, the Chamber of Shipping of the United Kingdom in London, founded in 1878, and the Baltic and International Maritime Council in Copenhagen (BIMCO), founded in 1905 under the name of the Baltic and White Sea Conference. The work on documentary matters is performed by the Chamber of Shipping through its Documentary Committee and by BIMCO through its Documentary Council. These bodies have issued or approved a great number of standard charterparty forms many of which are so-called 'agreed' documents, as they result from negotiations between charterer and shipper interests, on the one hand, and shipowner interests, on the other; listed as being in current use are four forms for time chartering, including the much used Baltime form, and more than 60 forms for voyage chartering, comprising special forms for most main commodities, as well as general trade forms. In chartering practice, these documents are generally referred to as 'approved' or 'official' forms.

59 Besides the Chamber of Shipping/BIMCO documents – hereafter called approved forms – there are various long-standing standard charterparty forms which are in widespread use in different trades. Mention might be made of the 'C (Ore)7' form, originally devised by the British government to cover ore imports during the First World War, the 'Americanised Welsh Coal Charter 1953', the 'Africanphos 1950' for shipments of phosphate from Morocco, the 'Sugar Charter Party-Steam (London Form)' in general use for cereal shipments from the United States and Canada, and, for time charters, the 'New York Produce Exchange Time Charter'.

60 A further type of standard charterparty form is the so-called 'private' form (sometimes called 'house charterparty'), which is issued and employed by individual firms, usually charterers enjoying more or less of a monopoly in a particular trade and therefore in a position generally to impose their own form on the shipowner. Such private forms, of which there exist a great number, are common in, for example, the ore, fertilizer and oil trades.

General Aspects of Standard Charterparty Forms

61 It is the view of some authorities that where standard forms or particular clauses therein are completed by one party to the contract enjoying a dominant position *vis-à-vis* the other, through protection of his own interests the contract may tend to become unduly favourable to him to the detriment of the other party. In shipping this may be illustrated by the practices which prevailed in respect of liner bills of lading prior to the introduction of the Hague Rules. The situation as regards charterparties does not, however, lend itself to any generalisation of this kind.

62 It is true that some existing charterparty forms may be said to be generally biased in favour of one side, or to contain clauses on particular points which may be considered as unduly detrimental to the interests of one of the parties; in this regard, particular attention needs to be drawn to the so-called private forms mentioned above which, in the main, are documents

issued by charterers. On the other hand, many standard forms are considered to represent a fair equilibrium between the interests of the parties; and it should be recalled in this context that many forms in common use are agreed documents, implying that they have been negotiated between owner and charterer interests.

63 As regards the drafting of the standard documentation in current use in chartering, this has been criticised as sometimes lacking in logical and systematic order, and, further, as often containing unclear expressions, lacunae, and provisions of little commercial or legal importance. While this is true in the case of several standard forms of an early origin, attention should be drawn to the fact that considerable improvement in documentary practice has been achieved by the work done over the last few decades by the Chamber of Shipping and BIMCO. Those two organisations have issued a number of modern documents, most of them agreed documents, which to a great extent have done away with earlier deficiencies.

64 Despite deficiencies of the kind that may still remain in certain documents, it is generally recognised that standard forms – as far as concerns approved or otherwise well known and commonly used forms – serve significant practical purposes and play an important role in maritime commerce as instruments for facilitating and improving the functioning of the contracting procedure.

65 As to the advantages to be derived from the use of such forms, it should be pointed out, firstly, that often the parties to a charter contract are domiciled in different countries and that the negotiations, which to a great extent are carried out through the intermediary of one or several brokers, are often performed under considerable time pressure. By basing the negotiations on a standard form, the contents of which are well known or readily available to both sides, the parties can concentrate their attention on the particular points on which they require an individual regulation, leaving all other questions to be regulated by the terms of the standard form. The use of a standard form, moreover, means that the parties run no risk of being caught out by an unusual clause or a clause imposing unreasonable or unexpected burdens on them; this, in turn, means cheaper freight rates since the owner does not have to reckon on the freight to cover him for such risks. Generally speaking, it reduces the risk of misunderstandings and ensuing disputes arising in respect of the matters covered by the contract.

66 The employment of standard forms in international chartering has an important effect also from a general legal standpoint, in that they contribute to international uniformity; disparities between regulations prescribed in the various legal systems are partly neutralised, so that similar cases taken to litigation or arbitration will tend, to a certain extent, to bring the same result, irrespective of the jurisdiction under which they are decided. Litigation and submission to arbitration is also thereby reduced. The fact that standard forms are very largely drafted in the English language and are based on English legal thinking supports this tendency toward international uniformity.

67 It should be stressed, however, that the charterparty, whether a voyage or a time charter, is an individual contract, and that the widely varying conditions under which chartering is done set a limit to the possibility of using stereotyped contract terms framed to suit a large number of cases. Thus, time charterparties, especially for long charter periods, must to a considerable extent be tailor-made to meet the particular requirements of the parties.

As to voyage charterparties, these are often concluded by the charterer pursuant to the conclusion of a sales contract respecting the cargo to be shipped, and their terms are then made to conform with that contract. Consequently, the standard forms may be amended in various respects, and clauses are often added in order to adapt the contract to the wishes and requirements of the parties. Such amendments, unless made with skill and care, may easily lead to inconsistencies and subsequent difficulties in respect of the construction of the charter; in fact, most charterparty disputes arise from ambiguities created by changes in the standard text or from unclear drafting of additional clauses inserted in the form . . .

(2) The Charter Market

A The marketplace

110 Finding the right ship or the right cargo among the hundreds of possibilities existing in world shipping at one particular time may seem like searching for the proverbial needle in the haystack. Yet the process of mating cargo with ship can be performed very quickly.

111 The efficiency of the chartering process can be attributed to three dominant characteristics of the charter market:

(a) The large number of shipowners, charterers and shipbrokers the world over;

(b) The availability of rapid modern communications, principally long-distance telex and telephone networks; and

(c) The prevalence of numerous charter market information sources providing late market status reports, as trade newspapers and magazines, shipbrokers' daily information sheets and special studies from a variety of sources.

112 In addition, the world shipping fraternity is an avid reader of the daily news, with special emphasis on weather, economic, trade and crop reports as well as political events. Any current development in those areas may have an important influence on the availability of shipping and on the level of market freight rates. Knowledgeable shipowners and charterers commence a particular chartering transaction with full background information on existing market conditions. Thus, bargaining over freight rates may be limited to a narrow range of rates, with relatively lengthier discussion taking place concerning other specific charter terms.

113 The existence of shipbrokers greatly facilitates the speed and efficiency of the chartering process. The role of the shipbroker is to provide expertise and information at the time these are required by his clients. The expertise takes the form of a knowledge and understanding of ships and trades that enables him to meld the two to the mutual satisfaction of owner and charterer. The shipbroker's information must be highly specific as to the availability of ships and cargoes, together with the freight rates that each may command.

114 A shipbroker is likely to specialise in particular categories of ships and trades. In this process he acquires and maintains an appreciation of the economic factors underlying the trades which he can utilise in interpreting the needs of shipowner and charterer clients alike. The shipbroker's role is that of an intermediary. In this role his communications between principals must reflect the realities of the market place.

115 A standard commission rate for shipbrokers is 2.5 per cent of the gross charter revenue. If the owner and charterer are each represented by a broker normally the commission is equally shared between the two. Many of the larger shipowners and charterers perform their own brokering functions in order to avoid commission, as this can amount to large sums in the case of long-term charters.

116 The charter market is actually composed of many sectoral markets which are generally non-competing. Vessel class distinctions exist for reasons of vessel type or size. Tankers, as a rule, do not engage in the dry cargo trades although they may from time to time enter the grain trades. Ore carriers, whose holds are small, are not suitable for the carriage of lighter commodities such as grain.

117 Specialised vessels, as LNG (liquid natural gas) tankers or other special product tankers, cannot compete with bulk carriers or other vessels of more generalised characteristics. Conversely, combination carriers in the market will cross over between the tanker and dry-cargo trades to seek the employment offering the greatest return. Large tankers and large dry-cargo carriers are most economically employed in long-haul trades. Small vessels cannot compete effectively in these long trades: they are generally most economical in coastal or short deep-sea shipping services. Despite the many differences in vessel sizes and types, a high degree of interchangeability in the employment of vessels does exist at the margin, so that movements in one sector of the market quickly affect the whole chartering market. Small tankers can carry oil even though they are more costly to operate than large tankers.

118 The charter market is also divided by length of charter: the short-term 'spot' market and the longer-term 'period' market. Short-term chartering may take the form of voyage charters or trip time charters (trip charters). The period market includes longer-term time charters, multiple (consecutive) voyage charters and long-term freighting contracts.

119 In contrast with the open charter market, there exists a very sizeable and growing 'closed' or private charter market wherein the fixture details are not publicly reported. In the negotiation of many charters, particularly the long-term sort, owners and charterers are reluctant to publicise the terms of the charter fixtures. For good reason, owners may have agreed to lower rates than might have been expected and widespread knowledge of such rates might 'spoil' the market. Similarly, charterers may not wish their transport costs to become known for reasons of competitiveness. However, the existence of such charters generally becomes known to the market even though information on specific terms may be lacking. The industry 'grapevine' is often very efficient in providing the missing information. Ironically, the level of charter rates negotiated in these non-reported fixtures is believed to be influenced by the reported level of open-market freight rates.

B Comparison of voyage and time charter costs (earnings)

120 Shipowners and charterers each have a choice between chartering on a voyage or on a time charter basis with the selection of the particular form of charter dependent on a variety of factors. For the shipper (charterer) the frequency, regularity and expected duration of the shipping need are important considerations. The additional workload on the shipper's organisation required by a time charter as compared with a voyage charter will also be considered.

121 For the shipowner, organisational requirements may be a dictating factor since shipowning companies staff, or conversely do not staff, to handle the additional workload associated with voyage charters. However, the shipowner's expectations of future freight market levels as compared with existing levels are frequently an overriding factor in his choice between voyage or time charter. If freight rates are at what the owner considers to be peak levels, he tends to fix his vessels in long-term charters which usually means chartering on a time charter basis, while preferring shorter-term voyage charters when he believes future market rates will rise. For the charterer and shipowner alike, the comparative cost (earnings) of the voyage and the time charter is of great interest. The cost-earnings calculations concerning the two types are not directly comparable since, as has been noted, voyage charters are contracts to transport cargo on a tonnage basis and time charters contract for the lifting capacity of a vessel on a time basis. There exists a need, therefore, for charterers and owners to compare the cost (earnings) relationship of chartering opportunities offered as voyage or time charters. The ability to make such a comparison is basic in the bargaining process associated with the negotiation of a charterparty ...

C Fixing a voyage charter

125 The process of voyage chartering begins with an expression of a shipping requirement by a prospective charterer to his broker for a voyage charter which may be generally described as '25,000 tons of a commodity between ports A and B, loading date ... ideas $4.50'. The broker will circulate this information to his shipowner clientele and make the information available to the shipping world generally through daily circulars and telex and telephone circuits to the principal chartering centres of the world, as London, New York, Tokyo and Hong Kong.

126 Responses to the charter offering will be received by the charterer's agent in the form of 'indications' which are relayed to the charterer for reaction and instructions. In a voyage charter, the charterer's main concerns are: the suitability of the vessel size and type, the geographical position of the vessel as affecting its ability to meet required loading dates, the charter rate, loading and discharging rates, laytime, and demurrage and dispatch rates.

127 An owner's consideration of a voyage chartering opportunity will particularly include, in addition to the indicated charter rate, the ports of loading and discharge of the voyage in question, the length of the voyage, and the nature of the cargo to be carried. To the owner the offered charter rate is a dominant but by no means the only consideration. If the discharge port is such as to offer further favourable trading possibilities without an unduly long haul in ballast, the owner will be inclined to accept a lower charter rate. As to voyage length, in general the longer the voyage at a given rate of return, the more attractive the charter to the owner.

128 Owners' responses are usually valid only for a short stated period of time, as 24 hours, so that he may in turn respond to other market offers if the current offer is not accepted. Depending on the 'tone' of the market (ie an indicated plentiful or short supply of tonnage), the charterer will make an early counter-offer or choose to wait if he anticipates that owners may improve their offers.

129 A firm offer for a voyage charter from an owner generally includes the following details:

Period for which the offer is valid

Freight rate

Name of vessel

Lay days

Vessel's carrying capacity of the cargo in question

Loading and discharging ports

Loading/discharge costs

Demurrage/dispatch

Commission

Charterparty form to be used

130 If, after analysis of the owner's offer, the prospective charterer believes that detailed agreement can be reached, he will make a counter-offer specifying the modifications that are desired. As discussed earlier, the effective cost of the voyage charter to the charterer can be reduced not only by lowering the stated charter rate but also by changes in such terms as those concerned with loading and discharging costs, demurrage and dispatch rates, and commission rates.

131 Voyage charters involving more than a single voyage may require extended interchange to reach agreement on the precise timing of each of the voyages, particularly in the case of long-term voyage charters lasting several years. The negotiations on long-term voyage charters will also require agreement on a variety of alternate charter performance conditions (as, acceptable vessel sizes and cargo loading dates, among others), not usually required in single-voyage charters.

132 A firm offer which is accepted within the period of validity binds the offerer and concludes the negotiations, while acceptance after the expiration of the time limit is considered a counter-offer. Indications or counter-offers bind neither party until formulated and accepted as firm offers. The exchange of offers is usually made in written form by telex or telegram and those made and accepted by telephone are usually confirmed afterwards in writing.

133 Often a firm offer is forwarded or accepted subject to special conditions. A typical example may be that of a merchant who wants to secure shipping space for goods he is about to buy or sell. He may find it practical to have tonnage at hand and negotiate all arrangements for the shipment prior to buying or selling the goods. In such a case his charter offer is made 'subject stem', meaning that he is in no way committed if the purchase or sale of the goods should not materialise. Another example is that of the owner who makes a firm offer 'subject open', meaning that he retains the right to withdraw his offer in case the vessel should be fixed for other business prior to acceptance of the offer in question. Offers with an attached 'subject' proviso should be treated with caution. In general such an offer is no more than an indication. Firm offers given or accepted on this basis do, however, serve a meaningful purpose in keeping the negotiations going and in providing a guide as to why the other party is hesitant.

134 The preparation of the formal voyage charterparty, following agreement on charter terms, is usually an expeditious and straightforward process, particularly for single-voyage charters embodied in a standard form.

135 The administration of the charter during its life requires careful record keeping by both the owner and the charterer to ensure that the payment terms of the various clauses of the charterparty are adhered to. For example, accurate measurement of the cargo loaded must be made in order to compute the charter hire payment. Payments of demurrage or dispatch normally result from each voyage, requiring computations carefully made in accordance with the charterparty terms. Often, agreement on the cost of repairing stevedoring damages does not occur until long after the voyage is completed since the performance of such repairs may not take place until the vessel's next dry-docking period.

D Fixing a time charter

136 The process of searching the market and fixing the charter for vessels to be placed on time charter may vary considerably depending on the contemplated length of the charter. For trip or other short-term charters, the procedures parallel those used for fixing a single-voyage charter. A more selective process is frequently used in the negotiation of time charters of longer duration than, say, one year. Often there is direct negotiation between the charterer and the owner, leaving out shipbrokers to avoid payment of commission.

137 A charterer will have highly specific ideas about the size, type and operating characteristics of the vessel he is seeking to place on time charter for an extended period. In addition, he is likely to have detailed knowledge of the charter status of individual ships of the class he has in mind. Some of those ships may have been employed previously in the charterer's trade and hence he is familiar both with the performance record of the vessel and the reliability of the vessel's owner. Accordingly, the market search may be limited to direct inquiries to one or more owners in order to determine specific vessel availability.

138 The negotiation of a long-term time charter often takes a period of weeks or longer since the wording of each clause will have an important bearing on the overall cost (earnings) under the agreed contract. The negotiation of the rate of hire may well include a series of offers and counter-offers, frequently consisting of varying rates or combinations of rates for different duration periods or extension options. For time charters involving the 'forward' delivery of the vessel (which may be from, say, six months to several years ahead, as in the case of vessels not yet built), the negotiations on rate of hire become more complicated due to uncertainties as to future market freight rate levels. Current rate levels influence the rate of hire under time charters of both near-term and forward delivery. If, during the charter-negotiating period a turning point in market freight rates is experienced, the process of negotiating the charter rate is further complicated by both owner and charterer having to assess the significance of the change.

139 As discussed in paragraphs 97–99, agreement on the clauses pertaining to the performance of the vessel, in terms of average speeds and fuel consumption, is of basic importance. Equal care is required in the negotiation of other charter clauses. For example, agreement should be reached on the treatment of vessel off hire as this relates to the duration of the charter. Under some time charters, the charter period is extended by the off hire time, although many variations of this method are possible.

140 Careful construction of the time charter clauses affects not only its cost (earnings) value to the charterers and owners but also the ease of administering the charter during its operating

life. Time charters require extensive and meticulous record-keeping by both owner and charterer, to ensure that sufficient detail is accumulated to serve as the basis for the adjudication of possible claims, many of which may arise, as is often the case, long after the charter has expired. Owners and charterers must provide for the maintenance of these functions within their respective organisations.

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CHAPTER 2

LIABILITY OF SEA CARRIERS

This chapter deals with the basic principles of liability of a sea carrier for goods that are lost, damaged or destroyed. The law in this area has a long history. Modern English law developed from cases that were decided long before steel hulls and steam engines began to be used in maritime commerce.

The chapter begins by considering the liability at common law of public or common carriers and then looks at the position of the private carrier. Common carriers by sea are unlikely to be found in England today, but the law relating to private carriers is best understood against the older background.

In addition to their express contractual obligations, sea carriers are treated in English law as subject to a number of implied duties. The implied duties to carry with care in a seaworthy ship on an appropriate route are considered in the next three chapters. The Hague and Hague-Visby Rules, when they apply, alter the common law position (see Chapter 10).

1 PUBLIC CARRIERS

At common law, a distinction was made between the position of public and private carriers. A public or common carrier by sea was someone who held himself out as willing to carry for reward for anyone who wanted to use his services. It does not seem to have been necessary for the goods of several persons to be carried in common, or for the carriage to be between English ports, or even for the ship to follow a fixed itinerary. However, a carrier who carried only for particular persons or who genuinely reserved the right to pick and choose his customers was a private carrier.

A public carrier was subject to a stringent legal regime. If space was available, he was bound to carry with reasonable despatch and at a reasonable cost for anyone who wanted to make use of his services. Goods which were unreasonable in quantity or weight could be refused, and so could goods that were dangerous or not of the type of which he professed to be a carrier. But if goods carried for hire were lost or damaged, a common carrier was absolutely liable, except where the loss or damage was caused by the common law excepted perils, which were losses caused by an act of God, the Queen's enemies or by inherent vice of the goods themselves. Damage or loss caused by a general average sacrifice or by the fault of the shipper were also defences at common law.

A common carrier was not, therefore, merely expected to take reasonable care of goods that had been entrusted to him. On the contrary, as the old cases explained, a common carrier was virtually in the position of an insurer of goods against all consequences except the common law excepted perils. Thus he was, for example, liable for loss by theft even if he had not been negligent; and it made no difference whether the goods were stolen from the carrier by strangers or by his own employees. However, the severity of this approach could be mitigated by the common carrier himself, who was free at common law to limit his responsibilities by contract.

The rule imposing this extended liability on common carriers was justified on the ground of public policy. It was said that the carrier was often the only person in a

position to know how goods were lost or damaged. So to prevent abuse and to avoid uncertainty, the law held him liable, unless he could prove that the loss or damage was caused 'by the King's enemies, or by such act as could not happen by the intervention of man'.

Coggs v Barnard (1703) 2 Ld Raym 918

Facts

John Coggs brought an action against William Barnard who had undertaken to move casks of brandy belonging to Coggs from a cellar in Holborn in London to one that was closer to the river. One of the casks was staved and 150 gallons were lost. Coggs was successful at trial before a jury, but the case was regarded as raising a difficult point of law, which was then argued before the four judges of the court at Westminster. The judgment of Holt CJ was an important restatement of the liabilities of the various sorts of bailee, one of whom is the carrier.

Held

> **Holt CJ:** As to the fifth sort of bailment . . . those cases are of two sorts; either a delivery to one that exercises a publick employment, or a delivery to a private person. First if it be a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, &c, which case of a master of a ship was first adjudged . . . in the case of *Morse v Slue* (1671) 1 Ventris Rep 190, 238. The law charges this person thus entrusted to carry goods, against all events but acts of God, and of enemies of the King. For though the force be never so great, as if an irresistible multitude of persons should rob him, nevertheless he is chargeable. And this is a politick establishment contrived by the policy of the law for the safety of all persons the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c, and yet doing it in such a clandestine manner as would not be possible to be discovered.

Notes

1 In English common law no one is obliged to undertake the responsibilities of a common carrier and there are few, if any, sea carriers in this country who choose to do so today. The test for identifying a common carrier is summarised in the next two extracts and shows how this undesirable status is avoided.

2 'Everybody who undertakes to carry for anyone who asks him, is a common carrier. The criterion is, whether he carries for particular persons only, or whether he carries for everyone. If a man holds himself out to do it for everyone who asks him, he is a common carrier; but if he does not do it for everyone, but carries for you and me only, that is a matter of special contract': *Ingate v Christie* (1850) 3 C & K 61, *per* Alderson B.

3 'Did the defendant, while inviting all and sundry to employ him, reserve to himself the right of accepting or rejecting their offers of goods for carriage whether his lorries were full or empty, being guided in his decision by the attractiveness or otherwise of the particular offer and not by his ability or inability to carry having regard to his other engagements? Upon the facts as found by me I answer that question in the affirmative, and in my opinion that answer shows that he is not a common carrier': *Belfast Ropework Co Ltd v Bushell* [1918] 1 KB 210, p 215, *per* Bailhache J.

4 *Act of God.* The common law excepted perils mentioned in the text and in *Coggs v Barnard* include act of God, which has been said to be loss or damage 'due to

natural causes directly and exclusively, without human intervention, and that ... could not have been prevented by any amount of foresight and pains and care reasonably to be expected': *Nugent v Smith* (1876) 1 CPD 423, p 444, *per* James LJ.

5 *King's enemies.* The meaning of this phrase was considered in *Russell v Niemann* (1864) 17 CBNS 163 where cargo was shipped under a bill of lading containing this exception. The shipowner was a subject of the Duke of Mecklenburg and the ship a Mecklenburg ship; the port of loading was in Russia, the port of discharge in England and the shippers either German or Russian. The ship was seized by Danes with whom the Duke was at war. On the question whether the exception referred to the Emperor of Russia, the Queen of England or the Duke, it was held it included enemies of the sovereign of the carrier, whether or not a King.

6 *Inherent vice*: 'anything which by reason of its own inherent qualities was lost without negligence by any one': *Greenshields v Stephens* [1908] AC 431, *per* Earl of Halsbury. In *Gould v South Eastern and Chatham Rly* [1920] 2 KB 186 (a case of inland carriage), Atkin LJ, citing *Story on Bailments*, held that the implied liability of a common carrier did not include responsibility for ordinary wear and tear in transit, ordinary loss or deterioration in quality or quantity such as evaporation or loss or damage through insufficiency of packing.

2 PRIVATE CARRIERS

The position of a private carrier by land is less onerous than that of the public carrier. A private carrier by land is not absolutely liable for goods which are lost or damaged while in his possession. At common law, where the rights of the parties are not regulated by an express contract, a private land carrier is only liable, as a bailee who is paid, if he fails to take reasonable care of goods entrusted to him. However, to escape liability, he is obliged to prove that the loss or damage was not caused by his negligence.

The liability at common law of a private carrier by sea, where the rights of the parties are not regulated by an express contract, is less certain. The cases contain inconsistent statements. One view is that all sea carriers are subject to the same rule of strict liability as common carriers. The judgment of Brett LJ in *Liver Alkali* (1874) LR 9 Ex 338 is the best known statement of this view, although it is not an isolated example: see, for example, *Pandorf v Hamilton* (1885) 16 QBD 635 and *Beaumont-Thomas v Blue Star Line* [1939] 3 All ER 127, p 131.

However, Cockburn CJ's judgment in *Nugent v Smith*, below, rejects Brett LJ's views and treats the private carrier by sea as in the same position as a private carrier by land and therefore as being liable only as a bailee for reward, to exercise reasonable care. Some commentators find support for this view in *dicta* such as that of Willes J in *Grill v General Iron Screw Collier Co* (1866) LR 1 CP 600, p 612 that the 'contract is to carry with reasonable care unless prevented by the excepted perils'.

A third possibility mentioned in several cases is that some classes of sea carriers such as lightermen may have a special status as public-but-not-common-carriers and as such have the same liability as common carriers, while all others are liable only to take reasonable care.

Liver Alkali v Johnson (1874) LR 9 Ex 338, Court of Exchequer Chamber; affirming (1872) LR 7 Ex 267, Court of Exchequer Chamber

Facts

The defendant was a barge owner. He did not ply between fixed termini. With each customer an agreement was made for carriage at a negotiated rate per ton between the places selected by the customer. His customers (including the plaintiffs) did not normally select or agree on a particular barge. A barge was never used to carry the goods of more than one customer at a time. There was no evidence that the defendant had ever refused to let his vessels to anyone who ever applied to him. The defendant argued that he was not a common carrier.

Held

> **Blackburn J:** It appears by the case stated for this Court on appeal that the defendant was engaged in carrying from Widnes to Liverpool some salt cake of the plaintiffs in a flat on the river Mersey. The goods were injured by reason of the flat getting on a shoal in consequence of a fog. This was a peril of navigation, but could in no sense be called the act of God or of the Queen's enemies.
>
> The jury found that there was no negligence on the part of the defendant.
>
> The question, therefore, raised is, whether the defendant was under the liability of a bailee for hire, viz, to take proper care of the goods, in which case he is not responsible for this loss, or whether he has the more extended liability of a common carrier, viz, to carry the goods safe against all events but acts of God and the enemies of the Queen.
>
> We have purposely confined our expressions to the question, 'whether the defendant has the liability of a common carrier', for we do not think it necessary to inquire whether the defendant is a carrier so as to be liable to an action for not taking goods tendered to him . . .
>
> It appears from the evidence stated that the defendant was the owner of several flats, and that he made it his business to send out his flats under the care of his own servants, different persons as required from time to time, to carry cargoes to or from places in the Mersey, but that it always was to carry goods for one person at a time, and that 'he carried for any one who chose to employ him, but that an express agreement was always made as to each voyage or employment of the defendant's flats', which means, as we understand the evidence, that the flats did not go about plying for hire, but were waiting for hire by any one. We think that this describes the ordinary employment of a lighterman, and that, both on authority and principle, a person who exercises this business and employment does, in the absence of something to limit his liability, incur the liability of a common carrier in respect of the goods he carries . . .

(Blackburn J then reviewed cases decided between 1671 and 1850 and concluded that the defendant was liable. Mellor, Archibald and Grove JJ concurred.)

> **Brett J:** I cannot come to the conclusion that the defendant in this case was liable whether he was a common carrier or not, because I conclude that he was liable, notwithstanding that I am clearly of opinion that he was not a common carrier . . .
>
> It is clear to my mind that a shipowner who publicly professes to own sloops, and to charter them to any one who will agree with him on terms of charter, is not a common carrier, because he does not undertake to carry goods for or to charter his sloop to the first comer. He wants, therefore, the essential characteristic of a common carrier; he is, therefore, not a common carrier, and therefore does not incur at any time any liability on the ground of his being a common carrier. The defendant in the present case, in my opinion, carried on his business like any other owner of sloops or vessels, and was not a common carrier, and was in no way liable as such. But I think that, by a recognised custom of England – a custom adopted and recognised by the Courts in precisely the same manner as the custom of England with regard to common carriers has been adopted and

recognised by them – every shipowner who carries goods for hire in his ship, whether by inland navigation, or coastways, or abroad, undertakes to carry them at his own absolute risk, the act of God or of the Queen's enemies alone excepted, unless by agreement between himself and a particular freighter, on a particular voyage, or on particular voyages, he limits his liability by further exceptions . . .

I therefore hold that the defendant is liable as a shipowner, upon the custom applicable to him as such, but not liable as a common carrier, upon the custom applicable to that business or employment.

Nugent v Smith (1876) 1 CPD 423, CA; reversing (1876) 1 CPD 19

Facts

The plaintiff shipped two horses on board a steamship plying regularly as a general ship between London and Aberdeen. The horses were shipped without any bill of lading. In the course of the voyage one of the horses died from injuries caused partly by the rolling of the vessel in a severe storm and partly from struggling caused by excessive fright. The plaintiff was awarded damages in the High Court. On appeal, the court held that the defendant was a common carrier, but was not liable for a loss caused by a combination of an act of God and inherent vice. Cockburn CJ went on to consider whether the defendant would have been liable if he had not been a common carrier.

Held

Cockburn CJ: As the vessel by which the mare was shipped was one of a line of steamers plying habitually between given ports and carrying the goods of all corners as a general ship, and as from this it necessarily follows that the owners were common carriers, it was altogether unnecessary to the decision of the present case to determine the question so elaborately discussed in the judgment of Mr Justice Brett [(1876) 1 CPD 19] as to the liability of the owner of a ship, not being a general ship, but one hired to carry a specific cargo on a particular voyage, to make good loss or damage arising from inevitable accident.

The question being, however, one of considerable importance – though its importance is materially lessened by the general practice of ascertaining and limiting the liability of the shipowner by charterparty or bill of lading – and the question not having before presented itself for judicial decision, I think it right to express my dissent from the reasoning of the Court below, the more so as, for the opinion thus expressed, I not only fail to discover any authority whatever, but find all jurists who treat of this form of bailment carefully distinguishing between the common carrier and the private ship . . .

[After considering earlier cases Cockburn CJ continued:] The last case is that of the *Liver Alkali Co v Johnson* [above] . . . the Court of Exchequer Chamber held, affirming the judgment of the Court of Exchequer, that the defendant was a common carrier and liable as such. Mr Justice Brett, differing from the majority, held that the defendant was not a common carrier, but, asserting the same doctrine as in the judgment now appealed from, held him liable upon a special custom of the realm attaching to all carriers by sea, of which custom, however, as I have already intimated, I can find no trace whatever. We are, of course, bound by the decision of the Court of Exchequer Chamber in the case referred to as that of a court of appellate jurisdiction, and which, therefore, can only be reviewed by a court of ultimate appeal.

[But] . . . it is obvious that as the decision of the Court of Exchequer Chamber proceeded on the ground that the defendant in that case was a common carrier, the decision is no authority for the position taken in the Court below, that all shipowners are equally liable for loss by inevitable accident. It is plain that the majority of the Court did not adopt the view of Mr Justice Brett. Lastly, while it does not lie within our province to criticise the law we have to administer or to question

its policy, I cannot but think that we are not called upon to extend a principle of extreme rigour, peculiar to our own law, and the absence of which in the law of other nations has not been found by experience to lead to the evils for the prevention of which the rule of our law was supposed to be necessary, further than it has hitherto been applied. I cannot, therefore, concur in the opinion expressed in the judgment delivered by Mr Justice Brett, that by the law of England all carriers by sea are subject to the liability which by that law undoubtedly attaches to the common carrier whether by sea or by land . . .

Notes

1 Later cases have interpreted *Liver Alkali* and *Nugent v Smith* in a variety of ways. The decision in *Liver Alkali* was followed in *Hill v Scott* [1895] 2 QB 371, where Lord Russell of Killowen CJ said that there was really no essential difference between the judgments of Blackburn J and Brett J, although he preferred the language of Blackburn J. On appeal, Lord Russell's judgment was affirmed by a Court of Appeal which included Brett J. But *Liver Alkali* was distinguished in *Consolidated Tea v Oliver's Wharf* [1910] 2 KB 395 where it was said that to attract the liability of a common carrier it was essential that 'the defendants were exercising a public employment'. In *Watkins v Cottell* [1916] 1 KB 10, Avory J said that in *Liver Alkali* the defendant had been held to be a common carrier. To complete the range of possible analyses, in *Belfast Ropework v Bushell*, *Liver Alkali* was spoken of as a case confined to lightermen.

2 There has been little recent consideration of this problem by the courts in England, although the issue has been raised indirectly from time to time: *The Emmanuel C* [1983] 1 Lloyd's Rep 310, construction of exclusion clause; *The Torenia* [1983] 2 Lloyd's Rep 211, burden of proof of cargo claim. Modern cases dealing with performing carriers who are not in contract with the cargo owners – see for example *The Pioneer Container* (Chapter 9) – do not explore the issue but treat the carrier's liability as that of a bailee.

3 CARRIAGE UNDER SPECIAL CONTRACT

Uncertainty about the nature of the liability of a sea carrier at common law might seem to be a serious problem. But for the most part this is a theoretical rather than an important practical difficulty, since most cargoes are carried today, not on bare common law terms, but under contracts (called 'special contracts' or 'special carriage' in the older cases) which deal expressly with the carrier's obligations.

Under an express contract, the carrier's obligations will depend on precise terms of his undertakings and on any terms which must be implied into the contract. Where the contract takes the form of a bill of lading, the carrier's obligation is normally now regarded in English courts as an absolute undertaking to deliver the goods at their destination in the same condition in which they were when shipped, unless prevented by causes mentioned in the contract. The common form statement on a bill of lading that the goods are received 'in apparent good order and condition, for carriage subject to the terms hereof from the port of loading to the port of discharge' is not therefore merely a promise to make reasonable efforts. It is an undertaking to deliver the goods in question in the same order and condition in which they were when shipped, subject only to the exceptions in the contract and to any statutory defences to which the carrier may be entitled. To summarise, apart from the effect of legislation, a ship must deliver what she received, in the condition she received it, unless relieved by excepted perils or by legislation.

Kay v Wheeler (1867) LR 2 CP 302, Court of Exchequer Chamber

Facts

Coffee was shipped on the defendants' ship *Victoria*, for carriage from Colombo to London under a bill of lading containing the exceptions of 'the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the sea, rivers, and navigation, of what kind and nature soever'. Part of the cargo was damaged. The defendants argued that they were not common carriers and had used reasonable care, to which the Kelly CB replied: 'In this case the defendants have entered into an express contract to deliver the goods in good condition, except in the four specified cases; and they are therefore liable unless the injury arose from one of the causes so excepted.'

Held

> **Kelly CB:** The question we have to determine depends on the contract between the parties contained in the bill of lading. That, after stating that certain goods have been shipped in good order and condition, binds the defendants to deliver them in like good order and condition, except in four cases . . . The defendants have delivered the goods in a very different condition from that in which they received them and have therefore broken their contract . . .

Notes: contractual excepted perils

1 The heart of the common law approach to cargo claims is the rule that a ship must deliver up what she received, in the condition she received it, unless relieved by excepted perils in the contract or by legislation. Until the end of the 18th century bills of lading were very short documents which did not usually add exclusions to the common law excepted perils. But by 1800, the orthodox view in England was that to the traditional form of bills of lading 'additional exceptions are and may be introduced, to take away the responsibility of the master and owners in various cases, for which they would otherwise be responsible'. (*Abbot on Merchant Ships & Seamen*, 1802, London: E & R Brooke, p 176). From about this time a wide variety of exemption clauses began to be introduced into bills of lading and the meaning of standard clauses became a matter of general importance.

2 *Interpretation of exemption clauses*. A cautious approach has been adopted. If a stipulation 'is introduced by way of exception or in favour of one of the parties to the contract . . . we must take care not to give it an extension beyond what is fairly necessary, because those who wish to introduce words in a contract in order to shield themselves ought to do so in clear words': *Burton & Co v English & Co* (1883) 12 QBD 218, p 220, *per* Bowen LJ.

3 *Perils of the sea*. This contractual exemption was one of the earliest to be introduced into bills of lading. The phrase is not interpreted in the same way in all jurisdictions: *The Bunga Seroja* [1999] 1 Lloyd's Rep 512, High Court of Australia. In England a peril or accident is required: something which is fortuitous and unexpected, not something 'due to ordinary wear and tear, nor to the operation of any cause ordinarily incidental to the voyage and therefore to be contemplated': *Hamilton v Pandorf* (1887) App Cas 518, p 530, *per* Lord Herschell. The peril must be a peril *of* the sea, not merely a peril on the sea. Perils of the sea are those which are peculiar to carrying on business on the sea: *Pandorf v Hamilton* (1886) 17 QBD 670, p 675, *per* Lord Esher MR. Wind and waves are perils of the sea; but fire and lightning are not: *Hamilton v Pandorf*, p 527, *per* Lord Bramwell. The accidental incursion of seawater into a vessel at a part of the vessel, and in a manner, where seawater is not expected to enter in the ordinary course of things, is a peril of the sea: *Canada Rice Mills Ltd v Union*

Marine [1941] AC 55, PC, *per* Lord Wright. Extraordinary violence of the wind or water is not essential: a collision is a peril of the sea *(The Xantho* (1887) 12 App Cas 503) and can occur in fine weather. Nor is damage by wind or water necessarily required; over-heating of cargo when ventilators are closed to avoid water damage is a peril of the sea. On the other hand, it has also been held that the explosion of machinery and the consumption of the cargo or the ship by rats all lack the necessary connection with the sea: *Thames and Mersey Marine Insurance v Hamilton* (1887) App Cas 484, p 491; *Hamilton v Pandorf,* p 523. But if a rat eats part of a ship and the sea enters through the hole and harms the cargo, then the damage is done by a peril of the sea.

4 *Pirates* have also long been regarded as a peril of the sea: *Pickering v Barkley* (1648) Style 132; *Morse v Slue* (1671) 1 Vent 190. Piracy is defined by the Oxford English Dictionary as 'the practice or crime of robbery and depredation on the sea or navigable rivers etc, or by descent from the sea upon the coast, by persons not holding a commission from an established civilised state'. In *The Andreas Lemos* [1982] 2 Lloyd's Rep 483, Staughton J held (in a marine insurance context) that: (1) piracy requires force or the threat of force and is committed when a crew are overpowered by force or terrified into submission; it does not include clandestine theft. 'It is not necessary that the thieves must raise the pirate flag and fire a shot across the victim's bows before they can be called pirates. But piracy is not committed by stealth' (p 491); and (2) piracy can be committed in territorial waters, although only if the ship in question is 'at sea' or if the attack on her can be described as a 'maritime offence' thus excluding attacks where the vessel or the attack cannot be so described because the vessel is, for example, in harbour or moored in a creek or river. Compare *Nesbitt v Lushington* (1792) 4 TR 783 ('Restraint of Princes'), below. See also SJ Hazelwood, *The Peril of Pirates* (1983) 2 LMCLQ 283 and s 26(1) and Sched 5 to the Merchant Shipping and Marine Security Act 1997.

5 *Strikes*. *Tramp Shipping v Greenwich Marine, The New Horizon* [1972] 2 Lloyd's Rep 314 concerned a vessel chartered for a voyage to St Nazaire with a fixed time for discharge. The charter also provided that time should not count during a strike or lockout of any class of workmen essential to the discharge. The normal course of events at the berth in question was for drivers of cranes and suckers to work round the clock, dividing the 24 hours of the day into three shifts. But when the vessel was ready to discharge, drivers were only working during the day shift in an attempt to improve conditions. The Court of Appeal held that there had been a strike. Lord Denning MR said: '. . . I think a strike is a concerted stoppage of work by men done with a view to improving their wages or conditions, or giving vent to a grievance or making a protest about something or other, or supporting or sympathising with other workmen in such endeavour. It is distinct from a stoppage which is brought about by an external event such as a bomb scare or by apprehension of danger.' Lord Denning MR also said that there could be a strike even though the workmen were not in breach of contract; Stephenson LJ thought there could not be a strike where the employer consents to the stoppage.

6 *Robbers, thieves*. The first word refers to a taking by force which the carrier could not reasonably resist. It does not include theft by pilferage: *De Rothschild v Royal Mail Steam Packet* (1852) 7 Ex 734. 'Thieves' was said in *Taylor v Liverpool and Great Western Steam* (1874) LR 9 QB 546 to be ambiguous and so was construed against the interests of the carrier to mean a taking by persons from outside the ship and not belonging to it (that is, not crew, passengers or, perhaps, others on board with permission). In this context, theft may also require a violent taking: *Shell v Gibbs* [1982] 1 Lloyd's Rep 369, p 373.

7 *Barratry*. 'Where a captain is engaged in doing that which as an ordinary man of common sense he must know to be a serious breach of his duties to the owners, and is engaged in doing that for his own benefit, then he is acting barratrously': *Mentz, Decker v Maritime Insurance* (1909) 15 Com Cas 17, *per* Hamilton J.

8 *Restraint of princes, rulers, people*. A direct and specific action by sovereign authority does not seem to be needed: an indirect restraint (*Rodoconachi v Elliott* (1874) LR 9 CP 518) or a reasonable fear of seizure has been held sufficient: *Nobel's Explosives v Jenkins* [1896] 2 QB 326. The decision of a court is not an act of princes and rulers: *Finlay v Liverpool and Great Western Steamship* (1870) 23 LT 251; nor is seizure of cargo by a riotous mob a restraint of people, although it may be piracy: *Nesbitt v Lushington* (1792) 4 TR 783.

4 BURDEN OF PROOF

The general approach taken by English law – that it is for the party who seeks relief to prove the claim – applies to contracts for the carriage of goods by sea as to other civil actions. However, the way in which this general approach is applied to marine cargo claims depends on the special form of the carrier's contract, discussed in the last section.

Govt of Ceylon v Chandris [1965] 2 Lloyd's Rep 204

Facts

The *Agios Vlasios* was chartered to carry rice in bags from Burma to Ceylon. In breach of contract, the charterers detained the vessel on demurrage at Colombo for 120 days. On completion of discharge it was found that some of the bags had been lost or damaged. An umpire found as facts that some of the bags were damaged by condensation and sea water, but that the proportions of damage attributable to each cause could not be stated. The condensation damage was caused by lack of dunnage, by necessary restriction of ventilation and by the long duration of the voyage, but it was impossible to state the proportions of damage so caused. The vessel was not adequately fitted with dunnage for the carriage of rice or with adequate tarpaulins. The charter excepted the owners from liability for loss or damage to goods unless caused by personal act or default or personal want of diligence to make the vessel seaworthy. A special case was stated for the opinion of the court.

Held

Mocatta J: Mr Staughton (counsel for the charterers) put forward three propositions, which can more conveniently be reframed or re-stated as four in the following terms: first, the general rule is that the burden of proof rests upon the party claiming relief, be he plaintiff in an action or claimant in an arbitration, and this applies both to the liability of the other party and the damages recoverable. Secondly, in a claim for damages for breach of contract of carriage by sea, once it is proved that the goods in question were shipped in good condition (as is the case here) and that a known quantity of those goods is proved to have been delivered damaged, the carrier is liable to pay damages measured by the difference between the sound and damaged values of the goods at the date and place of delivery unless the carrier can establish, and the burden is on him to do so, that the goods were damaged through the operation of an exception in the contract of carriage. Thirdly, and this is a qualification upon the second proposition, if the carrier can only show that some part of the damage to the goods was due to a cause within the exception, he must also show how much of the damage is comprised in that part, otherwise he is liable for the whole. Fourthly, if part of the damage is shown to be due to a breach of contract by the claimants, then

the general rule stated in the first proposition applies, and the claimant must show how much of the damage was caused otherwise than by his breach of contract, failing which he can recover nominal damages only.

The third of the above propositions is based on the well-known *dictum* of Viscount Sumner in *Gosse Millerd v Canadian Government Merchant Marine* [1929] AC 223, at p 241. The *dictum* was *obiter*, but was applied by a Divisional Court in Admiralty in *White & Son (Hull) Ltd v 'Hobsons Bay' (Owners)* (1933) 47 LIL Rep 207, and must have been the basis of innumerable opinions by Counsel and solicitors. Mr Staughton did not seek to challenge its validity in this Court but reserved his right to do so should the case go higher. His answer to it on the facts of this case was, however, this fourth proposition. Viscount Sumner was dealing with a case in which the carrier could only escape from his *prima facie* liability for the whole of the damage by relying upon an exception clause. No question arose of any part of the damage to the cargo having been caused by the plaintiff's fault or breach of contract. Viscount Sumner did not, therefore, have to consider the application of another principle, namely, that a plaintiff cannot recover damages from a defendant for the consequences of his own breach of contract with the defendant. Where such circumstances arise, and they must necessarily be infrequent, if the quantum of damage due to the plaintiff's own breach of contract cannot be ascertained, the latter principle must, in Mr Staughton's submission, apply to the exclusion of Viscount Sumner's *dictum*, otherwise the plaintiff would recover for the whole of the damage to the goods, notwithstanding that part of such damage, albeit unknown in extent, was due to his own breach.

Counsel for the shipowners was not able, as I understood him, to fault the logic or force of Mr Staughton's argument. He did, however, submit (and with this I have the greatest sympathy) that too ready an application either of Viscount Sumner's *dictum* or of counsel for the respondent's fourth proposition was to be deprecated because of their rigidity. Thus, on the one hand, a tribunal should be slow, in a case where the carrier has established that part of the damage is due to an excepted peril, to find that he has failed to adduce sufficient facts from which the quantum of such damage can be inferred. Similarly, on the other hand, when some part of a claimant's goods has undoubtedly been damaged by the carrier's breach of contract and some by the claimant's own breach of contract, the tribunal should be slow to award only nominal damages because of the paucity of primary facts from which the quantum of damages due to the claimant's own breach can be inferred. Juries, arbitrators, judges, and even the Court of Appeal (see, for example, *Silver v Ocean Steamship* [1930] 1 KB 416, *per* Lord Justice Scrutton, at p 429) have not infrequently to make what may in truth be little more than informed guesses at the quantum of damages by drawing inferences from the primary facts proved before them.

In my judgment, Mr Staughton's argument and his fourth proposition are well-founded. In so deciding, I am applying no authority because there is none, but the result follows, in my view, from the principles involved. Moreover, if the final view of the facts here be that some part of the sweat damage to the cargo was due to the claimants' breach of contract in keeping the vessel on demurrage for 120 days and some part was due to the respondent's breach of contract in equipping the ship and caring for the cargo, and if there are no primary facts in evidence from which it is possible to draw an inference as to the quantum of damage attributable to either cause, it is, in my view, more consonant with the practice and tradition of the law that the claimants should fail to recover more than nominal damages than that the respondent should pay for the damage caused by her breach of contract and also that caused by the claimants. The law is not unfamiliar with cases where the plaintiff or the claimant fails owing to inability to discharge the burden of proof falling on him . . .

CHAPTER 3

THE DUTY TO CARRY WITH CARE

In the last chapter it was pointed out that before 1800 English bills of lading did not usually contain extensive exclusion clauses. The practice changed in the 19th century. Within 80 years the typical list of exceptions and qualifications in steamship bills of lading was so long that it was said, more or less seriously, that the effect was to exonerate 'shipowners from all liability as carriers, and reduce them substantially to the condition of irresponsible bailees': *Crooks v Allan* (1879) 5 QBD 38, p 40.

The unrestrained use by carriers of exclusion clauses encouraged a close analysis of the nature of carriers' obligations. This process resulted in the identification of a series of duties which are implied at common law and stand alongside the carrier's express promise to carry and deliver: the duty to carry with care, the subject of this chapter, the duty to provide a seaworthy ship (Chapter 4) and the duty to not depart from the proper route (Chapter 5). The implied duty to proceed with reasonable despatch is considered in Chapter 11. Statutory duties arising under the Hague and Hague-Visby Rules are dealt with in Chapter 10.

1 THE CARRIER'S DUTY OF CARE

Paterson Steamships v Canadian Co-operative Wheat Producers
[1934] AC 538, PC

Facts

Wheat was shipped on the appellants' steamship *Sarniadoc* under a bill of lading that incorporated the Canadian Water-Carriage of Goods Act 1910. The vessel was stranded and the cargo lost during a gale. The Judicial Committee of the Privy Council held that the Act had to be considered in the light of the shipowner's liability at common law.

Held

> **Lord Wright:** It will therefore be convenient here, in construing those portions of the Act which are relevant to this appeal, to state in very summary form the simplest principles which determine the obligations attaching to a carrier of goods by sea or water. At common law, he was called an insurer, that is he was absolutely responsible for delivering in like order and condition at the destination the goods bailed to him for carriage. He could avoid liability for loss or damage only by showing that the loss was due to the act of God or the King's enemies. But it became the practice for the carrier to stipulate that for loss due to various specified contingencies or perils he should not be liable: the list of these specific excepted perils grew as time went on. That practice, however, brought into view two separate aspects of the sea carrier's duty which it had not been material to consider when his obligation to deliver was treated as absolute. It was recognized that his overriding obligations might be analysed into a special duty to exercise due care and skill in relation to the carriage of the goods and a special duty to furnish a ship that was fit for the adventure at its inception. These have been described as fundamental undertakings, or implied obligations. If then goods were lost (say) by perils of the seas, there could still remain the inquiry whether or not the loss was also due to negligence or unseaworthiness. If it was, the bare exception did not avail the carrier . . .

Note

Lord Wright's judgment suggests that the carrier's duty of care was developed to prevent unfair reliance by carriers on exclusion clauses. Two other explanations of the origins of the duty of care can be found in the law reports. One is that the duty is simply a consequence of the carrier's position as a bailee. Another explanation is that the duty grew from a standard approach to the interpretation of exclusion clauses ('Negligence … came in as an exception on an exception': *The Torenia* [1983] 2 Lloyd's Rep 211). These explanations are not necessarily inconsistent: it seems likely that all three factors played a part in the development of the modern law.

2 CARE AND PERILS OF THE SEA

The Xantho (1887) 12 App Cas 503

Facts

Goods were shipped on the defendants' vessel at Cronstadt for carriage to Hull under bills of lading which were endorsed to the plaintiffs. The bills of lading contained exceptions for dangers and accidents of the sea. The *Xantho* collided with another vessel in fog and was lost. The plaintiffs brought proceedings for non-delivery. In the House of Lords, the appellant shipowners argued that since collision was a peril of the sea in a policy of insurance, it must also be a peril of the sea in a bill of lading.

Held

> **Lord Macnaghten** (515): My Lords, in this case the bill of lading on which the question arises is in common form. In the usual terms it states the engagement on the part of the shipowner to deliver the goods entrusted to his care. At the same time it specifies, by way of exception, certain cases in which failure to deliver those goods may be excused. So much for the express terms of the bill of lading. But the shipowner's obligations are not limited and exhausted by what appears on the face of the instrument. Underlying the contract, implied and involved in it . . . there is also an engagement on his part to use due care and skill in navigating the vessel and carrying the goods. Having regard to the duties thus cast upon the shipowner, it seems to follow as a necessary consequence, that even in cases within the very terms of the exception in the bill of lading, the shipowner is not protected if any default or negligence on his part has caused or contributed to the loss.

Note

The Xantho is an important decision but it is far from unique. There are many other clear statements in the cases to the same effect: see, for example, *The Glendarroch* [1894] P 226 and *The Super Servant Two* [1990] 1 Lloyd's Rep 1, CA.

3 CARE AND FIRE

Lord Macnaghten's judgment in *The Xantho* suggests that, on analysis, a contract for the carriage of goods by sea can be seen to consist of an absolute promise by the carrier to carry and deliver and a separate implied promise to do so carefully. In the next extract, Scrutton LJ suggests a way in which these two duties can be harmonised.

In Re Polemis and Furness, Withy & Co [1921] 3 KB 560, CA

Facts

The steamship *Thrasyvoulos* was lost by fire while being discharged by workmen employed by the charterers. Arbitrators held that the fire was caused by a spark

igniting petrol vapour in the hold. The vapour came from leaks from cargo shipped by the charterers. The spark was caused by stevedores employed by the charterers who negligently knocked a plank out of a temporary staging erected in the hold, so that the plank fell into the hold, and in its fall by striking something made the spark which ignited the petrol vapour.

Held

Scrutton LJ: On these findings the charterers contend that they are not liable [*inter alia*, because] they are protected by an exception of 'fire' which in the charter is 'mutually excepted' . . .

An excepted perils clause, if fully expanded, runs that one of the parties undertakes to do something unless prevented by an excepted peril, in which case he is excused. But where he has an obligation to do some act carefully, if he fails in his obligation, and by his negligence an excepted peril comes into operation and does damage, the excepted peril does not prevent him from acting carefully, and he is liable for damages directly flowing from his breach of his obligation to act carefully, though the breach acts through the medium of an excepted peril. It is a commonplace of mercantile law that if a peril of the sea is brought into operation by the carelessness of the shipowner or his servants, he is liable, though perils of the sea are excepted perils, unless he has also a clause excepting the negligence of his servants. In the same way, though the charterer has an exception of fire in his favour, he will be liable if the fire was directly caused by his servants' negligence, for it was not fire that prevented them from being careful. This disposes of the first defence.

4 CARE TO AVOID CONSEQUENCES

In *Polemis*, above, the negligent conduct occurred before the events to which the excepted peril was said to apply and which caused the damage. The next extract shows how a breach of the carrier's duty of care may occur at a later stage, after initial damage covered by an exemption clause has occurred.

Notara v Henderson (1872) LR 7 QB 225, Court of Exchequer Chamber

Facts

The plaintiffs shipped beans on board the defendants' ship *Trojan*, under a bill of lading, from Alexandria to Glasgow, with leave to call at intermediate ports. The ship called at Liverpool and on leaving the port met with a collision (a peril excepted in the bill of lading) and had to put back for repairs. The beans became wet in consequence of the collision and, on arrival at Glasgow, had deteriorated in value. This deterioration could have been prevented if they had been dried at Liverpool. The plaintiffs sued to recover this loss.

Held

Willes J (reading the judgment of the Court): The question thus raised is a compound one of law and fact; first, of law, whether there be any duty on the part of the shipowners, through the master, to take active measures to prevent the cargo from being spoilt by damage originally occasioned by sea accidents, without fault on their part, and for the proximate and unavoidable effects of which accident they are exempt from responsibility by the terms of the bill of lading; and secondly, of fact, whether, if there be such a duty, there was, under the circumstances of this case, a breach thereof in not drying the beans . . .

That a duty to take care of the goods generally exists cannot be doubted . . . the duty imposed upon the master, as representing the shipowner, [is] to take reasonable care of the goods entrusted to him, not merely in doing what is necessary to preserve them on board the ship

during the ordinary incidents of the voyage, but also in taking reasonable measures to check and arrest their loss, destruction, or deterioration, by reason of accidents, for the necessary effects of which there is, by reason of the exception in the bill of lading, no original liability.

The exception in the bill of lading was relied upon in this court as completely exonerating the shipowner; but it is now thoroughly settled that it only exempts him from the absolute liability of a common carrier, and not from the consequences of the want of reasonable skill, diligence, and care, which want is popularly described as 'gross negligence'. This is settled, so far as the repairs of the ship are concerned, by the judgment of Lord Wensleydale in *Worms v Storey* (1855) 11 Ex 427, 430; as to her navigation, by a series of authorities collected in *Grill v General Iron Screw Collier Co* (1866) LR 1 C P 600; (1868) 3 CP 476; and as to her management, so far as affects the case of the cargo itself, in *Laurie v Douglas* (1846) 15 M & W 746; where the Court (in a judgment unfortunately not reported at large) upheld a ruling of Pollock, CB, that the shipowner was only bound to take the same care of the goods as a person would of his own goods, viz, 'ordinary and reasonable care'. These authorities and the reasoning upon which they are founded are conclusive to shew that the exemption is from liability for loss which could not have been avoided by reasonable care, skill, and diligence, and that it is inapplicable to the case of a loss arising from the want of such care, and the sacrifice of the cargo by reason thereof, which is the subject-matter of the present complaint. For these reasons we think the shipowners are answerable for the conduct of the master, in point of law, if, in point of fact, he was guilty of a want of reasonable care of the goods in not drying them at Liverpool . . .

(The Court held, affirming the judgment of the Court of Queen's Bench, that the facts shewed that the beans might have been taken out and dried and then re-shipped, without unreasonably delaying the voyage; that it was, therefore, the master's duty to have done so, and consequently the defendants were liable.)

5 EXCLUSION OF DUTY TO EXERCISE DUE CARE

At common law, just as the parties to a contract could agree to exclude the carrier's liability for particular perils – perils of the sea, for example – so also it was possible to agree expressly that the carrier would not be liable for negligence which caused loss. But English courts adopt a cautious approach to the interpretation of clauses of this type.

The Raphael [1982] 2 Lloyd's Rep 42

Held

May LJ: . . . if an exemption clause of the kind we are considering excludes liability for negligence expressly, then the Courts will give effect to the exemption. If it does not do so expressly, but its wording is clear and wide enough to do so by implication, then the question becomes whether the contracting parties so intended. If the only head of liability upon which the clause can bite in the circumstances of a given case is negligence, and the parties did or must be deemed to have applied their minds to this eventuality, then clearly it is not difficult for a Court to hold that this was what the parties intended – that this is its proper construction. Indeed, to hold otherwise would be contrary to commonsense. On the other hand if there is a head of liability upon which the clause could bite in addition to negligence then, because it is more unlikely than not a party will be ready to excuse his other contracting party from the consequences of the latter's negligence, the clause will generally be construed as not covering negligence. If the parties did or must be deemed to have applied their minds to the potential alternative head of liability at the time the contract was made then, in the absence of any express reference to negligence, the Courts can sensibly only conclude that the relevant clause was not intended to cover negligence and will refuse so to construe it. In other words, the Court asks itself what in all the relevant circumstances the parties intended the alleged exemption clause to mean.

Note

A vivid example of the approach described by May LJ in *The Raphael* can be found in *Industrie Chimiche v Nea Ninemia* [1983] 1 Lloyd's Rep 310 where Bingham J concluded that 'errors of navigation' in cl 16 of the New York Produce Exchange (NYPE) charter form meant 'non-negligent errors of navigation', reasoning that the clause might have been intended to protect the carrier against claims based on the strict liability of a sea carrier at common law, rather than negligent errors of navigation. This decision was approved by the Court of Appeal in *Seven Seas Transportation Ltd v Pacifico Union Marina Corp, The Satya Kailash and Oceanic Amity* [1984] 1 Lloyd's Rep 588.

6 BURDEN OF PROOF

The burden of proof in a cargo claim is of course a matter of great importance in legal practice. But the leading cases are also important for the explanation which they provide of the underlying substantive law and are included here for that reason.

The Glendarroch [1894] P 226, CA

Facts

The plaintiffs were shippers and consignees of cement which was damaged by sea water and became valueless when the *Glendarroch* stranded on St Patrick's Causeway in Cardigan Bay. They brought an action against the defendants for non-delivery. The goods had been shipped under a bill of lading which excepted losses by perils of the sea, but did not relieve the carrier from liability for negligence. The Court of Appeal held that it was for the plaintiffs to prove the contract and for the defendants to prove loss by perils of the sea. If they did so, the burden of proving that the defendants were not entitled to the benefit of the exception on the ground of negligence was on the parties who alleged it, who in this case were the plaintiffs.

Held

> **Lord Esher MR**: We have to treat this case as if the contract were in the ordinary terms of a bill of lading. The contract being one on the ordinary terms of a bill of lading, the goods are shipped on the terms that the defendant undertakes to deliver them at the end of the voyage unless the loss of the goods during the voyage comes within one of the exceptions in the bill of lading . . .
>
> When you come to the exceptions, among others, there is that one, perils of the sea. There are no words which say 'perils of the sea not caused by the negligence of the captain or crew'. You have got to read those words in by a necessary inference. How can you read them in? They can only be read in, in my opinion, as an exception upon the exceptions. You must read in, 'Except where the loss is by perils of the sea, unless or except that loss is the result of the negligence of the servants of the owner'.
>
> That being so, I think that according to the ordinary course of practice each party would have to prove the part of the matter which lies upon him. The plaintiffs would have to prove the contract and the non-delivery. If they leave that in doubt, of course they fail. The defendants' answer is, 'Yes; but the case was brought within the exception – within its ordinary meaning'. That lies upon them. Then the plaintiffs have a right to say there are exceptional circumstances, viz, that the damage was brought about by the negligence of the defendants' servants, and it seems to me that it is for the plaintiffs to make out that second exception . . .

***Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd, The Kingswood* [1941] 2 All ER 165, HL**

The decision in *The Glendarroch* was cited with approval in this case.

Held

Viscount Simon: It is ancient law that, by an implied term of the contract, the shipowner cannot rely on the exception [of perils of the sea] if its operation was brought about either (i) by negligence of his servants, or (ii) by his breach of the implied warranty of seaworthiness. If a ship sails and is never heard of again, the shipowner can claim protection for loss of the cargo under the express exception of perils of the seas. To establish that, must he go on to prove (i) that the perils were not caused by negligence of his servants, and (ii) were not caused by unseaworthiness? I think clearly not. He proves a *prima facie* case of loss by sea perils, and then he is within the exception. If the cargo owner wants to defeat that plea, it is for him by rejoinder to allege and prove either negligence or unseaworthiness. The judgment of the Court of Appeal in *The Glendarroch* is plain authority for this . . .

Note

See further Ezeoke, C, 'Allocating onus of proof in sea cargo claims' (2001) LMCLQ 261.

7 LIABILITY IN TORT

The sea carrier's contractual rights and duties limit the importance of a duty of care in tort as between the parties to a contract for the carriage of goods by sea. However, tort liability is important where there is actionable fault on the part of someone with whom the owner of the goods is not in contract, typically a sub-carrier or an employee or agent of the contracting carrier, such as a stevedore. The two cases in this section deal with the accrual of the cause of action for negligence, a topic that gives rise to special difficulties in the circumstances in which carriage contracts are performed. Also see Chapter 9 for the general topic of carriage contracts and third parties.

***Leigh and Sillivan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785**

Facts

Leigh and Sillivan were buyers of a cargo of steel coils. The coils were damaged by bad stowage, which caused crushing, condensation and then rust. The damage was done at a time when the risk, but not the legal property in the goods had passed to the buyers. The special terms of the purchase contract agreed between the buyers and the sellers of the steel meant that, in the unusual circumstances of the case, the buyers had no right of action in contract against the owners of *Aliakmon*. The following extract deals with the claim made by the buyers against the shipowners in tort.

Held

Lord Brandon: . . . My Lords, there is a long line of authority for a principle of law that, in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it. The line of authority to which I have referred includes the following cases: *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453 (contractor doing work on another's land

unable to recover from a waterworks company loss suffered by him by reason of that company's want of care in causing or permitting water to leak from a water pipe laid and owned by it on the land concerned); *Simpson & Co v Thomson* (1877) 3 App Cas 279 (insurers of two ships A and B, both owned by C, unable to recover from C loss caused to them by want of care in the navigation of ship A in consequence of which she collided with and damaged ship B); *Société Anonyme de Remorquage à Hélice v Bennetts* [1911] 1 KB 243 (tug owners engaged to tow ship A unable to recover from owners of ship B loss of towage remuneration caused to them by want of care in the navigation of ship B in consequence of which she collided with and sank ship A); *Chargeurs Réunis Compagnie Française de Navigation a Vapeur v English & American Shipping Co* (1921) 9 LIL R 464 (time charterer of ship A unable to recover from owners of ship B loss caused to them by want of care in the navigation of ship B in consequence of which she collided with and damaged ship A); *The World Harmony* [1967] P 341 (same as preceding case). The principle of law referred to is further supported by the observations of Scrutton LJ in *Elliott Steam Tug Co Ltd v Shipping Controller* [1922] 1 KB 127, 139–140.

None of these cases concerns a claim by cif or c and f buyers of goods to recover from the owners of the ship in which the goods are carried loss suffered by reason of want of care in the carriage of the goods resulting in their being lost or damaged at a time when the risk in the goods, but not yet the legal property in them, has passed to such buyers. The question whether such a claim would lie, however, came up for decision in *Margarine Union GmbH v Cambay Prince Steamship Co Ltd (The Wear Breeze)* [1969] 1 QB 219 . . . Roskill J held [it would] not, founding his decision largely on the principle of law established by the line of authority to which I have referred . . .

[In] *The Mineral Transporter* [1986] AC 1 . . . a collision took place between ships A and B solely by reason of want of care in the navigation of ship B. As a result of the collision ship A was damaged and had to be repaired, and during the period of repair the first plaintiff, who was the time charterer of ship A, suffered loss in the form of wasted payments of hire and loss of profits. The Supreme Court of New South Wales held that the first plaintiff was entitled to recover his loss from the owners of ship B. On appeal to the Privy Council that decision was reversed and it was held that the first plaintiff had no right of suit in respect of his loss. It was urged on the Board that the rule against admitting claims for loss arising solely from a contractual relationship between a plaintiff and the victim of a negligent third party could no longer be supported, and that it was enough that the loss was a direct result of a wrongful act and that it was foreseeable. The judgment of the Board was given by Lord Fraser of Tullybelton who rejected this contention. He made a full examination of the long line of English authority to which I referred earlier, and also of certain Scottish, Australian, Canadian and American decisions. He expressed the conclusion of the Board, at p 25:

> Their Lordships consider that some limit or control mechanism has to be imposed upon the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence . . . The common law limitation which has been generally accepted is that stated by Scrutton LJ in *Elliott Steam Tug Co Ltd v Shipping Controller* [1922] 1 KB 127, 139–140 . . . Not only has that rule been generally accepted in many countries including the United Kingdom, Canada, the United States of America and until now Australia, but it has the merit of drawing a definite and readily ascertainable line. It should enable legal practitioners to advise their clients as to their rights with reasonable certainty, and their Lordships are not aware of any widespread dissatisfaction with the rule. These considerations operate to limit the scope of the duty owed by a wrongdoer . . .

Mr Clarke [counsel] said, rightly in my view, that the policy reason for excluding a duty of care in cases like *The Mineral Transporter* and what I earlier called the other non-recovery cases was to avoid the opening of the floodgates so as to expose a person guilty of want of care to unlimited liability to an indefinite number of other persons whose contractual rights have been adversely affected by such want of care. Mr Clarke went on to argue that recognition by the law of a duty of care owed by shipowners to a cif or c and f buyer, to whom the risk but not yet the property in the goods carried in such shipowners' ship has passed, would not of itself open any floodgates of

the kind described. It would, he said, only create a strictly limited exception to the general rule, based on the circumstance that the considerations of policy on which that general rule was founded did not apply to that particular case. I do not accept that argument. If an exception to the general rule were to be made in the field of carriage by sea, it would no doubt have to be extended to the field of carriage by land, and I do not think that it is possible to say that no undue increase in the scope of a person's liability for want of care would follow. In any event, where a general rule, which is simple to understand and easy to apply, has been established by a long line of authority over many years, I do not think that the law should allow special pleading in a particular case within the general rule to detract from its application. If such detraction were to be permitted in one particular case, it would lead to attempts to have it permitted in a variety of other particular cases, and the result would be that the certainty, which the application of the general rule presently provides, would be seriously undermined. Yet certainty of the law is of the utmost importance, especially but by no means only, in commercial matters. I therefore think that the general rule, re-affirmed as it has been so recently by the Privy Council in *The Mineral Transporter* [1986] AC 1, ought to apply to a case like the present one . . .

As I said earlier, Mr Clarke submitted that your Lordships should hold that a duty of care did exist in the present case, but that it was subject to the terms of the bill of lading. With regard to this suggestion Sir John Donaldson MR said in the present case [1985] QB 350, 368:

> I have, of course, considered whether any duty of care owed in tort to the buyer could in some way be equated to the contractual duty of care owed to the shipper, but I do not see how this could be done. The commonest form of contract of carriage by sea is one on the terms of the Hague Rules. But this is an intricate blend of responsibilities and liabilities (Article III), rights and immunities (Article IV), limitations in the amount of damages recoverable (Article IV, r 5), time bars (Article III, r 6), evidential provisions (Article III, rr 4 and 6), indemnities (Article III, r 5 and Article IV, r 6) and liberties (Article IV, rr 4 and 6). I am quite unable to see how these can be synthesised into a standard of care.

I find myself suffering from the same inability to understand how the necessary synthesis could be made as the Master of the Rolls.

As I also said earlier, Mr Clarke sought to rely on the concept of a bailment on terms as a legal basis for qualifying the duty of care for which he contended by reference to the terms of the bill of lading. He argued that the buyers, by entering into a c and f contract with the sellers, had impliedly consented to the sellers bailing the goods to the shipowners on the terms of a usual bill of lading which would include a paramount clause incorporating the Hague Rules. I do not consider that this theory is sound. The only bailment of the goods was one by the sellers to the shipowners. That bailment was certainly on the terms of a usual bill of lading incorporating the Hague Rules. But, so long as the sellers remained the bailors, those terms only had effect as between the sellers and the shipowners. If the shipowners as bailees had ever attorned to the buyers, so that they became the bailors in place of the sellers, the terms of the bailment would then have taken effect as between the shipowners and the buyers. Because of what happened, however, the bill of lading never was negotiated by the sellers to the buyers and no attornment by the shipowners ever took place. I would add that, if the argument for the buyers on terms of bailment were correct, there would never have been any need for the Bills of Lading Act 1855 or for the decision of the Court of Appeal in *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575 to which I referred earlier . . .

My Lords . . . Mr Clarke [also] submitted that any rational system of law ought to provide a remedy for persons who suffered the kind of loss which the buyers suffered in the present case, with the clear implication that, if your Lordships' House were to hold that the remedy for which he contended was not available, it would be lending its authority to an irrational feature of English law. I do not agree with this submission for, as I shall endeavour to show, English law does, in all normal cases, provide a fair and adequate remedy for loss of or damage to goods the subject matter of a cif or c and f contract, and the buyers in this case could easily, if properly advised at the

time when they agreed to the variation of the original c and f contract, have secured to themselves the benefit of such a remedy.

As I indicated earlier, under the usual cif or c and f contract the bill of lading issued in respect of the goods is endorsed and delivered by the seller to the buyer against payment by the buyer of the price. When that happens, the property in the goods passes from the sellers to the buyers upon or by reason of such endorsement, and the buyer is entitled, by virtue of section 1 of the Bills of Lading Act 1855, to sue the shipowners for loss of or damage to the goods on the contract contained in the bill of lading. The remedy so available to the buyer is adequate and fair to both parties, and there is no need for any parallel or alternative remedy in tort for negligence. In the present case, as I also indicated earlier, the variation of the original c and f contract agreed between the sellers and the buyers produced a hybrid contract of an extremely unusual character. It was extremely unusual in that what had originally been an ordinary c and f contract became, in effect, a sale ex-warehouse at Immingham, but the risk in the goods during their carriage by sea remained with the buyers as if the sale had still been on a c and f basis. In this situation the persons who had a right to sue the shipowners for loss of or damage to the goods on the contract contained in the bill of lading were the sellers, and the buyers, if properly advised, should have made it a further term of the variation that the sellers should either exercise this right for their account (see *The Albazero* [1977] AC 774) or assign such right to them to exercise for themselves. If either of these two precautions had been taken, the law would have provided the buyers with a fair and adequate remedy for their loss.

These considerations show, in my opinion, not that there is some lacuna in English law relating to these matters, but only that the buyers, when they agreed to the variation of the original contract of sale, did not take the steps to protect themselves which, if properly advised, they should have done. To put the matter quite simply the buyers, by the variation to which they agreed were depriving themselves of the right of suit under section 1 of the Bills of Lading Act 1855 which they would otherwise have had, and commercial good sense required that they should obtain the benefit of an equivalent right in one or other of the two different ways which I have suggested . . .

My Lords, if I had reached a different conclusion on the main question of the existence of a duty of care, and held that such a duty of care, qualified by the terms of the bill of lading, did exist, it would have been necessary to consider the further question whether, on the rather special facts of this case, the shipowners committed any breach of such duty. As it is, however, an answer to that further question is not required.

Notes

1 In the course of his judgment in this case Lord Brandon also rejected suggestions that the buyers could recover as owners of the goods in equity or on the basis of a suggested principle of transferred loss. The Bills of Lading Act 1855 was repealed and replaced by the Carriage of Goods by Sea Act 1992; for the 1992 Act, *The Albazero*, *Brandt* contracts and the doctrine of bailment on terms, see further, Chapter 9.

2 The decision in *The Aliakmon* stressed the need for a clear and certain general rule defining the ambit of the carrier's duty of care in tort. A rule may be clear, but difficult to apply in practice, as the next case demonstrates and where it is also suggested that an aspect of the general rule is still uncertain.

Homburg Houtiport BV v Agrosin Private Ltd, The Starsin
[2001] EWCA Civ 55; [2001] 1 Lloyd's Rep 437

Facts

Parcels of timber and plywood were carried from three ports in Malaysia to Avonmouth and Antwerp under bills of lading. The cargo was delivered damaged and three claimants, holders of the bills of lading, brought actions in contract and tort. The

damage was caused by rain before shipment and then by condensation during the voyage. The stowage was negligent, with inadequate dunnage, inadequate ventilation and improper stowage in one compartment of parcels with different moisture contents. Damage caused by the negligence was progressive throughout the voyage. But at the moment the voyage began, with one exception, the goods were still owned by the shippers and not the claimants. The claimants sought to recover in respect of damage that occurred after they had acquired title. For other aspects of this case, see Chapter 9.

Held (obiter)

Rix LJ: 77 The traditional view is that a shipowner can only be sued in tort by a cargo-owner whose cargo has suffered damage while on board the vessel by reason of a breach of duty owed to that cargo-owner. Thus damage done to a future owner of the damaged cargo, before the passing of title to that owner, will not give him a cause of action in tort. See *Margarine Union GmbH v Cambay Prince Steamship Co Ltd (The Wear Breeze)* [1969] 1 QB 219 and *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785.

78 In the present case, the breach of duty occurred on loading or at latest on completion of loading on Dec 8 in the form of negligent stowage at a time when, other than in the case of Makros Hout, the shippers and not the claimants owned the cargo. The damage caused by that negligence was progressive throughout the voyage and throughout the damaged parcels: it was also inevitable in that it was common ground that there was nothing that could be done to mitigate the effects of the initial breach. The claimants make no claim in respect of the damage which had occurred before they obtained title respectively to their goods, only in respect of the continuing damage which occurred after title had passed. The Judge . . . held that a duty of care was owed at the time of loading to all those, such as the claimants, who would become owners of the cargo during the course of the voyage, that there was a breach of that duty at the outset, and that the cause of action in tort was completed once further damage had occurred after the transfer of title to each claimant in respect of their goods . . .

79 In *The Wear Breeze* and again in *The Aliakmon* the plaintiff cargo-owners never obtained title to the goods until after discharge from the vessels concerned. There never was in those cases any damage caused on board the vessels after title had passed to the purchasers. Nor of course was there any breach by the shipowners of any duty of care at a time when the plaintiffs were owners of cargo on the vessels. Therefore the precise point which has arisen in the present case was never in issue there. The difficulty which has now arisen is to determine whether the rule laid down in those cases was to require both breach of duty and damage to occur at a time when the claimants had title, or whether it is sufficient that damage occurs after the claimants have gained title albeit in respect of a breach of duty which predates the transfer of title. Or to put the matter in another way: is Mr Justice Colman [trial judge] right to say that those cases contemplate that a duty can be owed, and thus broken, to future owners of cargo, or only to those who are owners at the time of breach?

80 One difficulty in answering this problem is that by and large in *The Wear Breeze* Mr Justice Roskill spoke in terms of the time when the negligence occurred, whereas in *The Aliakmon* Lord Brandon of Oakbrook spoke in terms of the time when the damage occurred. If the latter formulation is the correct rule, as Mr Jacobs [counsel for claimants] submits, then it admits of the possibility of Mr Justice Colman's conclusion; whereas if the former formulation is correct, as Mr Berry [counsel for defendants] submits – and *The Wear Breeze* was approved by Lord Brandon – then it is hard to see how Mr Justice Colman's solution can be accepted . . .

94 These are interesting submissions. When all is said and done, it remains true that in *The Wear Breeze*, *The Irene's Success* and *The Aliakmon* the precise issue did not arise because the claimants there never obtained title while the goods were on board the vessel or before all relevant loss had already been suffered. It is also perhaps arguable that, even if it may be said that both Mr Justice Roskill and Lord Brandon considered that no duty of care was owed to the claimants in those

cases, they simply did not have in mind the case of a claimant who had actually suffered damage to his goods during the voyage, and after they had become his goods on the voyage. The contrary argument is that there is a firm and well-known rule applying to the carriage of goods, any difficulties in that rule in this context are dealt with in contract by the exceptional statutory effect given to the transfer of a bill of lading, and that it is not necessary or desirable to forego the certainty and simplicity of the old rule to cover exceptional cases where a claimant either has never taken a transfer of the bill of lading or wants to have his own independent remedies against the shipowner in tort as well as against his contract partner under the bill of lading.

95 In my judgment, however, it is not necessary to resolve this point, for in the present case all the damaged goods were treated as having already suffered condensation damage before the transfer of title in them took place (Makros Hout is now revealed as an exception) and in respect of negligence which had already occurred by at latest the start of the voyage. All subsequent condensation damage continuing beyond the transfer of title in the respective parcels was merely the continuation and progression of the damage already suffered. No new negligence, no new mechanism of damage, postdated the transfer of title. It was not submitted that the negligent act of stowage was a continuing breach, merely that the fresh damage which occurred after the claimants had each acquired title created new causes of action in the hands of each new owner of cargo . . .

96 In my judgment, however, the cause of action in respect of the negligent stowage was in the present circumstances completed once and for all when more than insignificant damage was caused by that negligence to the respective parcels of timber. On Mr Justice Colman's findings that would have been not long after the voyage began. That cause of action was possessed by the then owners of that cargo, the shippers or Makros Hout. The principle in question was laid down in *Cartledge v E Jopling & Sons* [1963] AC 758 in the case of personal injury, and in *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1 in the case of damage to property . . .

105 In my judgment . . . progressive damage originating from one act or omission creates a single cause of action . . . It may be different where entirely different damage is done on different occasions by reason of a different defect, as where, owing to defective hatch covers, one hold is flooded on one day and another hold is flooded on a different day: but that is for another occasion. In my judgment, however, the progressive damage done in this case does not create new causes of action in respect of the later stages of the same progressive damage, even in the hands of a new cargo-owner and even upon the assumption that the new cargo-owner was always within the scope of the shipowner's duty of care. Thus even if the underlying reasoning of Mr Justice Colman on this aspect of the case is correct, further consideration of the nature of the damage and the cause of action in question prevents recovery.

Notes

1 Rix LJ concluded that, with the exception of Makros Hout, the claims in tort must fail. In the case of one other claim it was said pre-transfer condensation damage of something over 5% of the cargo's value was 'more than negligible'.

2 On appeal to the House of Lords, Rix LJ's conclusion (paras 96 and 105, above) was approved. There was no discussion of the unresolved point raised in para 79.

CHAPTER 4

SEAWORTHINESS

As the last chapter explained, at common law it is an implied term of a contract for the carriage of goods by sea that the carrier will ensure that the ship is seaworthy. This duty is important and complex. It extends far beyond the provision of a ship that is able to remain afloat and move from place to place. The common law duty can, however, be modified or excluded by agreement provided clear words are used. If the intention is not clear, an exclusion or limitation clause in a contract will be interpreted as applying only to the carrier's express undertaking to carry and deliver the cargo. Thus an exception of perils of the sea does not qualify the duty to furnish a seaworthy ship: *Paterson Steamships Ltd v Canadian Co-operative Wheat Producers* [1934] AC 538, PC (see Chapter 3).

The extracts in this chapter deal first with the general features of the common law doctrine. Later sections deal with particular aspects of the duty, including the fitness of the ship for the particular cargo, the competence of the crew and the extent to which lack of necessary documents can render a ship unfit. The last three sections of the chapter deal with the times at which a ship must be seaworthy, causation and with the remedies available for breach. The Hague and Hague-Visby Rules, when they apply, modify the common law rules (see Chapter 10).

1 THE IMPLIED WARRANTY: ORIGINS

The carrier's duty to provide a vessel that was tight, staunch and properly manned and equipped for the voyage was a feature of customary maritime law recognised by many commentators. It was incorporated into modern English law by being treated – as *Lyon v Mells* shows – as an implied promise.

Lyon v Mells (1804) 5 East 428

Facts

The defendant agreed to lighter a quantity of yarn owned by the plaintiffs from the quayside at Hull to a vessel in the dock. The lighter leaked and partly capsized, damaging the yarn. The defendant relied on a public notice which purported to limit the liability of lightermen in the Humber area.

Held

> **Lord Ellenborough CJ:** . . . In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public; it is the very foundation and immediate substratum of the contract that it is so: the law presumes a promise to that effect on the part of the carrier without any actual proof; and every reason of sound policy and public convenience requires it should be so.
>
> . . . This brings me to consider the terms of the notice . . . Every agreement must be construed with reference to the subject matter; and looking at the parties to this agreement (for so I denominate the notice) and the situation in which they stood in point of law to each other, it is clear beyond a

doubt that the only object of the owners of the lighters was to limit their responsibility in those cases only where the law would otherwise have made them answer for the neglect of others, and for accidents which it might not be within the scope of ordinary care and caution to provide against. For these reasons, we are of opinion that the plaintiffs are entitled to have their verdict . . .

2 THE MODERN DOCTRINE: SUMMARY

Over the last 200 years, the implied duty recognised in *Lyon v Mells* has become increasingly complex. The decision in the next case, *The Eurasian Dream* contains a valuable restatement of the main features of the modern law which are considered in the following sections of this chapter.

***Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd, The Eurasian Dream* [2002] EWHC 118; [2002] 1 Lloyd's Rep 719**

Facts

A fire on the car carrier *Eurasian Dream* damaged the vessel's cargo of cars. It was alleged that the loss and damage was caused by unseaworthiness.

Held

Cresswell J: 125 The classic definition of seaworthiness is contained in the judgment of Lord Justice Scrutton in *FC Bradley & Sons Ltd v Federal Steam Navigation Co* (1926) 24 LIL Rep 446 at 454, approving a statement from *Carver on Carriage by Sea*:

> The ship must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it. To that extent the shipowner . . . undertakes absolutely that she is fit, and ignorance is no excuse. If the defect existed, the question to be put is, would a prudent owner have required that it should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy . . .

126 Seaworthiness is not an absolute concept; it is relative to the nature of the ship, to the particular voyage and even to the particular stage of the voyage on which the ship is engaged . . .

127 Seaworthiness must be judged by the standards and practices of the industry at the relevant time, at least so long as those standards and practices are reasonable.

128 The components of the duty (as illustrated by the case law) are as follows:

(1) The vessel must be in a suitable condition and suitably manned and equipped to meet the ordinary perils likely to be encountered while performing the services required of it. This aspect of the duty relates to the following matters.

(a) The physical condition of the vessel and its equipment.

(b) The competence / efficiency of the master and crew.

(c) The adequacy of stores and documentation.

(2) The vessel must be cargoworthy in the sense that it is in a fit state to receive the specified cargo.

Notes

1 The duty to provide a seaworthy ship is here described as both absolute and relative. The standard that the ship must meet is relative. But once that standard has been defined, at common law the shipowner's obligation to meet the standard is absolute: *Steel v State Line* (1877) 3 App Cas 72. It is no excuse that the owner did not know of a defect or that best endeavours were used to make the ship fit: *McFadden v Blue Star Line* [1905] 1 KB 697. The provisions of the Hague-Visby Rules

which modify this aspect of common law doctrine are contained in Art III, r 1 and Art IV: see Chapter 10.

2 The 'ordinary careful and prudent owner' test is not the only verbal formula used to decide if a ship is unseaworthy. An alternative is to ask if the ship, at the relevant moment, was reasonably fit to meet the perils of the voyage.

3 Unseaworthiness can take a number of forms and may relate to the vessel, stores and equipment, the competence and efficiency of the crew and/or to the documentation carried. This classification is best seen as one of convenience rather than a rigid framework into which every defect must fit neatly: defects often overlap the different classes.

4 A ship may be unseaworthy because of trivial as well as serious failings. But not every defect that requires attention will make a ship unseaworthy: *The Fjord Wind* [1999] 1 Lloyd's Rep 307, p 319; *The Pride of Donegal* [2002] EWHC 24 [2002] 1 Lloyd's Rep 659. The prudent shipowner might leave some defects to be rectified during the voyage or at a later day.

5 It is not necessary, in order to apply the prudent shipowner test, to identify the precise cause of every mechanical failure: *The Fjord Wind*, p 318. Where a serious failure occurs at sea without outside interference, the natural inference may be that the ship was unseaworthy on sailing. It has also been said that there is 'an inevitable presumption of fact' that a vessel is unseaworthy 'if there is something about it which endangers the safety of the vessel or its cargo or which might cause significant damage to its cargo or which renders it legally or practically impossible for the vessel to go to sea or to load or unload its cargo': *The Arianna* [1987] 2 Lloyd's Rep 376, p 389, *per* Webster J.

6 Examples of defects in the physical condition of a vessel or its equipment rendering it unseaworthy include:

- leaking hull: *Lyon v Mells* [1805] 1 KB 697;
- leaking hatch covers: *The Gundulic* [1981] 2 Lloyd's Rep 511;
- leaking sea valve: *McFadden v Blue Star Line*;
- porthole not capable of being closed at sea: *Steel v State Line*; *Dobell v Steamship Rossmore Co* [1905] 2 QB 408;
- neglecting to put in a nail: *Havelock v Geddes* (1809) 10 East 555;
- crankshaft with flaw in weld: *The Glenfruin* (1885) 10 PD 103;
- defective propeller: *SNIA v Suzuki* (1924) 29 Com Cas 284;
- insufficient spare parts: *The Pride of Donegal*;
- unsuitable spare parts: *The Kamsar Voyager* [2002] 2 Lloyd's Rep 57;
- sludge in lubricating oil: *The Kriti Rex* [1996] 2 Lloyd's Rep 373;
- insufficient supply of fuel: *The Vortigern,* [1899] P 140;
- contaminated fuel: *The Makedonia* [1962] P 190;
- contaminated cargo tanks and lines: *Vinmar v Theresa* [2001] 2 Lloyd's Rep 1;
- inadequate charts and navigation aids: *The Isla Fernandina* [2000] 2 Lloyd's Rep 15.

3 CARGOWORTHINESS

A ship which can navigate safely may still be unseaworthy in law if it is not fit to carry the agreed cargo. Some commentators prefer to treat cargoworthiness as a distinct

obligation, while others regard it as an example of the wider duty to ensure seaworthiness, as it is treated here. This difference is, in practice, one of presentation rather than substance.

***Tattersall v National Steamship Co* (1884) 12 QBD 297, DC**

Facts

The plaintiff shipped cattle on board the defendants' ship *France* for carriage from London to New York under a bill of lading which, among other things, provided that the defendants should not be liable 'for accidents, disease, or mortality, and that under no circumstances shall they be held liable for more than £5 for each of the animals'. The ship had on a previous voyage carried cattle suffering from foot and mouth disease. Some of the cattle shipped under the bill of lading were infected during the voyage. It was found that this was caused by the negligence of the defendants' servants in not cleaning and disinfecting the ship before loading the plaintiff's cattle on board. The plaintiff in consequence suffered damage amounting to more than £5 for each animal.

Held

> **Day J:** I take it to have been clearly established . . . that where there is a contract to carry goods in a ship there is, in the absence of any stipulation to the contrary, an implied engagement on the part of the person so undertaking to carry that the ship is reasonably fit for the purposes of such carriage. In this case it is clear that the ship was not reasonably fit for the carriage of these cattle. There is, therefore, a breach of their implied engagement by the defendants, and the plaintiff having sustained damage in consequence must be entitled to recover the amount of such damage, unless the defendants are protected by any express stipulation . . .
>
> I have considered the terms of the bill of lading, and, as I construe it, its stipulations which have been relied upon all relate to the carriage of the goods on the voyage, and do not in any way affect the liability for not providing a ship fit for their reception. If the goods had been damaged by any peril in the course of the voyage, which might be incurred in a ship originally fit for the purpose of the carriage of the goods, the case would have been wholly different, but here the goods were not damaged by any such peril, or by any peril which, in my opinion, was contemplated by the parties in framing the bill of lading. They were damaged simply because the defendants' servants neglected their preliminary duty of seeing that the ship was in a proper condition to receive them, and received them into a ship that was not fit to receive them. There is nothing in the bill of lading that I can see to restrict or qualify the liability of the defendants in respect of the breach of this obligation . . .

Note

Other examples of this type of unseaworthiness include:

- defective refrigerating machinery where the cargo was frozen meat: *Maori King v Hughes* [1895] 2 QB 550;
- bullion room not reasonably fit to resist bullion thieves: *Queensland National Bank v P & O* [1898] 1 QB 567;
- ship with no dunnage mats to protect dry cargo: *Hogarth v Walker* [1899] 2 QB 401;
- pumps inadequate for cargo: *Stanton v Richardson* (1872) LR 7 CP 421.

4 UNSEAWORTHINESS: COMPETENCE OF CREW

A crew which is inadequate in number, untrained or incompetently led or supervised is just as dangerous as a ship which is sent to sea with inadequate supply of fuel, the wrong charts or a hole in the hull. In all these cases, the vessel will be unseaworthy.

The decision in *Clan Line* confirmed the basic principle; the *Eurasian Dream,* below, summarises the position today.

***Standard Oil v Clan Line* [1924] AC 100**

Facts

The vessel's characteristics meant that special precautions had to be taken when ballasting. The owners knew of these peculiarities but the captain did not.

Held

> **Lord Atkinson:** . . . It is not disputed, I think, that a ship may be rendered unseaworthy by the inefficiency of the master who commands her. Does not that principle apply where the master's inefficiency consists, whatever his general efficiency may be, in his ignorance as to how his ship may, owing to the peculiarities of her structure, behave in circumstances likely to be met with on an ordinary ocean voyage? There cannot be any difference in principle, I think, between disabling want of skill and disabling want of knowledge. Each equally renders the master unfit and unqualified to command, and therefore makes the ship he commands unseaworthy. And the owner who withholds from the master the necessary information should, in all reason, be as responsible for the result of the master's ignorance as if he deprived the latter of the general skill and efficiency he presumably possessed . . .

***Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd, The Eurasian Dream* [2002] EWHC 118; [2002] 1 Lloyd's Rep 719**

Facts

The ship was a purpose built car carrier. A fire started while the vessel was in port. Cars were being jump-started in the same area in which petrol was being used to prime carburettors. A spark ignited petrol. The fire was not extinguished and cargo and the ship were destroyed. It was alleged that the ship was unseaworthy because there were too few portable radios, working fire extinguishers and sets of breathing apparatus. Other allegations were: that a CO_2 valve was defective and that the master ('a car carrier novice') and crew were ignorant of the peculiar hazards of car carriage and the fire fighting systems of the ship; that there had been insufficient training in fire fighting; and that the manuals carried on board dealing with fire prevention and control and the precautions to be taken were also inadequate.

Held

> **Cresswell J:** 129 As to the competence or efficiency of the master and crew:
>
> (1) Incompetence or inefficiency may consist of a 'disabling want of skill' or a 'disabling want of knowledge' . . .
>
> (2) Incompetence or inefficiency is a question of fact, which may be proved from one incident and need not be demonstrated by reference to a series of acts: *The Star Sea* [1997] 1 Lloyd's Rep 360 at 373–374 (*per* Lord Justice Leggatt). However, one mistake or even more than one mistake does not necessarily render a crew-member incompetent: *The Star Sea* at 374 . . .
>
> (3) Incompetence is to be distinguished from negligence and may derive from:
>
> (a) an inherent lack of ability;
>
> (b) a lack of adequate training or instruction: eg lack of adequate fire-fighting training;
>
> (c) a lack of knowledge about a particular vessel and/or its systems: *Standard Oil v Clan Line* [1924] AC 100, 121; *The Farrandoc* [1967] 2 Lloyd's Rep 276; *The Star Sea*;
>
> (d) a disinclination to perform the job properly . . .;
>
> (e) physical or mental disability or incapacity (eg drunkenness, illness) . . .

(4) The test as to whether the incompetence or inefficiency of the master and crew has rendered the vessel unseaworthy is as follows: Would a reasonably prudent owner, knowing the relevant facts, have allowed this vessel to put to sea with this master and crew, with their state of knowledge, training and instruction? (Mr Justice Salmon, *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 34.)

(5) As to causation, unseaworthiness must be 'a cause or, if it is preferred, a real or effective or actual cause [and] in truth, unseaworthiness … can never be the sole cause of the loss … It must, I think, always be only one of several co-operating causes … I can draw no distinction between cases where the negligent conduct of the master is a cause and cases in which any other cause, such as perils of the seas, or fire, is a co-operating cause …' (Lord Wright, *Smith Hogg & Co v Black Sea and Baltic General Insurance Co* [1940] AC 997 at 1005).

Applying these principles, Cresswell J held that the ship was unseaworthy because her equipment and people were inadequate. 'Had the crew … been properly instructed and trained they … would have prohibited simultaneous and proximate refuelling/jump-starting and there would not have been a fire.'

5 LACK OF NECESSARY DOCUMENTS

The duty to provide a seaworthy ship, as restated in *The Eurasian Dream*, requires the carrier to provide 'adequate documentation'. This aspect of the duty is less well developed than other features. The older common law decisions are reviewed in *The Derby*, which decided that a ship may be seaworthy even where the shipowner does not provide a document which is needed if the ship is to carry on her business without hindrance.

Alfred C Toepfer v Tossa Marine, The Derby [1985] 2 Lloyd's Rep 325, CA

Facts

The vessel was chartered on the New York Produce Exchange (NYPE) form. Line 22 of the charter provided 'vessel on her delivery to be ready to receive cargo … and in every way fitted for the service'. The vessel was delayed at Leixoes in Portugal when the ITF (an international workers organisation) discovered the vessel did not have and was not qualified to receive an ITF 'blue card', because the crew were not being paid at European rates.

Held

Kerr LJ: … The context in which the words 'in every way fitted for the service' occur shows that these words relate primarily to the physical state of the vessel. However, the authorities also show that their scope is wider, in at least two respects. First, in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, the words 'she being in every way fitted for ordinary cargo service' in the Baltime form of time charter were treated as forming part of an express warranty that the vessel was seaworthy, and it was held that this warranty required the provision of a sufficient and competent crew to operate the vessel for the purposes of the charter service. I accept that precisely the same reasoning applies to the words 'in every way fitted for the service' in the present case. To that extent, therefore, these words go beyond the purely physical state of the vessel as such. However, I cannot see any basis for any further enlargement of the scope of these words by extracting from them a warranty that the rates of pay and conditions of employment of the crew, with which they expressly declared themselves to be satisfied, must also comply with the requirements, not of any law which is relevant to the vessel, her crew or the vessel's operation under the charter, but also of a self-appointed and extra-legal organization such as the ITF. In my view this is not a meaning which these words can properly bear, let alone in the context in which they appear in the charter.

The second respect in which the scope of these words in line 22 has been held to go beyond the physical state of the vessel is that they have been held to cover the requirement that the vessel must carry certain kinds of documents which bear upon her seaworthiness or fitness to perform the service for which the charter provides. Navigational charts which are necessary for the voyages upon which the vessel may be ordered from time to time are an obvious illustration. For present purposes, however, we are concerned with certificates bearing upon the seaworthiness of the vessel. The nature of such certificates may vary according to the requirements of the law of the vessel's flag or the laws or regulations in force in the countries to which the vessel may be ordered, or which may lawfully be required by the authorities exercising administrative or other functions in the vessel's ports of call pursuant to the laws there in force. Documents falling within this category, which have been considered in the authorities, are certificates concerning the satisfactory state of the vessel which is in some respect related to her physical conditions, and accordingly to her seaworthiness. Their purpose is to provide documentary evidence for the authorities at the vessel's ports of call on matters which would otherwise require some physical inspection of the vessel, and possibly remedial measures – such as fumigation – before the vessel will be accepted as seaworthy in the relevant respect. The nature of description of such certificates, which may accordingly be required to be carried on board to render the vessel seaworthy, must depend on the circumstances and would no doubt raise issues of fact in individual cases. But I do not see any basis for holding that such certificates can properly be held to include documents other than those which may be required by the law of the vessel's flag or by the laws, regulations or lawful administrative practices of governmental or local authorities at the vessel's ports of call. An ITF blue card does not fall within this category, and I can therefore see no reason for including it within the scope of the words in line 22, even in their extended sense as indicated above.

Moreover, I do not consider that the words in line 22 have acquired as a matter of law, any 'expanded meaning', as the arbitrator suggests in para 5 above. The requirement of a deratisation certificate under the laws in force in India in 1957, which was the point at issue in *The Madeleine*, and without which the vessel could not sail to any other country, was in no way different in principle from the 'bill of health' required by the law of Sardinia, which fell to be considered in *Levy v Costerton* (1816) 4 Camp 389. Since a vessel chartered for a voyage from England to Sardinia could not enter and discharge in the port of Cagliari without this document, 'required from all ships even from England', and was consequently delayed by being put under quarantine by the local authorities, it was inevitably held in that case that the vessel had not been '… furnished with everything needful and necessary for such a ship, and for the voyage …'.

A decision about half-way in time between 1816 and the present was *Ciampa v British India Steam Navigation Co Ltd* [1915] 2 KB 774. On the appeal before us there was considerable controversy whether the reason for the unseaworthiness of the vessel on arrival in Marseilles in that case was the fact that she had previously called at Mombasa, which was contaminated by a plague, or whether she had a 'foul bill of health' in the sense of some deficiency in her proper documentation. In my view this is irrelevant for present purposes. The vessel was clearly unseaworthy at Marseilles in either event, whether on the ground that the local authorities required her to be fumigated because she had recently called at Mombasa, or because she did not have any document certifying a 'clean bill of health', in the same way as the vessel in *Levy v Costerton*. On whichever basis that decision in 1915 falls to be considered, it is wholly in line with the other two cases decided respectively in 1816 and 1967. The same applies to the 'tonnage certificate' required by Swedish law which was in issue in *Chellew Navigation Co Ltd v AR Appelquist Kolinport AG* (1933) 45 LIL Rep 190 and (1932) 38 Com Cas 218, which the learned Judge also discussed in his judgment. In that case the umpire held, on the facts, that it was no part of the shipowners' obligation to obtain this certificate, or at any rate not by the time when the charterers had obtained it at their own expense.

I can therefore see no basis for the arbitrator's conclusion in the present case that the words in line 22 of this form of charter-party have somehow acquired an expanded meaning in our law so

as to lead to the conclusion that a document in the nature of an ITF blue card can nowadays be held to fall within the requirements imposed upon shipowners by virtue of these words …

6 TIME AT WHICH WARRANTY ATTACHES: THE DOCTRINE OF STAGES

At common law, the carrier's duty to provide a seaworthy ship is not a continuing obligation that extends throughout the period covered by the carriage contract. The duty arises only at particular points in time. Two key points are the moment that cargo is loaded and the moment that the ship sails. However, these are not the only relevant times.

The Vortigern [1899] P 140, CA

Facts

The owners of the steamship *Vortigern* sued the defendants to recover the freight due under a charterparty under which shipowners had agreed to carry a cargo of copra to Liverpool from Cebu, Phillipine Islands. The defence was that a portion of the defendants' cargo had been burned as fuel because insufficient coal had been loaded and that the shipowners were in breach of the implied warranty of seaworthiness which attached to the contract of affreightment at the commencement of the voyage.

Held

AL Smith LJ: … The implied warranty which *prima facie* attaches to a charterparty such as the present is that the ship shall be seaworthy for the voyage at the time of sailing, by which is meant that the vessel shall then be in a fit state as to repairs, equipment, and crew, and in all other respects, sufficient to take her in ordinary circumstances to her port of destination, though there is no warranty that the ship shall continue seaworthy during the voyage.

That coals are part of the equipment of a steamship I do not doubt, and if the voyage in this case had been an ordinary voyage, as to which there was no necessity, as regards taking in coal, for dividing it into stages, it cannot be denied that the steamship was unseaworthy when she started from Cebu on her voyage to Liverpool, for the simple reason that she had not then on board an equipment of coal sufficient to take her in ordinary circumstances to her port of destination …

In my judgment when a question of seaworthiness arises between either a steamship owner and his underwriter upon a voyage policy, or between a steamship owner and a cargo owner upon a contract of affreightment, and the underwriter or cargo owner establishes that the ship at the commencement of the voyage was not equipped with a sufficiency of coal for the whole of the contracted voyage, it lies upon the shipowner, in order to displace this defence, which is a good one, to prove that he had divided the voyage into stages for coaling purposes by reason of the necessity of the case, and that, at the commencement of each stage, the ship had on board a sufficiency of coal for that stage – in other words, was seaworthy for that stage. If he fails in this he fails in defeating the issue of unseaworthiness which *prima facie* has been established against him. In each case it is a matter for proof as to where the necessity of the case requires that each stage should be, and I think that in the present case the necessity for coaling places at Colombo and Suez has been established.

This question of dividing up voyages into stages, as regards the warranty of seaworthiness, is by no means destitute of authority. There are numerous cases decided upon policies of marine insurance when the voyage is divided into stages, and there is also a case in this Court relating to the warranty of seaworthiness upon a contract of affreightment when the voyage was divided into stages.

As regards the first class of cases it suffices to cite from a judgment of Lord Penzance, when delivering the judgment of the Judicial Committee of the Privy Council, consisting of himself, Sir

William Erle, and Giffard LJ in the case of the *Quebec Marine Insurance Co v Commercial Bank of Canada* (1870) LR 3 PC 234 where the numerous prior authorities relating to voyages consisting of different stages are referred to. Lord Penzance says:

> The case of *Dixon v Sadler* (1841) 5 M & W 405 and the other cases which have been cited, leave it beyond doubt that there is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases, as in a case that has been put forward of a whaling voyage, for some definite, well recognised, and distinctly separate stage of the voyage. This principle has been sanctioned by various decisions; but it has been equally well decided that the vessel in cases where these several distinct stages of navigation involve the necessity of a different equipment or state of seaworthiness, must be properly equipped, and in all respects seaworthy for each of these stages of the voyage respectively at the time when she enters upon each stage, otherwise the warranty of seaworthiness is not complied with. It was argued that the obligation thus cast upon the assured to procure and provide a proper condition and equipment of the vessel to encounter the perils of each stage of the voyage, necessarily involves the idea that between one stage of the voyage and another he should be allowed an opportunity to find and provide that further equipment which the subsequent stage of the voyage requires; and no doubt that is so. But that equipment must, if the warranty of seaworthiness is to be complied with [that is, the warranty at the time of the commencement of the voyage] be furnished before the vessel enters upon that subsequent stage of the voyage which is supposed to require it.

Read into this judgment the word 'shipowner' in the place of 'the assured', and the judgment is in point in the present case.

There is no difference between the implied warranty of seaworthiness which attaches at the commencement of the voyage in the case of an assured shipowner and in the case of a shipowner under a contract of affreightment. In each case the shipowner warrants that his ship is seaworthy at the commencement of the voyage . . .

Note

In *Northumbrian Shipping v Timm* [1939] AC 397, Lord Porter said that the right to determine bunkering stages was probably a matter for the shipowner, 'provided he chooses usual and reasonable stages'. It was also said in this case that refuelling stages should be fixed not later than the start of the voyage, that fuel sufficient for the intended stage and a margin for contingencies should be loaded, but that the allowance for contingencies ought not to be reduced because of the availability en route of alternative bunkering places, even if the charter gives the owner a wide liberty to deviate. This approach to margins seems to coincide with the requirements of marine underwriters: see Kendall, L and Buckley, J, *Business of Shipping*, 7th edn, 2001, Centreville, Maryland: Cornell Maritime, p 183.

AE Reed & Co Ltd v Page, Son and East [1927] 1 KB 743, CA

Facts

The plaintiffs were the consignees of 500 tons of wood pulp which arrived at Erith on the *Borgholm*. They employed the defendants to lighter it to Nine Elms. One of the defendants' barges, *Jellicoe*, had a carrying capacity of 170 tons; 190 tons were put on board. While she was lying alongside the steamer waiting for a tug to tow her to Nine Elms she sank and her cargo was lost. The plaintiffs succeeded in an action for damages. The defendants appealed.

Held

> **Scrutton LJ:** . . . A ship, when she sails on her voyage, must be seaworthy for that voyage, that is, fit to encounter the ordinary perils which a ship would encounter on such a voyage. But she need

not be fit for the voyage before it commences, and when she is loading in port. It is enough if, before she sails, she has completed her equipment and repair. But she must be fit as a ship for the ordinary perils of lying afloat in harbour, waiting to sail. She must, in my view, be fit as a ship, as distinguished from a carrying warehouse, at each stage of her contract adventure, which may, as in *Cohn v Davidson* (1877) 2 QBD 455, commence before loading. And she may as a ship after loading be unfit to navigate because of her stowage, which renders her unsafe as a ship . . .

Looked at from the point of view of a ship to sail the sea, the highest measure of liability will be when she starts on her sea voyage, and this is often spoken of as the stage when the warranty attaches; but what is meant is that it is the time when that highest measure of liability attaches. There are previous stages of seaworthiness as a ship, applicable to proceeding to loading port, loading, and waiting to sail when loading is completed.

On the other hand, the highest measure of liability as a cargo-carrying adventure, that is, of 'cargoworthiness', is when cargo is commenced to be loaded. It has been decided that if at this stage the ship is fit to receive her contract cargo, it is immaterial that when she sails on her voyage, though fit as a ship to sail, she is unfit by reason of stowage to carry her cargo safely . . .

It was argued that the doctrine of stages was only a question of difference of equipment, and that overloading was not equipment. But damages unrepaired at the commencement of a new stage, collision during loading, and starting on the voyage with that damage unrepaired, may obviously be unseaworthiness at the commencement of the voyage stage. I see no reason for defining stages only by difference of equipment.

Applying the above statement of the law to the facts of the present case: the barge was sent to the ship's side to carry 170 tons, and she was fit to carry that quantity. The warranty of cargoworthiness was complied with when loading commenced. But then 190 tons were put into her, some 14 per cent more than her proper load. With that cargo in, she had a dangerously low freeboard in calm water. I think at any rate one of her gunwales was awash, and water could continuously enter through cracks, which would be only an occasional source of leakage if she were properly loaded. She had to lie so loaded for some unascertained time in the river till a tug came. The ship was not bound to let the barge lie moored to the ship's side. She might have to navigate under oars to a barge road. She was exposed to all the wash of passing vessels, and the more water she took on board, the more dangerous she would become. It is clear that she was quite unfit to lie in the river for any time exposed to the wash of passing vessels and the natural 'send' of the water. It is still clearer that she was quite unfit to be towed, and that she was in such a condition that she would soon go to the bottom. I am clearly of opinion that the barge was unseaworthy as a barge from the time loading finished, unfit to lie in the river, and still more unfit to be towed . . .

I think in the present case, when the loading was finished and the man in charge, apparently in the ordinary course of his business, left her unattended in the river waiting for a tug, and unfit in fact either to lie in the river or be towed, there was a new stage of the adventure, a new warranty of fitness for that stage, and a breach of that warranty which prevented the exceptions from applying.

7 UNSEAWORTHINESS OR BAD STOWAGE?

It has been said that the duty to provide a seaworthy ship is breached if there is something about the vessel that endangers the safety of the cargo: *The Arianna,* above. Bad stowage is an obvious source of danger. But English courts have been reluctant to treat every case of bad stowage as rendering the ship unseaworthy. There is nothing wrong with this policy. The difficulty is to find a convincing way of reconciling it with established doctrine. The leading case is *Elder Dempster.*

Elder Dempster & Co Ltd v Paterson, Zochonis & Co Ltd
[1924] AC 522

Facts

The *Grelwen* loaded casks of palm oil and bags of palm kernels, which were stowed over the casks. On arrival at Hull, it was found that the casks had been crushed by the bags of palm kernels, which were very heavy. The cargo owners claimed damages for breach of the contract of carriage, or alternatively for negligence or breach of duty. If the damage was due to bad stowage, Elder Dempster were protected against liability by the conditions contained in the bills of lading; but if it was due to unseaworthiness, they were liable.

Held

> **Viscount Cave:** . . . The general principles which should govern the decision are not in doubt. It is well settled that a shipowner or charterer who contracts to carry goods by sea thereby warrants, not only that the ship in which he proposes to carry them shall be seaworthy in the ordinary sense of the word – that is to say, that she shall be tight, staunch and strong, and reasonably fit to encounter whatever perils may be expected on the voyage – but also that both the ship and her furniture and equipment shall be reasonably fit for receiving the contract cargo and carrying it across the sea . . .
>
> It is hardly necessary to add that unseaworthiness and bad stowage are two different things. There are cases, such as *Kopitoff v Wilson* (1876) 1 QBD 377, where, a ship having been injured in consequence of bad stowage, the warranty of seaworthiness of the ship has been held to be broken; but in such cases it is the unseaworthiness caused by bad stowage and not the bad stowage itself which constitutes the breach of warranty. There is no rule that, if two parcels of cargo are so stowed that one can injure the other during the course of the voyage, the ship is unseaworthy: *per* Swinfen Eady LJ in *The Thorsa* [1916] P 257.
>
> Applying these principles to the present case, I have come to the conclusion that the damage complained of was not due to unseaworthiness but to improper stowage. If the fitness or unfitness of the ship is to be ascertained (as was held in *McFadden v Blue Star Line)* at the time of loading, there can be no doubt about the matter. At the moment when the palm oil was loaded the *Grelwen* was unquestionably fit to receive and carry it. She was a well built and well found ship, and lacked no equipment necessary for the carriage of palm oil; and if damage arose, it was due to the fact that after the casks of oil had been stowed in the holds the master placed upon them a weight which no casks could be expected to bear. Whether he could have stowed the cargo in a different way without endangering the safety of the ship is a matter upon which the evidence is conflicting; but if that was impossible, he could have refused to accept some part of the kernels and the oil would then have travelled safely. No doubt that course might have rendered the voyage less profitable to the charterers, but that appears to me for present purposes to be immaterial. The important thing is that at the time of loading the palm oil the ship was fit to receive and carry it without injury; and if she did not do so this was due not to any unfitness in the ship or her equipment, but to another cause.
>
> But it was argued that an owner or charterer loading cargo is to be deemed to warrant the fitness of his ship to receive and carry it, not only at the moment of loading, but also at the time when she sails from the port, and that at the moment when the *Grelwen* left each of her ports of departure she was unfit without 'tween decks to carry the cargo which had then been placed in her holds. My Lords, I think there is some authority for the proposition that the implied warranty of 'seaworthiness for the cargo' extends to fitness for the cargo not only at the time of loading, but also at the time of sailing: see *Cohn v Davidson* (1877) 2 QBD 455, and the observations of Phillimore LJ in *The Thorsa* (above). But it is unnecessary to pursue the point, for the proposition if established will not avail the present respondents. The evidence of the log is conclusive to show that the injury to the casks was caused at or immediately after the time when the cargo was

> loaded and before the ship sailed, and accordingly that it was not due to any unseaworthiness at the time of sailing. And in any case nothing occurred between the time when the oil was loaded and the time when the ship sailed to make the ship structurally less fit to carry the oil; and it is with reference to the contract cargo – namely, the oil – that the question of fitness must be considered . . .

Notes

1 Should the master of the *Grelwen* have refused to load the palm kernels on top of the casks of oil? Did his willingness to load in this way show incompetence? If so, did his incompetence make the ship unseaworthy in the way suggested above?

2 In *The Thorsa*, chocolate and gorgonzola cheese were stowed in the same hold, which was not ventilated between Genoa and London because of bad weather. The chocolate, which was loaded first, was tainted by the cheese. It was held that the damage was the result of bad stowage and nothing more and that the shipowner was protected by the terms of the bill of lading. This decision treats it as immaterial that when the ship sailed she was unfit by reason of stowage to carry her cargo safely. If this decision is correct – *Elder Dempster* leaves the point open – the result in any case of incompatible consignments turns on the order in which the cargo is loaded and stowed, so that if the cheese had been loaded first in *The Thorsa,* the result would have been reversed. Unattractive though this is, where a contract clearly intends to exclude liability for bad stowage and negligence but not unseaworthiness, some line must be drawn between these matters and this line is drawn, clearly but a little arbitrarily, so that the carrier is not liable for anything occurring after the time of first loading.

8 CAUSATION

To recover for loss or damage to cargo where unseaworthiness is alleged, the claimant must show that the lack of seaworthiness caused the loss or damage complained of: *Kish v Taylor* [1912] AC 604. But unseaworthiness is rarely the sole and exclusive cause of damage or loss of cargo. There are usually other factors that can be said to have caused or contributed to a disaster. What connection should the law demand between a breach of this duty and a loss? Must the unseaworthiness be the sole, dominant, real, substantial or proximate cause or is it enough if it is *a* cause of the loss? The judgments in *Smith, Hogg v Black Sea and Baltic* do not all adopt the same approach.

Smith, Hogg v Black Sea and Baltic General Insurance [1940] AC 997

Facts

The *Lilburn* loaded a cargo of timber for carriage from Soroka to Garston. So much cargo was loaded on deck that on sailing she was dangerously unstable and consequently unseaworthy. When she put into Stornoway to refuel, she fell on her beam ends. Portions of cargo were lost or damaged. The owners claimed a general average contribution. The respondents resisted the claim on the ground that the owners had not exercised due diligence in accordance with the charter to make the vessel seaworthy and that the average act was occasioned by the unseaworthiness. They counterclaimed for loss and damage to cargo. The owners alleged that the accident was the fault of the master (for whose negligence they were not responsible) in taking on bunkers without discharging or reducing the deck cargo.

Held

Lord Wright: … Sir Robert Aske [counsel] has strenuously contended on behalf of the appellants, that the master's action, whether or not negligent, was '*novus actus interveniens*', which broke the nexus or chain of causation, and reduced the unseaworthiness from '*causa causans*' to '*causa sine qua non*'. I cannot help deprecating the use of Latin or so-called Latin phrases in this way. They only distract the mind from the true problem which is to apply the principles of English law to the realities of the case …

Indeed the question what antecedent or subsequent event is a relevant or decisive cause varies with the particular case. If tort, which may in some respects have its own rules, is put aside and the enquiry is limited to contract, the selection of the relevant cause or causes will generally vary with the nature of the contract. I say 'cause or causes' because as Lord Shaw pointed out in *Leyland Shipping Co v Norwich Union Fire Insurance Co* [1918] 1 AC 350, 369 causes may be regarded not so much as a chain, but as a network. There is always a combination of co-operating causes, out of which the law, employing its empirical or common sense view of causation, will select the one or more which it finds material for its special purpose of deciding the particular case …

In carriage of goods by sea, unseaworthiness does not affect the carrier's liability unless it causes the loss, as was held in *The Europa* [1908] P 84 and in *Kish v Taylor* [1912] AC 604 …

Apart from express exceptions, the carrier's contract is to deliver the goods safely. But when the practice of having express exceptions limiting that obligation became common, it was laid down that there were fundamental obligations, which were not affected by the specific exceptions, unless that was made clear by express words. Thus an exception of perils of the sea does not qualify the duty to furnish a seaworthy ship or to carry the goods without negligence: see *Paterson Steamships Ltd v Canadian Co-operative Wheat Producers Ltd* (above). From the nature of the contract, the relevant cause of the loss is held to be the unseaworthiness or the negligence as the case may be, not the peril of the sea, where both the breach of the fundamental obligation and the objective peril are co-operating causes. The contractual exception of perils of the seas does not affect the fundamental obligation, unless the contract qualifies the latter in express terms.

To consider these rules, in relation to unseaworthiness, I think the contract may be expressed to be that the shipowner will be liable for any loss in which those other causes covered by exceptions co-operate, if unseaworthiness is a cause, or if it is preferred, a real, or effective or actual cause …

In truth, unseaworthiness, which may assume according to the circumstances an almost infinite variety, can never be the sole cause of the loss. At least I have not thought of a case where it can be the sole cause. It must, I think, always be only one of several co-operating causes … In this connection I can draw no distinction between cases where the negligent conduct of the master is a cause and cases in which any other cause, such as perils of the seas, or fire, is a co-operating cause. A negligent act is as much a co-operating cause, if it is a cause at all, as an act which is not negligent. The question is the same in either case, it is, would the disaster not have happened if the ship had fulfilled the obligation of seaworthiness, even though the disaster could not have happened if there had not also been the specific peril or action …

The sole question, apart from express exception, must then be: 'Was that breach of contract "a" cause of the damage.' It may be preferred to describe it as an effective or real or actual cause though the adjectives in my opinion in fact add nothing. If the question is answered in the affirmative the shipowner is liable though there were other co-operating causes, whether they are such causes as perils of the seas, fire and similar matters, or causes due to human action, such as the acts or omissions of the master, whether negligent or not or a combination of both kinds of cause …

In cases of the type now being considered, the negligence, if any, must almost inevitably occur in the course of the voyage, and thus intervene between the commencement of the voyage when the duty to provide a seaworthy ship is broken, and the actual disaster. I doubt whether there could be

any event which could supersede or override the effectiveness of the unseaworthiness if it was 'a' cause.

This is clearly so in the facts of this case. The acts of the master in bunkering as he did, and in pumping out the forepeak, whether negligent or not, were indeed more proximate in time to the disaster, and may be said to have contributed to the disaster, but the disaster would not have arisen but for the unseaworthiness, and hence the shipowners are liable . . .

Lord Porter: . . . No doubt those who are either defending themselves or putting forward a counterclaim based upon an allegation of unseaworthiness must prove that the loss was so caused.

But here the loss was, I think, incontestably due to the inability of the ship to take in bunkers by a method which would have been both safe and usual in the case of a seaworthy ship. It was not the coaling that was at fault nor the method adopted: it was the fact that that coaling took place and that method was adopted in a tender ship. If a vessel is to proceed on her voyage, bunkers must be shipped, and though in one sense the change of balance caused by taking in bunkers was responsible for the accident to the *Lilburn*, it was not the dominant cause even if it be necessary to show what the dominant cause was. The master merely acted in the usual way and indeed exercised what he thought was exceptional care in diverting the coal shipped towards the port bunker. In a seaworthy ship his action would have been a safe one. It was the instability of the ship which caused the disaster.

In such circumstances it is unnecessary to decide what would be the result if the loss were attributable partly to the coaling and partly to the unseaworthiness, or to determine whether the fact that the unseaworthiness was a substantial cause even though some other matter relied upon were a substantial cause also, would be enough to make the owners liable for failure to use due care to make the vessel seaworthy.

Note

Lord Wright and Lord Atkin concluded that where unseaworthiness is *a* cause of a loss, the carrier is liable, even though there may be other co-operating causes of the loss that are nearer in time to the disaster. Lord Porter and Lord Romer were more cautious. Confusingly, Lord Maugham agreed with both Lord Porter and Lord Wright. Later decisions, *The Eurasian Dream* for example, have followed the formulation of the law in Lord Wright's judgment. Is there any alternative to Lord Wright's approach where a carrier makes promises that overlap, as in the case of the promise to carry and deliver and the promise to do so in a seaworthy ship? In these circumstances, would it be possible to insist that a cargo claimant could only recover damages by showing that the breach of one of those promises was the exclusive or perhaps the dominant cause of the loss?

9 BURDEN OF PROOF

In principle, a cargo claimant who alleges that loss or damage has been caused by failure to deliver in accordance with the contract or failure to provide a seaworthy ship may succeed on either ground but bears the burden of proof on both. But a carrier who resists a claim under the first head may find himself providing evidence that establishes liability under the second.

Danske Sukkerfabrikker v Bajamar Compania Naviera, The Torenia
[1983] 2 Lloyd's Rep 211

Facts

The *Torenia* was chartered to load a cargo of sugar at Guayabal, Cuba, for carriage to Denmark. In the course of the voyage she developed an uncontrollable leak when a

fracture occurred in her hull; she was abandoned and later sank. The cargo was a total loss. The plaintiffs brought proceedings for non-delivery. At trial, the defendants submitted that, on the basis of *Joseph Constantine Steamship v Imperial Smelting* [1941] 2 All ER 165, once they had proved the destruction of the goods by a peril of the sea (the fortuitous incursion of sea water), the burden passed to the plaintiffs to prove whatever fault they relied on.

Held

Hobhouse J: … The plaintiffs sought to treat the fact that the vessel's shell plating fractured in weather conditions of a type which ought to have been, and no doubt were, well within the contemplation and expectation of the vessel's owners and crew as liable to be encountered at some stage during the voyage as a wholly neutral occurrence which carried with it no implication of the unfitness of the vessel for that voyage. Whereas in the days of wooden ships or in the days when the design of steel ships and their construction was less well advanced or the forces they were liable to encounter were less well known and understood there may have been many instances where unexplained losses at sea gave rise to no inference of unseaworthiness, it will now be rare for such an inference not to arise in the absence of some overwhelming force of the sea or some occurrence affecting the vessel from outside. In the present case the shipowners, whilst proving the loss of the cargo, have proved also the loss of the vessel in conditions which ought not to have led to the loss of a seaworthy ship. Similarly in proving that the incursion of seawater was fortuitous they have proved that the structure of the vessel was defective …

10 REMEDIES

The primary remedy for any breach of contract is damages. But in some circumstances, breach of an express or implied duty to provide a seaworthy ship may entitle the innocent party to terminate the contract. The *Hongkong Fir*, perhaps the best known case in this chapter, has been treated as settling the law in this field for the last 40 years.

Hongkong Fir Shipping v Kawasaki Kisen Kaisha [1962] 2 QB 26, CA

Facts

The plaintiff shipowners time chartered the *Hongkong Fir* to the defendants for 24 months. The vessel was placed at the disposal of the charterers at Liverpool and the same day sailed for Newport News to load coal for carriage to Osaka. Between Liverpool and Osaka she was at sea for about eight and a half weeks, off-hire undergoing repair for about five weeks and had £21,400 spent on her on repairs. While at Osaka, a further 15 weeks and £37,500 were necessary to make her ready for sea. During this period the charterers repudiated the charter and claimed damages for breach of contract. The owners responded that they treated the charterers as having wrongfully repudiated the charter and they too claimed damages. Subsequently the charterers again repudiated the charter and the owners formally accepted the repudiation. In the Court of Appeal, two main issues were argued: (1) Is the seaworthiness obligation a condition the breach of which entitles the charterers to treat the contract as repudiated? (2) Where in breach of contract a party fails to perform it, by what standard does the ensuing delay fall to be measured for the purpose of deciding whether the innocent party is entitled to treat the contract as repudiated?

Held

Sellers LJ: … By clause 1 of the charterparty the shipowners contracted to deliver the vessel at Liverpool 'she being in every way fitted for ordinary cargo service'. She was not fit for ordinary

cargo service when delivered because the engine room staff was incompetent and inadequate and this became apparent as the voyage proceeded. It is commonplace language to say that the vessel was unseaworthy by reason of this inefficiency in the engine room.

Ships have been held to be unseaworthy in a variety of ways and those who have been put to loss by reason thereof (in the absence of any protecting clause in favour of a shipowner) have been able to recover damages as for a breach of warranty. It would be unthinkable that all the relatively trivial matters which have been held to be unseaworthiness could be regarded as conditions of the contract or conditions precedent to a charterer's liability and justify in themselves a cancellation or refusal to perform on the part of the charterer . . .

If what is done or not done in breach of the contractual obligation does not make the performance a totally different performance of the contract from that intended by the parties, it is not so fundamental as to undermine the whole contract. Many existing conditions of unseaworthiness can be remedied by attention or repairs, many are intended to be rectified as the voyage proceeds, so that the vessel becomes seaworthy; and, as the judgment points out, the breach of a shipowner's obligation to deliver a seaworthy vessel has not been held by itself to entitle a charterer to escape from the charterparty. The charterer may rightly terminate the engagement if the delay in remedying any breach is so long in fact, or likely to be so long in reasonable anticipation, that the commercial purpose of the contract would be frustrated . . .

Diplock LJ: . . . Every synallagmatic contract contains in it the seeds of the problem: in what event will a party be relieved of his undertaking to do that which he has agreed to do but has not yet done? The contract may itself expressly define some of these events, as in the cancellation clause in a charterparty; but, human prescience being limited, it seldom does so exhaustively and often fails to do so at all. In some classes of contracts such as sale of goods, marine insurance, contracts of affreightment evidenced by bills of lading and those between parties to bills of exchange, Parliament has defined by statute some of the events not provided for expressly in individual contracts of that class; but where an event occurs the occurrence of which neither the parties nor Parliament have expressly stated will discharge one of the parties from further performance of his undertakings, it is for the court to determine whether the event has this effect or not.

The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?

. . . What the judge had to do in the present case, as in any other case where one party to a contract relies upon a breach by the other party as giving him a right to elect to rescind the contract, and the contract itself makes no express provision as to this, was to look at the events which had occurred as a result of the breach at the time at which the charterers purported to rescind the charterparty and to decide whether the occurrence of those events deprived the charterers of substantially the whole benefit which it was the intention of the parties as expressed in the charterparty that the charterers should obtain from the further performance of their own contractual undertakings.

One turns therefore to the contract, the Baltime 1939 charter . . . Clause 13, the 'due diligence' clause, which exempts the shipowners from responsibility for delay or loss or damage to goods on board due to unseaworthiness, unless such delay or loss or damage has been caused by want of due diligence of the owners in making the vessel seaworthy and fitted for the voyage, is in itself sufficient to show that the mere occurrence of the events that the vessel was in some respect unseaworthy when tendered or that such unseaworthiness had caused some delay in performance of the charterparty would not deprive the charterer of the whole benefit which it was the intention of the parties he should obtain from the performance of his obligations under the contract – for he undertakes to continue to perform his obligations notwithstanding the occurrence of such events if they fall short of frustration of the contract and even deprives

himself of any remedy in damages unless such events are the consequence of want of due diligence on the part of the shipowner.

The question which the judge had to ask himself was, as he rightly decided, whether or not at the date when the charterers purported to rescind the contract, namely, June 6, 1957, or when the shipowners purported to accept such rescission, namely, August 8, 1957, the delay which had already occurred as a result of the incompetence of the engine-room staff, and the delay which was likely to occur in repairing the engines of the vessel and the conduct of the shipowners by that date in taking steps to remedy these two matters, were, when taken together, such as to deprive the charterers of substantially the whole benefit which it was the intention of the parties they should obtain from further use of the vessel under the charterparty . . .

FURTHER READING

Barclay, C, 'Technical aspects of unseaworthiness' (1975) LMCLQ 288

Clarke, M, 'Seaworthiness in time charters' (1977) LMCLQ 493

Grunfeld, C, 'Affreightment – unseaworthiness – causation' (1949) MLR 372

CHAPTER 5

DEVIATION

At common law, it is an implied term of a contract for the carriage of goods by sea that the carrier will not deviate from the proper route without lawful justification. Breach of this duty has serious consequences. The shipowner may not be able to rely on exemption clauses in the contract of carriage if cargo is damaged or lost during or after a deviation and may not be able to enforce other terms of that contract.

This chapter looks first at the origins of the implied duty not to deviate and the reasons for it. The following sections deal with particular aspects of the duty and consider what is meant by deviation, the proper route and lawful justification. Cases dealing with agreements giving a carrier a right to deviate are collected under the heading 'Liberty to Deviate Clauses'. The last section of the chapter deals with the difficult question of the effect of a deviation on the carrier's contractual rights.

The Hague and Hague-Visby Rules, when they apply, modify the common law rules relating to deviation (see Chapter 10).

1 ORIGINS OF THE DUTY NOT TO DEVIATE

The first reported English decision to recognise the sea carrier's implied duty not to deviate from route was *Davis v Garrett* in 1833. It had been held in at least one earlier case that as between the parties to a contract to carry goods by sea, a duty not to deviate could only arise by express agreement. However, a number of writers on maritime and trade law had asserted that there was a general legal duty governing the route to be followed by a carrier. And the duty not to deviate was a well established feature of the law of marine insurance. The decision in *Davis* put an end to this uncertainty.

***Davis v Garrett* (1830) 6 Bing 716, Court of Common Pleas**

Facts

A cargo of lime was to be carried on the barge *Safety* to London from the river Medway in Kent, act of God, fire and perils of the sea being excepted. At trial, the jury found that as part of a smuggling venture the barge deviated to the East Swale and to Whitstable Bay, which were out of the usual and customary route, where she was caught in a storm. Sea water reached the cargo, the barge caught fire and the master was forced to run her on shore. The lime and the barge were both lost. The plaintiff alleged that the defendant's duty was to carry by the direct usual and customary course. The defendant barge owner argued that he was not liable because (i) the storm and not the deviation was the proximate cause of the loss, which might have occurred even if the *Safety* had taken a direct course; and (ii) that he had not agreed to carry the lime directly to London.

Held

> **Tindal CJ:** . . . As to the first point . . . (w)e think that the real answer to the objection is that no wrongdoer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened while his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his

> wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done; but there is no evidence to that extent in the present case . . .
>
> [On the second point] . . . We cannot but think that the law does imply a duty in the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course.

Notes

1 The judgments in *Davis* do not explain why the court thought that there should be a duty not to deviate. Reports of the case show that counsel for the cargo owner argued that this obligation was necessary in order to prevent delay, because the risks associated with the usual route were the only things the shipper could take into account when entering into a contract and because a deviation by the carrier would make the shipper's insurance policy on the goods void.

2 There is no suggestion in the report of the judgment that the decision was confined to deviations for an illegal purpose (smuggling) or to dangerous places (*Safety* was not designed for the open sea).

3 The barge owner did not argue that he was protected by the standard form exclusion of liability for 'dangers and accidents of the seas'. It seems likely that both the parties and the court read the exclusion clause as applying only to losses occurring on the proper route.

4 The judgment suggests that after a wrongful deviation a carrier might escape liability for loss or damage to cargo if, but only if, he can show that the loss would also have happened on the proper route. In practice it will be very difficult to show this where the immediate cause of the loss is a storm or other natural force; but it might be possible in the case of losses by fire or inherent vice.

2 PROPER ROUTE

The parties to a carriage contract can agree on the precise route to be followed if they wish. But what happens if they do not? How is the proper route to be identified?

Reardon Smith Line v Black Sea and Baltic General Insurance **[1939] AC 562, HL**

Facts

The appellants' vessel *Indian City* was chartered to carry a cargo of ore from Poti in the Black Sea to Sparrow's Point, Baltimore, USA. After loading, she sailed first for Constanza on the west coast of the Black Sea for fuel. The vessel grounded at Constanza and was damaged; part of the cargo had to be jettisoned. The charterers refused to contribute to general average expenses on the grounds that in going to Constanza the ship had deviated from her contractual route, which they said was from Poti to Sparrow's Point by the direct route through Istanbul.

Held

> **Lord Porter:** . . . It is the duty of a ship, at any rate when sailing upon an ocean voyage from one port to another, to take the usual route between those two ports. If no evidence be given, that route is presumed to be the direct geographical route, but it may be modified in many cases for navigational or other reasons, and evidence may always be given to show what the usual route is, unless a specific route be prescribed by the charter party or bill of lading. In each case therefore when a ship is chartered to sail or when a parcel is shipped upon a liner sailing from one port to another, it is necessary to inquire what the usual route is. In some cases there may be more than

> one usual route. It would be difficult to say that a ship sailing from New Zealand to this country had deviated from her course whether she sailed by the Suez Canal, the Panama Canal, round the Cape of Good Hope or through the Straits of Magellan. Each might, I think, be a usual route. Similarly the exigencies of bunkering may require the vessel to depart from the direct route or at any rate compel her to touch at ports at which, if she were proceeding under sail, it would be unnecessary for her to call.
>
> It is not the geographical route but the usual route which has to be followed, though in many cases the one may be the same as the other. But the inquiry must always be, what is the usual route, and a route may become a usual route in the case of a particular line though that line is accustomed to follow a course which is not that adopted by the vessels belonging to other lines or to other individuals. It is sufficient if there is a well known practice of that line to call at a particular port.
>
> . . . No doubt *prima facie* the route direct from Poti to Sparrow's Point through Istanbul would be the ordinary course, but I think that in this case we have evidence sufficient to show that the route has been varied and that the practice of proceeding to Constantza to bunker after loading had become a usual one. It is true that a considerable number of vessels proceeding from Black Sea ports do not call at Constantza for bunkers, and that, if one is to take particulars of Poti and Novorossisk alone, only about one-quarter of the ships proceeding on ocean voyages call at Constantza after loading. It is true also that the journey to Constantza lengthens the voyage by some 200 miles, and that shortly after the accident to the *Indian City* the cost of oil at Constantza increased and the appellants thereafter have taken their bunkers from Algiers instead of Constantza.
>
> All these are matters to be considered, but a short usage, particularly where the obtaining of bunkers is concerned, may still be a sufficient usage to create a usual route . . .

Note

Moving even a short distance away from route can amount to a deviation. But few cases turn on minor movements at sea away from the ordinary track. In most cases where the doctrine is invoked, the ship has moved off route to call at an unauthorised port in order to take on fuel or to load or discharge other cargo. But calling at the right ports in the wrong order is a deviation and so is carrying a cargo to and then beyond the contracted port of discharge or landing a cargo short of its proper destination: *Cunard Steamship v Buerger* [1927] AC 1.

3 VOLUNTARY DEPARTURE

Deviation is a voluntary departure from the proper route. A deliberate or conscious breach of contract is not required. However, a ship does not necessarily deviate every time she strays off course.

***Rio Tinto v Seed Shipping* (1926) 24 LIL Rep 316**

Facts

The charterers shipped a cargo of coal and coke on the defendants' ship *Marjorie Seed* at Glasgow for Huelva. After leaving the Cumbrae the master, not being in perfect health, ordered the helmsman to steer south-south-east, which stranded the ship on rocks off the coast of Ayr. The ordinary course would have been to steer south south west. Ship and cargo were totally lost. The plaintiffs sued for the value of the cargo; the defendants pleaded an excepted peril to which the plaintiffs replied that there had been a deviation.

Held

Roche J: The essence of deviation [is] that the parties contracting have voluntarily substituted another voyage for that which has been insured. A mere departure or failure to follow the contract voyage or route is not necessarily a deviation, or every stranding which occurred in the course of a voyage would be a deviation, because the voyage contracted for, I imagine, is in no case one which essentially involves the necessity of stranding. It is a change of voyage, a radical breach of the contract, that is required to, and essentially does, constitute a deviation . . .

Here I am satisfied, and I find as a fact, that the master never intended to leave the route of the voyage, that is to say, the route of the voyage from Glasgow to Huelva. What he did was to make a mistake as to the compass course which was necessary to take him from the *terminus a quo* to the *terminus ad quem*. To use an analogy which, although analogies are misleading, I think at this stage is in order, he did not adopt another road instead of the road that he had agreed to take, but he got himself into the ditch at the side of the road which he was intending to follow. He was not on another route; he was on the existing route, although he was out of the proper part of the route which he ought to have followed. That is my finding of fact as to what happened; and in my judgment it follows from that that there was not that substitution or change of route which is necessary to constitute a deviation . . .

4 JUSTIFIABLE DEVIATION: DEVIATION TO SAVE LIFE

At common law, a departure from route can be justified if it is made to save life but not if made only to save property. The common law rule is altered by the Hague and Hague-Visby Rules, when they apply, which allow deviation to save either life or property: see Chapter 10.

Scaramanga v Stamp (1880) 5 CPD 295, CA

Facts

The *Olympias* was chartered to carry a cargo of wheat from Cronstadt to Gibraltar. Nine days out she sighted the *Arion* whose engine had failed. The weather was fine and the sea smooth, and there would have been no difficulty in taking off the crew. Instead, the master of the *Olympias* agreed to tow the *Arion* into the Texel for £1,000. Having taken the *Arion* in tow, the *Olympias* ran on the Terschelling Sands on the way to the Texel and was lost. The plaintiff claimed the value of his goods, alleging that the goods were not lost by perils of the seas within the exception in the charterparty, but were lost through the wrongful deviation of the defendants' vessel. The defendants pleaded that the deviation was justified, because it was for the purpose of saving the *Arion* and her cargo.

Held

Cockburn CJ: . . . That there was here a twofold deviation, which, unless the circumstances were such as to justify it, would entitle the plaintiff to recover, cannot be disputed – in the first place, in the departure of the *Olympias* from her proper course in going to the Texel, secondly, in her taking the *Arion* in tow . . . (since) the effect of taking another vessel in tow is necessarily to retard the progress of the towing vessel, and thereby to prolong the risk of the voyage.

[After reviewing the few English authorities on the point, Cockburn CJ said that the effect of American decisions was that] . . . deviation for the purpose of saving life is protected, and involves neither forfeiture of insurance nor liability to the goods' owner in respect of loss which would otherwise be within the exception of 'perils of the seas'. And, as a necessary consequence of the foregoing, deviation for the purpose of communicating with a ship in distress is allowable,

inasmuch as the state of the vessel in distress may involve danger to life. On the other hand, deviation for the sole purpose of saving property is not thus privileged, but entails all the usual consequences of deviation . . .

In these propositions I entirely concur . . . The impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity, and is nowhere more salutary in its results than in bringing help to those who, exposed to destruction from the fury of winds and waves, would perish if left without assistance . . . there is neither injustice nor hardship in treating both the merchant and the insurer as making their contracts with the shipowner as subject to this exception to the general rule of not deviating from the appointed course . . .

Deviation for the purpose of saving property stands obviously on a totally different footing. There is here no moral duty to fulfil, which, though its fulfilment may have been attended with danger to life or property, remains unrewarded. There would be much force, no doubt, in the argument that it is to the common interest of merchants and insurers, as well as of shipowners, that ships and cargoes, when in danger of perishing, should be saved, and consequently that, as matter of policy, the same latitude should be allowed in respect of the saving of property as in respect of the saving of life, were it not that the law has provided another, and a very adequate motive for the saving of property, by securing to the salvor a liberal proportion of the property saved – a proportion in which not only the value of the property saved, but also the danger run by the salvor to life or property is taken into account, and in calculating which, if it be once settled that the insurance will not be protected, nor the shipowner freed from liability in respect of loss of cargo, the risk thus run will, no doubt, be included as an element. It would obviously be most unjust if the shipowner could thus take the chance of highly remunerative gain at the risk and possible loss of the merchant or the insurer, neither of whom derive any benefit from the preservation of the property saved . . .

5 DEVIATION TO AVOID IMMINENT PERIL: EXTENT OF PERMISSIBLE DEVIATION

Phelps, James & Co v Hill [1891] 1 QB 605, CA

Facts

Tin and iron plates were shipped on the *Llanduff City* at Swansea for New York. About five days out the vessel and some of her equipment and cargo were damaged in a storm and it was necessary to put back to a port of refuge. She went first to Queenstown where she was ordered by the defendant owners to return to their own yards in Bristol where suitable spare parts were available and where repairs could have been done more cheaply and quickly than elsewhere. It would also have been possible to sell or trans-ship the cargo there. In the Avon, she was run into by another vessel and was sunk. This risk was excepted by the bill of lading. The question was whether there was an unjustifiable deviation in going to Bristol instead of Swansea. The jury at trial found that there had not been an unjustifiable deviation.

Held

Lopes LJ: The question in this case is whether there was a deviation. If there was a deviation, or, in other words, if the deviation was not justified, the shipowner is liable for a loss by the perils of the sea, and is not protected by the exception of perils in the contract. The voyage must be prosecuted without unnecessary delay or deviation. The shipowner's contract is that he will be diligent in carrying the goods on the agreed voyage, and will do so directly without any unnecessary deviation. But this undertaking is to be understood with reference to the circumstances that arise during the performance of the contract. He is not answerable for delays or deviations which are occasioned or

become necessary without default on his part. Where the safety of the adventure under the master's control necessitates that he should go out of his course, he is not only justified in doing so, but it is his duty in the right performance of his contract with the owners of the cargo. The shipowner through his master is bound to act with prudence and skill and care in avoiding dangers and in mitigating the consequences of any disaster which may have happened. The master is bound to take into account the interests of the cargo-owners as well as those of the shipowner. He must act prudently for all concerned . . . Going into a port out of the usual course for necessary repairs, and staying till they are completed, is no deviation, provided it plainly appears that such repairs, under the circumstances and at such port, were reasonably necessary, and the delay not greater than necessary for the completion of such repairs, so as to enable the vessel to proceed on her voyage. The deviation must not be greater than a reasonable necessity demands, having regard to the respective interests of shipowner and cargo-owner. A reasonable necessity implies the existence of such a state of things as, having regard to the interests of all concerned, would properly influence the decision of a reasonably competent and skilful master . . .

6 JUSTIFIABLE DEVIATION AND UNSEAWORTHINESS

In the last extract, Lopes LJ referred to deviations that become necessary without fault on the part of the carrier. In the next case the carrier was at fault but the deviation was nevertheless held to be justified.

***Kish v Taylor* [1912] AC 604, HL**

Facts

The *Wearside* was chartered to load a full and complete cargo of timber at Mobile or Pensacola. The charterers failed to provide a full cargo so the master attempted to mitigate by obtaining additional cargo from other sources. He was so successful that the *Wearside* was overloaded with deck cargo and became unseaworthy. She sailed, encountered bad weather and had to take refuge in the port of Halifax, where she was repaired and the cargo restowed. On arrival at Liverpool, the shipowners claimed a lien for the charterers' failure to load a full cargo. The cargo owners disputed the existence of the lien, arguing that the deviation to Halifax was not justifiable.

Held

Lord Atkinson: . . . On the whole . . . I am of opinion that a master, whose ship is, from whatever cause, in a perilous position, does right in making such a deviation from his voyage as is necessary to save his ship and the lives of his crew, and that while the right to recover damages from all breaches of contract, and all wrongful acts committed either by himself or by the owners of his ship, is preserved to those who are thereby wronged or injured, the contract of affreightment is not put an end to by such a deviation, nor are the rights of the owners under it lost . . .

Note

In *Monarch Steamship v Karlshamns Oliefabriker* [1949] AC 196, p 212, Lord Porter referred to *Kish v Taylor* and said that deviation made to remedy unseaworthiness does not amount to unjustifiable deviation but that it might do so if it was established that the owners knew of the vessel's state on sailing. On the general effect of a deviation on a contract of carriage, see the last section of this chapter.

7 LIBERTY TO DEVIATE CLAUSES

At common law the duty not to deviate can be varied or excluded by agreement between the parties to a contract of carriage of goods by sea. In older cases, clauses in

bills of lading that purported to confer on a carrier an unrestricted discretion to deviate were interpreted narrowly in English courts. This approach is illustrated here by the decision in *Leduc v Ward*. But as the subsequent extract from *Renton v Palmyra* [1957] AC 149, HL shows, a literal interpretation of a liberty clause may be appropriate in some circumstances.

Leduc v Ward (1888) 20 QBD 475, CA

Facts

The bill of lading stated that the ship was at the port of Fiume and bound for Dunkirk, 'with liberty to call at any ports in any order, and to deviate for the purpose of saving life or property'. Instead of proceeding direct to Dunkirk, the vessel sailed for Glasgow, a total of about 1200 miles out of the ordinary course of the voyage; ship and cargo were lost near Ailsa Craig, off the mouth of the Clyde. The owners of the goods sued for non-delivery at Dunkirk.

Held

> **Lord Esher MR:** . . . In the present case liberty is given to call at any ports in any order. It was argued that that clause gives liberty to call at any port in the world. Here, again, it is a question of the construction of a mercantile expression used in a mercantile document, and I think that as such the term can have but one meaning, namely, that the ports, liberty to call at which is intended to be given, must be ports which are substantially ports which will be passed on the named voyage. Of course such a term must entitle the vessel to go somewhat out of the ordinary track by sea of the named voyage, for going into the port of call in itself would involve that. To 'call' at a port is a well-known sea-term; it means to call for the purposes of business, generally to take in or unload cargo, or to receive orders; it must mean that the vessel may stop at the port of call for a time, or else the liberty to call would be idle. I believe the term has always been interpreted to mean that the ship may call at such ports as would naturally and usually be ports of call on the voyage named. If the stipulation were only that she might call at any ports, the invariable construction has been that she would only be entitled to call at such ports in their geographical order; and therefore the words 'in any order' are frequently added, but in any case it appears to me that the ports must be ports substantially on the course of the voyage. It follows that, when the defendants' ship went off the ordinary track of a voyage from Fiume to Dunkirk to a port not on the course of that voyage, such as Glasgow, there was a deviation, and she was then on a voyage different from that contracted for to which the excepted perils clause did not apply; and therefore the shipowners are responsible for the loss of the goods . . .

Notes

1 *Port of call*. Lord Esher described ports of call as 'ports which will be passed on the named voyage'. In *James Morrison & Co v Shaw, Savill and Albion* [1916] 2 KB 783, CA, it was held that there is no hard and fast rule that determines whether a port is an intermediate port but that this is a question of interpretation and fact and depends on all circumstances, including the size and class of ship, the nature of the voyage, the usual and customary course, the natural or usual ports of call and the nature and position of the port in question. In that case, it was held that Le Havre was not an intermediate port on a trip from New Zealand to London, even though the deviation added only 54 miles to the voyage.

2 *Main purpose of the contract.* The approach to interpretation adopted in *Leduc v Ward* will not help a cargo owner if a liberty to deviate clause is careful to confer wide express rights on the carrier. But if the liberty conferred is too extensive, the clause may be open to another form of attack. In *Glynn v Margetson* [1891] AC 351, HL, oranges were shipped on the *Zena* for carriage from Malaga to Liverpool. The printed form provided that she had 'liberty to proceed to and stay at any ports in any rotation

in the Mediterranean, Levant, Black Sea or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo or passengers, or for any other purpose whatsoever'. The vessel, on leaving Malaga, did not sail towards Liverpool but in the opposite direction and went first to Burriana about 350 miles from Malaga on the east coast of Spain. The oranges were found damaged on arrival at Liverpool because of the delay. The House of Lords held that the main object and intent of the contract was the carriage of a perishable cargo from Malaga to Liverpool. Since the general words in the printed form would defeat the main purpose of the contract if given full effect, the words were to be given a more limited construction (Lord Herschell) or (Lord Halsbury) if this was not possible, the general words were to be rejected. On the facts, the general words only entitled the owners to call (for the purposes stated) at ports which in a business sense could be said to be on the voyage between Malaga and Liverpool.

***Renton v Palmyra* [1957] AC 149, HL**

Facts

Bills of lading issued by the shipowners provided for the carriage of timber in the *Caspiana* from Canada to London or Hull. While the ship was on passage a dock strike broke out in London followed subsequently by a strike at Hull; the shipowners ordered the vessel to proceed to Hamburg where the timber was discharged. The shipowners took no steps to forward it to England but made it available at Hamburg to the holders of the bills of lading on payment of the full freight. In an action against the shipowners for damages for breach of contract, the shipowners contended that they had effected due delivery under the bills of lading and relied on the following printed terms:

> 14 (c) 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 ...
>
> (f) The discharge of cargo under the provisions of this clause shall be deemed due fulfilment of the contract ...

The House of Lords rejected an argument that since the main object of the contract was the carriage of timber to London or Hull, cl 14 was inconsistent with that object and could be disregarded.

Held

> **Viscount Kilmuir LC:** ... It is necessary in considering the authorities on which Mr Mocatta (counsel for the appellants) relies to consider carefully the form of the deviation clauses in each case. They were invariably in so extensive a form that, if they were fully and literally construed, the shipowners had a complete discretion to delay intolerably and so defeat the main object and intent of the contract if they so desired. The distinction between these cases and that before your Lordships' House has been so well stated by Jenkins LJ [1956] 1 QB 462, 502, that I find it impossible to improve on his words, which I quote:
>
> > ... there is a material difference between a deviation clause purporting to enable the shipowners to delay indefinitely the performance of the contract voyage simply because they choose to do so, and provisions such as those contained in clause 14(c) and (f) in the present case, which are applicable and operative only in the event of the occurrence of certain specified emergencies. The distinction is between a power given to one of the parties which, if construed literally, would in effect enable that party to nullify the contract at will, and a special provision stating what the rights and obligations of the parties are to be in the event of obstacles beyond the control of either arising to prevent or impede the performance of the contract in accordance with its primary terms.

8 EFFECT OF DEVIATION

The law relating to the effect of deviation has changed since *Davis v Garrett*, above, was first decided. At least three different approaches can be identified in later cases.

In the period 1833–90 the orthodox view was that a shipowner was liable for loss or damage to cargo that occurred during a deviation and could not normally rely on exclusion clauses in the contract, which only applied to the planned voyage. Liability for losses that occurred after a deviation when the ship had returned to her intended route was uncertain: *Scaramanga v Stamp*, p 299. A deviation did not give a cargo owner the right to put an end to the contract of carriage, unless perhaps it deprived him of the whole benefit of it: *Freeman v Taylor* (1831) 8 Bing 124; *MacAndrew v Chapple* (1866) 1 CP 643. Failure to carry by an agreed route was not a good reason for refusing to pay freight: *Cole v Shallet* (1682) 3 Lev 41; *Davidson v Gwynne* (1810) 1 Camp 376.

A more radical doctrine was developed in *Balian & Sons v Joly, Victoria & Co* (1890) 6 TLR 345 and *Joseph Thorley Ltd v Orchis Steamship Co* [1907] 1 KB 660, CA. These cases treated the carrier's undertaking not to deviate as a condition precedent to the right to rely on any term of the contract. If the carrier deviated this would put an end to the express contract between the parties from the start of the voyage. The contract was, it was said, 'displaced or avoided'. Under the influence of these decisions, between 1890 and 1936 English courts held that a carrier could not rely on an exclusion clause in a bill of lading in answer to a claim for damage to cargo suffered before, during or after a deviation from route. It was also held in *The Alamosa* (below) that laytime provisions in a charter were no longer enforceable after a deviation on the grounds that the effect of a deviation was 'to wipe out the clauses in the charterparty which were in favour of the shipowner'. But a new view of the effect of deviation emerged in the decision of the House of Lords in the next case.

Hain Steamship v Tate & Lyle (1936) 41 Com Cas 350, HL

Subsequent US proceedings are reported as *Farr v Hain SS Co Ltd (The Tregenna)* 1941 121 F 2d 940.

Facts

Tate & Lyle were purchasers of sugar that was to be delivered by instalments. The sellers chartered *Tregenna* from Hain Steamship to carry part of the sugar, loading in Cuba and San Domingo. The ship loaded a part cargo in Cuba, but by a mistake for which the shipowners were held responsible, she received no orders for San Domingo and so sailed for her discharge port. She was recalled by the charterers the next day when the mistake was discovered and was directed to complete loading at San Pedro de Macoris in San Domingo, where she arrived a little over a day later than if she had gone direct and after steaming an extra 265 miles. On sailing from San Pedro, she ran aground and was damaged. Part of the cargo was saved and forwarded on another vessel. Claims for freight and for general average were made against Tate & Lyle to whom the bills of lading had been endorsed by the sellers of the sugar. Tate & Lyle argued that the deviation on the way to San Pedro freed them from any liability in respect of the sugar loaded in Cuba. The shipowners replied that any deviation had been waived by the charterers.

Held

Lord Atkin: … My Lords, the effect of a deviation upon a contract of carriage by sea has been stated in a variety of cases but not in uniform language. Everyone is agreed that it is a serious

matter. Occasionally language has been used which suggests that the occurrence of a deviation automatically displaces the contract, as by the now accepted doctrine does an event which 'frustrates' a contract. In other cases where the effect of deviation upon the exceptions in the contract had to be considered language is used which Sir Robert Aske (counsel) argued shows that the sole effect is, as it were, to expunge the exceptions clause, as no longer applying to a voyage which from the beginning of the deviation has ceased to be the contract voyage. I venture to think that the true view is that the departure from the voyage contracted to be made is a breach by the shipowner of his contract, a breach of such a serious character that, however slight the deviation, the other party to the contract is entitled to treat it as going to the root of the contract, and to declare himself as no longer bound by any of the contract terms. I wish to confine myself to contracts of carriage by sea, and in the circumstances of such a carriage I am satisfied that by a long series of decisions, adopting in fact commercial usage in this respect, any deviation constitutes a breach of contract of this serious nature. The same view is taken in contracts of marine insurance where there is implied an absolute condition not to deviate. No doubt the extreme gravity attached to a deviation in contracts of carriage is justified by the fact that the insured cargo owner when the ship has deviated has become uninsured. It appears to me inevitable that a breach of contract which results in such momentous consequences well known to all concerned in commerce by sea should entitle the other party to refuse to be bound. It is true that the cargo owner may, though very improbably, be uninsured: it is also true that in these days it is not uncommon for marine insurers to hold the assured covered in case of deviation at a premium to be arranged. But these considerations do not appear to diminish the serious nature of the breach in all the circumstances of sea carriage, and may be balanced by the fact that the ship can and often does take liberties to deviate which prevent the result I have stated. If this view be correct, then the breach by deviation does not automatically cancel the express contract, otherwise the shipowner by his own wrong can get rid of his own contract. Nor does it affect merely the exceptions clauses. This would make those clauses alone subject to a condition of no deviation, a construction for which I can find no justification. It is quite inconsistent with the cases which have treated deviation as precluding enforcement of demurrage provisions. The event falls within the ordinary law of contract. The party who is affected by the breach has the right to say, 'I am not now bound by the contract whether it is expressed in charterparty, bill of lading, or otherwise'. He can, of course, claim his goods from the ship; whether and to what extent he will become liable to pay some remuneration for carriage I do not think arises in this case . . . but I am satisfied that once he elects to treat the contract as at an end he is not bound by the promise to pay the agreed freight any more than by his other promises. But, on the other hand, as he can elect to treat the contract as ended, so he can elect to treat the contract as subsisting; and if he does this with knowledge of his rights he must in accordance with the general law of contract be held bound. No doubt one must be careful to see that the acts of the cargo owner are not misinterpreted when he finds that his goods have been taken off on a voyage to which he did not agree. He could not reasonably be expected to recall the goods when he discovers the ship at a port of call presumably still intending to reach her agreed port of destination. There must be acts which plainly show that the shipper intends to treat the contract as still binding. In the present case where the charterer procured the ship to be recalled to a San Domingo port for the express purpose of continuing to load under the charter, an obligation which of course only existed in pursuance of the express contract, and saw that the ship did receive the cargo stipulated under the subcharter provided by persons who had no right to load except under the subcharter, I am satisfied that there is abundant, indeed conclusive, evidence to justify the report of Branson J that the deviation was waived by the charterers.

The result is that at the time the casualty occurred and the general average sacrifice and expenses were incurred the ship was still under the charter. In respect of the Cuban sugar the charterers appear to have been at the time the owners of the goods, and I think it clear that on principle the contribution falls due from the persons who were owners at the time of the sacrifice, though no doubt it may be passed on to subsequent assignees of the goods by appropriate contractual stipulations. The place of adjustment does not seem to have a bearing on the question against

whom the contribution has to be adjusted. It must be remembered that, at any rate so far as the Cuban sugar is concerned, at the time of loss and until transfer of the bills of lading in October Messrs Farr were the only persons in contractual relation with the ship. The bills of lading which they held were in their hands merely receipts for shipment and of course symbols of the goods with which they could transfer the right to possession and the property.

It follows that when the (cargo) arrived at Greenock the Hain Company, who were, through their bills of lading, in possession of the goods, had a claim for contribution against the charterers, and for the reasons given by Greer LJ in his admirable judgment, with which I find myself in entire accord, had a lien on the goods for that contribution.

Now the position of the respondents, Tate & Lyle, has to be considered from two points of view: (1) as indorsees of the bills of lading in circumstances in which the rights and liabilities expressed in the bills of lading would devolve upon them as though the contract contained therein had been made with them (under the Bills of Lading Act); (2) as parties to the Lloyd's bond.

(1) In respect of the first, in my opinion, the fact of deviation gives the bill-of-lading holder the rights I have already mentioned. On discovery he is entitled to refuse to be bound by the contract. Waiver by the charterer seems on principle to have no bearing upon the rights and liabilities which devolve upon the bill-of-lading holder under the Bills of Lading Act. The consignee has not assigned to him the obligations under the charterparty, nor, in fact, any obligation of the charterer under the bill of lading, for *ex hypothesi* there is none. A new contract appears to spring up between the ship and the consignee of the terms of the bill of lading. One of the terms is the performance of an agreed voyage, a deviation from which is a fundamental breach. It seems to me impossible to see how a waiver of such a breach by the party to the charterparty contract can affect the rights of different parties in respect to the breach by the same event of the bill of lading contract. I think, therefore, that a deviation would admittedly preclude a claim for contribution arising against parties to a subsisting contract of carriage, though no doubt the claim does not arise as a term of the contract, and as the bill of lading holder is entitled to say that he is not bound by the agreed term as to freight the ship could not, in the present circumstances, claim against Tate & Lyle either contribution or freight if they had to rely on the bill of lading alone.

(2) On the other hand, the terms of the Lloyd's bond appear in the plainest words to give to the ship the right they claim in respect of contribution. The consignees agree to pay to the owners the proper proportion of general average charges 'which may be chargeable upon their respective consignments' or 'to which the shippers or owners of such consignments may be liable to contribute'. General average charges were, as I have said, chargeable by way of lien against the sugar, and the shippers were liable to contribute. The obligation is independent of the bill of lading; there is good consideration in the ship giving up a lien which it claims and giving to the consignees immediate and not delayed delivery. I do not attach any importance in this case to the without-prejudice provisions in the third part of the bond, which affect only the deposit, and would not in any case apply where there was in fact a good claim for contribution against the original shippers. I think, therefore, that the claim of Tate & Lyle which is directed to recovering the deposit made in respect of the Cuban sugar fails, and that the ship's claim for a declaration that there is a valid claim for contribution against the deposit succeeds. On the ship's claim for the balance of freight in respect of the San Domingo sugar I have come to the conclusion that it must fail. That there is no claim on the express contract, the bill of lading, I have already said. An amendment to claim a *quantum meruit* was, however, allowed, and this has occasioned me some difficulty. I am not prepared at present to adopt the view of Scrutton LJ that in no circumstances can a consignee, whether holder of a bill of lading or not, be liable to pay after a deviation any remuneration for the carriage from which he has benefited. I prefer to leave the matter open, and, in those circumstances, to say that the opinion of the Court of Appeal to the contrary in this case should not be taken as authoritative. In the present case I find that the balance of freight under the charterparty, and therefore under the bill of lading, was to be paid in New York after advice of right delivery and ascertainment of weight. The terms of the cesser clause do not affect this obligation, and consequently the charterer remained and remains still liable for that freight. In these

circumstances I am not satisfied that conditions existed under which a promise should be implied whereby the shippers undertook to give to the ship a further and a different right to receive some part of what would be a reasonable remuneration for the carriage. I think, therefore, that the claim for freight fails.

Notes

1 In this case the line of reasoning used in *Balian* and *Orchis Steamship* was abandoned. The House of Lords decided that deviation did not of itself make the contract void *ab initio* and it did not result in the automatic discharge of the agreement. But it was held that deviation was a serious breach of a contract of affreightment and always gave the innocent party the right to bring the contract to an end, in which case he would not be bound by exclusion clauses or by any other promises in the contract, including the promise to pay freight due on delivery. On the other hand, if the innocent party elected to treat the contract as subsisting, the innocent party would continue to be bound by the contract and in particular the shipowner would continue to be entitled to rely on the contractual excepted perils. In the words of Lord Wright MR:

> In the present case the charterers elected to waive the breach, with the result that the charterparty was not abrogated but remained in force. The appellants were thus entitled to . . . rely on the exception of perils of the sea . . .

2 The *Hain* approach is capable of producing very odd results. On this view of the law, if a ship makes a minor and harmless deviation, returns to the contractual route and then delivers the cargo on time and without loss or damage, it seems that the cargo owner can nevertheless bring the contract to an end and avoid liability for contractual payments (such as freight payable on delivery or demurrage at the port of discharge) which become due under the contract after the commencement of the deviation. (Liability on a *quantum meruit* claim is far from certain: cf Goff, R and Jones G, *Restitution,* 6th edn, 2002, London: Sweet & Maxwell, paras 20-053 and 20-054.) On the other hand, if a vessel deviates, the charterer waives the breach and thereafter the vessel and cargo are lost, *Hain* seems to allow the shipowner to rely on exclusion clauses in the contract in every case, even where the loss actually occurs at places or at times not contemplated by the original contract. In this situation, paradoxically, by affirming the contract, the innocent party changes it.

3 Is *Hain* still good law? The judgments in the case are not in perfect harmony with earlier decisions of the House of Lords in deviation cases and are inconsistent in important respects with the general law of contract as expounded in more recent decisions. In *Photo Production v Securicor* [1980] AC 827, the House of Lords rejected the idea that by rescinding a contract for a serious breach, the innocent party can bring the whole contract, including any exclusion clauses, to an end. In general the question whether an exclusion clause applies to a particular breach of contract depends on the proper meaning of the clause; there is no general rule of the law of contract that an exclusion clause cannot exclude liability for particularly serious or fundamental breaches. Nevertheless, *Hain* has not been formally overruled. In *Photo Production* Lord Wilberforce said of the deviation cases that (at p 845):

> . . . I suggested in the *Suisse Atlantique* [1967] 1 AC 361 that these cases can be regarded as proceeding upon normal principles applicable to the law of contract generally viz, that it is a matter of the parties' intentions whether and to what extent clauses in shipping contracts can be applied after a deviation, ie a departure from the contractually agreed voyage or adventure. It may be preferable that they should be considered as a body of authority *sui generis* with special rules derived from historical and commercial reasons . . .

4 It is not clear that a special rule is needed to deal with the problems of deviation under a contract to carry goods by sea. It is true that deviation may cause delay and can lead to loss or damage to cargo. And deviation could, in some circumstances, cause a loss of cargo insurance, although it will not necessarily have this effect today when the Standard Cargo Clauses of the Institute of London Underwriters apply. On the other hand, a minor deviation may have no effect at all on a cargo owner: a vessel might depart from route but still arrive on time, at the right place, with the cargo intact, the cargo insurance still in force and no additional premium payable. A rule of law that makes the agreement between the parties unenforceable by the shipowner in these circumstances does not make much sense. For these reasons the view is gaining ground that the law relating to deviation under a contract of affreightment ought to be brought into line with the ordinary law of contract: see *The Antares* [1986] 2 Lloyd's Rep 626, p 633; [1987] 1 Lloyd's Rep 424, CA; *State Trading Corp of India Ltd v M Golodetz Ltd, The Sara D* [1989] 2 Lloyd's Rep 277, CA.

5 *Deviation and demurrage*. In *Hain*, Lord Atkin referred to earlier cases where deviation had been treated as preventing enforcement of demurrage provisions. In *The Alamosa* the vessel was chartered to carry a cargo from the River Plate to Malaga and Seville in that order. After discharging at Malaga within the agreed lay time, she had enough fuel oil to take her to Seville and to discharge there, but not enough to enable her to leave Seville afterwards. The vessel therefore went to Gibraltar having arranged to meet a tanker there. After waiting for two days at Gibraltar for the tanker, which did not arrive, the master took the vessel to Lisbon, which was off the geographical route but was the nearest place at which fuel oil could be obtained. The arbitrator found as a fact that the master acted reasonably in doing so. After taking on fuel, the vessel went to Seville where time taken to discharge exceeded the time fixed by the charter. The owners claimed demurrage in arbitration proceedings. The charterers contended that the ship had deviated from the chartered course and that this deprived the owners of the right to demurrage; the charterers also claimed damages for deviation. On a case stated by the arbitrator, Bailhache J held ((1924) 40 TLR 54) that: 'from the point of deviation all clauses in the contract which were in favour of the shipowners come to an end. The fixed lay days for discharge must go, though the charterers will still remain liable to discharge within a reasonable time.' The owners' claim for demurrage failed.

This judgment was affirmed on appeal to the Court of Appeal. In the House of Lords it was not disputed that the trip to Lisbon was a deviation. However, the owners attempted to justify the deviation by arguing that, if the deviation was reasonably necessary in a business sense, then it was in the course of the voyage which the charter prescribed. This argument was rejected on the grounds that it could only aid the shipowners if it had been proved (which it had not) that all necessary steps had been taken to supply the vessel with fuel at the commencement of the voyage. The judgment of the Court of Appeal was affirmed. Even if proof had been available on the point in question, it is not certain that the shipowners would have been successful. The House of Lords seems to have doubted whether a deviation could be justified if the object was to take on fuel, not to get the ship to the port of discharge, but to take her out of that port after discharge had been completed: *United States Shipping Board v Bunge and Born* (1925) 42 TLR 174.

6 *Deviation and statutory limitation of liability.* The appellants *Paterson Steamships v Robin Hood Mills* (1937) 58 LlL Rep 33, p 39, were owners of a cargo of flour/cereals

loaded on the *Thordoc* for carriage from Port Arthur (Ontario) to Montreal. Before proceeding on her voyage down Lake Superior, the vessel called at the neighbouring port of Fort William to discharge some boats belonging to the respondents. The *Thordoc* then resumed her chartered voyage in the course of which, because of a faulty compass and the incompetence of the steersman, she stranded at Point Porphyry and was wrecked with great loss and damage to cargo. The appellants obtained judgment for damages in respect of that loss and damage. The respondents then brought the present action to limit their liability under s 503 of the Merchant Shipping Act 1894.

The Privy Council, on appeal from the Exchequer Court of Canada, held that since the loss and damage took place without the actual fault or privity of the respondents in respect of that which caused the loss or damage in question (see Chapter 6), the respondents were entitled to limit their liability. The respondents were not at fault in respect of the improper navigation which caused the stranding merely because there had previously been a deviation. The deviation 'had nothing whatever to do with the loss of, or damage to, cargo now in question. At the time of the stranding any deviation was over and past, and the ship was at a place and on a course proper for her voyage . . .' (*per* Lord Roche).

7 *Deviation and deck cargo*. Cargo stowed on deck is exposed to substantially greater risks than cargo stowed in a hold, so that stowing on deck is a serious breach of a contract to carry in a hold. Unauthorised stowage on deck is sometimes referred to as a quasi deviation. In *Royal Exchange Shipping Co Ltd v Dixon* (1886) 12 App Cas 11, bales of cotton were shipped on the appellants' screw steamer *Egyptian Monarch* for carriage from New Orleans to Liverpool. In breach of contract, some of the cotton was carried on deck. On the voyage the ship went aground, and in order to get her off the master properly jettisoned the cotton. The endorsees of the bills of lading brought an action against the shipowners to recover the value of the cotton. The House of Lords held that an exception in the bills of lading of 'jettison' was no defence to the claim. It is not clear from the report whether this was conceived as a decision on the construction of the clause, or the application of a rule of law, but in *The Chanda* [1989] 2 Lloyd's Rep 494 it was said that the decision in *Dixon* was based on a principle of construction.

FURTHER READING

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CHAPTER 6

THE BILL OF LADING AS A CONTRACT

It is common for contractual terms and conditions to be printed on bills of lading. However, the notes and extracts reproduced in Chapter 1 show that bills of lading are not always issued at the same time or in the same way. In some circumstances, a bill of lading may itself be the contract made between the shipper and the carrier. But bills of lading that acknowledge that goods have been shipped on board are almost inevitably issued some time after a contract for carriage has been concluded. The most that can be said in this and many other cases is that the bill is some evidence of the terms of the contract while it remains in the hands of the shipper. Once delivered to an endorsee the bill will become the only evidence of the contract's terms: see Chapter 8. It is also possible for a bill of lading to be neither a contract nor even evidence of a contract, as in the case of a bill issued to a charterer as a receipt.

1 THE CONTRACT OR EVIDENCE OF THE CONTRACT?

***Ardennes (Cargo Owners) v Ardennes (Owners)* [1951] 1 KB 55**

Facts

The plaintiffs shipped 3000 cases of mandarin oranges on the *Ardennes* at Cartagena after the defendants had orally agreed to carry this cargo direct to London. When the cargo had been loaded, a bill of lading was issued which contained liberty to call at intermediate ports, to proceed by any route directly or indirectly and to overcarry. Instead of sailing direct to London, the vessel went first to Antwerp. By the time she arrived in London there had been an increase in the import tax payable on mandarins and the market price of the fruit had fallen. The plaintiffs were awarded damages in respect of the increase in import duty and their loss of profit due to the foreseeable fall in the market price.

Held

> **Lord Goddard**: The defences raised were in substance that there was no oral agreement, and reliance is placed on one of the conditions in the bill of lading. I have no hesitation in finding that there was a promise made to the shippers' representative that the ship should go direct to London, and that they shipped in reliance on that promise. I therefore have now to consider the defence which arises out of the terms of the bill of lading . . .
>
> It is, I think, well settled that a bill of lading is not in itself the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence of its terms: *Sewell v Burdick* (1884) 10 App Cas 74, 105 *per* Lord Bramwell and *Crooks v Allan* (1879) 5 QBD 38. The contract has come into existence before the bill of lading is signed; the latter is signed by one party only, and handed by him to the shipper usually after the goods have been put on board. No doubt if the shipper finds that the bill contains terms with which he is not content, or does not contain some term for which he has stipulated, he might, if there were time, demand his goods back; but he is not, in my opinion, for that reason, prevented from giving evidence that there was in fact a contract entered into before the bill of lading was signed different from that which is found in the bill of lading or containing some additional term. He is no party to the preparation of the bill of lading; nor does he sign it. It is unnecessary to cite authority further than the two cases already mentioned for the proposition that the bill of lading is not itself the contract; therefore in my opinion evidence as to the true contract is admissible . . .

Note
The Lord Chief Justice's statement that the 'shipper is no party to the preparation of the bill of lading' is not correct for all carriers and all circumstances: see Chapter 1.

2 WHOSE CONTRACT? IDENTIFYING THE CARRIER

Bills of lading do not always clearly identify the party who contracts to carry and deliver the goods. The problem of identifying the contracting carrier can be acute where bills of lading are issued to shippers for goods that are loaded on a chartered ship. In English law a contracting carrier need not necessarily be the performing carrier or, to put the point another way, a contract to carry and deliver is not invariably a contract to carry and deliver personally. The result is that a bill of lading for goods on a chartered ship may show a contract with either the shipowner or the charterer or possibly with both.

Shipowners and charterers may have their own views on what arrangement makes the most sense. They might agree that the charterer will find the shippers but that the shipowner will issue the bills of lading: this arrangement is common in time chartering. On the other hand, a charterer may wish to contract with shippers in its own name: a liner service, for example, that happens to make use of chartered tonnage from time to time, may want to use the line's standard terms and conditions and to issue bills of lading in its own name to all its customers. But whatever a shipowner and charterer may agree between themselves, matters may look quite different from the perspective of a shipper.

If the parties have not made their intentions clear, the general approach in English courts is to ask first if the charter is by demise. Where the charter is by demise, possession of the vessel will pass to the charterer and the master will normally be an employee/agent of the charterer, but not the shipowner. Goods loaded on the ship will normally be in the possession of the demise charterer and a bill of lading signed by the master will normally show a contract with the demise charterer. In the case of any other form of charter, possession of the vessel and the goods carried will be in the owner, the master will normally be the employee/agent of the owner and a bill of lading signed by the master will normally show a contract with the shipowner.

***Sandeman v Scurr* (1866) LR 2 QB 86**

Facts

The defendants were owners of the ship *The Village Belle*. The ship was chartered to a Mr Hodgson to load from the charterer's agents at Oporto a full cargo of wine for carriage to a safe port in the United Kingdom. The cargo was to be loaded and discharged at the merchant's risk and expense. The captain was to 'sign bills of lading at any rate of freight, without prejudice to the charter'. The claim was for damage caused by bad stowage to goods shipped by the plaintiffs.

Held

> **Cockburn CJ:** . . . The ship accordingly proceeded to Oporto, consigned to the agents of the charterer. She was by them put up as a general ship, but without it being at all made known that the vessel was under charter. The plaintiffs delivered their goods on board without any knowledge that the ship was not entirely at the disposition of the owner. Bills of lading for the goods in question were signed by the master in the usual form. The cargo was stowed by stevedores

employed and paid by the charterer's agents, but the amount so paid by the latter was repaid to them by the master.

The goods having been damaged by reason of improper stowage, the plaintiffs have brought their action against the defendants, as owners of the vessel; and the question is whether the defendants, under the circumstances stated, are liable. We are of opinion that they are liable, and that the action against them lies.

On the argument, it was contended on behalf of the defendants, that, as the use of the ship had been made over to Hodgson, the charterer, and the ship had been put up as a general ship by his agents, and the bill of lading had been given by the captain in furtherance of a contract for freight of which the charterer was to have the benefit, the captain must be considered as having given the bill of lading as the agent of the charterer, and the contract as having been made with the latter, and not with the defendants, the owners of the vessel; and that, consequently, the charterer was alone responsible for the negligent stowing of the goods in question.

It is unnecessary to decide whether the charterer would or would not have been liable, if an action had under the circumstances been brought against him. Our judgment proceeds on a ground, wholly irrespective of the question of the charterer's liability, and not inconsistent with it, namely, that the plaintiffs, having delivered their goods to be carried in ignorance of the vessel being chartered, and having dealt with the master as clothed with the ordinary authority of a master to receive goods and give bills of lading on behalf of his owners, are entitled to look to the owners as responsible for the safe carriage of the goods.

The result of the authorities, from *Parish v Crawford* (1746) 2 Strange 1251 downwards, and more especially the case of *Newberry v Colvin* (1832) 1 Cl & F 283, in which the judgment of the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench, was affirmed on appeal by the House of Lords, is to establish the position, that in construing a charterparty with reference to the liability of the owners of the chartered ship, it is necessary to look to the charterparty, to see whether it operates as a demise of the ship itself, to which the services of the master and crew may or may not be superadded, or whether all that the charterer acquires by the terms of the instrument is the right to have his goods conveyed by the particular vessel, and, as subsidiary thereto, to have the use of the vessel and the services of the master and crew.

In the first case, the charterer becomes for the time the owner of the vessel, the master and crew become to all intents and purposes his servants, and through them the possession of the ship is in him. In the second, notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel, the ownership remains in the original owners, and through the master and the crew, who continue to be their servants, the possession of the ship also. If the master, by the agreement of his owners and the charterer, acquires authority to sign bills of lading on behalf of the latter, he nevertheless remains in all other respects the servant of the owners; in other words, he retains that relation to his owners out of which by the law merchant arises the authority to sign bills of lading by which the owner will be bound.

It appears to us clear that the charterparty in the present instance falls under the second of the two classes referred to. There is here no demise of the ship itself, either express or implied. It amounts to no more than a grant to the charterer of the right to have his cargo brought home in the ship, while the ship itself continues, through the master and crew, in the possession of the owners, the master and crew remaining their servants.

It is on this ground that our judgment is founded. We think that so long as the relation of owner and master continues, the latter, as regards parties who ship goods in ignorance of any arrangement whereby the authority ordinarily incidental to that relation is affected, must be taken to have authority to bind his owner by giving bills of lading. We proceed on the well known principle that, where a party allows another to appear before the world as his agent in any given capacity, he must be liable to any party who contracts with such apparent agent in a matter within the scope of such agency. The master of a vessel has by law authority to sign bills of lading on

behalf of his owners. A person shipping goods on board a vessel, unaware that the vessel has been chartered to another, is warranted in assuming that the master is acting by virtue of his ordinary authority, and therefore acting for his owners in signing bills of lading. It may be that, as between the owner, the master, and the charterer, the authority of the master is to sign bills of lading on behalf of the charterer only, and not of the owner. But, in our judgment, this altered state of the master's authority will not affect the liability of the owner, whose servant the master still remains, clothed with a character to which the authority to bind his owner by signing bills of lading attaches by virtue of his office. We think that until the fact that the master's authority has been put an end to is brought to the knowledge of a shipper of goods, the latter has a right to look to the owner as the principal with whom his contract has been made . . .

Notes

1 In this extract the Chief Justice referred to an agreement that the master would sign bills of lading on behalf of the charterer. It is more common today to find agreements authorising the charterer, or the charterer's agent, to sign bills as agent for the master or the shipowner. In *The Rewia* [1991] 2 Lloyd's Rep 325, the Court of Appeal held that a bill of lading signed for a master could not be a charterer's bill unless the contract was made with the charterer alone and the person signing had authority to sign and did sign on behalf of the charterer and not the owners.

2 The usual assumption in the case of a chartered ship is that the contracting carrier is either the owner or a charterer. Cockburn CJ hints in this extract that in some circumstances both might be liable, an idea that was said in *The Starsin,* below, to be 'unobjectionable in legal principle', but which has not been developed in decided cases.

3 Demise clauses. The original aim of these clauses (see an example below, in the extract from *The Starsin*) was to ensure that time charterers, who could not claim the protection of the legislation limiting the liability of shipowners, would not be held liable as carriers: (1990) 106 LQR 403, *per* Lord Roskill. The right to limit liability was, as the law then stood, only available to a shipowner or demise charterer. The right to limit liability was extended to time charterers in 1958. Nevertheless demise clauses continued to be included in bills of lading and were treated as effective in English courts: *The Berkshire* [1974] 1 Lloyd's Rep 185; *The Vikfrost* [1980] 1 Lloyd's Rep 560; *The Jalamohan* [1988] 1 Lloyd's Rep 443. The decision of the House of Lords in *The Starsin* now leaves little future for these clauses in liner shipping, unless perhaps they are printed prominently on the front of a bill of lading and do not contradict other statements that appear there.

4 Further reading: Pejovic, C, 'The identity of carrier problem under time charters' (2000) Jo Mar L & Com 379 (a comparative treatment).

Makros Hout BV v Agrosin Private Ltd, The Starsin [2003] UKHL 12; [2003] 1 Lloyd's Rep 571

Facts

The defendants' vessel the *Starsin* was time chartered to Continental Pacific Shipping, who operated a liner service from the Far East to Europe. Timber and plywood arrived seriously damaged by fresh water. The plaintiffs were purchasers and receivers of the cargo and sued the shipowners on the bill of lading contracts (for tort claims, see Chapter 2). The bills of lading were issued on printed forms bearing the name and logo of Continental Pacific Shipping. The printed form was designed to be signed by the master and to create a contract with the shipowner, but the bills were in fact signed by agents 'As Agent for Continental Pacific Shipping (The Carrier)'. On the back of the

bills, 'in barely legible tiny print', the terms included a clause dealing with the identity of the carrier (cl 33) and a demise clause (cl 35). Continental Pacific Shipping had authority to issue bills on behalf of the shipowners. The shipowners argued that the carriage contracts had been entered into by the charterers, who had become insolvent. The cargo owners claimed that the bills were contracts with the shipowners. The shipowners pointed out that where written words or clauses are added to a printed form, *prima facie* the added words have greater effect than printed ones. The cargo owners responded that parties were free to stipulate in printed conditions that written provisions added to a printed form were not to prevail over printed terms.

The terms printed on the bills of lading provided:

> 1 DEFINITIONS … (c) 'Carrier' means the party on whose behalf this Bill of Lading has been signed …
>
> 33 IDENTITY OF CARRIER The contract evidence by this Bill of Lading is between the merchant and owner of the vessel … and … the … shipowner only shall be liable for any damage … arising out of the contract of carriage …
>
> 35 If the ocean vessel is not owned or chartered by demise to the company or line by whom this Bill of Lading is issued (as may be the case notwithstanding anything that appears to the contrary) this Bill of Lading shall take effect only as a contract of carriage with the owner … as principal made through the agency of the said company or line who act solely as agent and shall be under no personal liability whatsoever …

Held

> **Lord Bingham:** [6] The first and most crucial issue between the parties on these appeals is whether the contracts to carry these various parcels of cargo were made by or on behalf of the shipowner, as the cargo owners contend, or by or on behalf of CPS, the charterers of the vessel, as the shipowner contends. Put another way, the question is whether these were shipowner's bills or charterer's bills …
>
> [14] … [A] very cursory glance at the face of the bill is enough to show that the master has not signed the bill. It has instead been signed by agents for CPS which is described as 'The Carrier'. I question whether anyone engaged in maritime trade could doubt the meaning of 'carrier', a term of old and familiar meaning, but any such doubt would be quickly resolved by resort to the first condition overleaf in which the term is defined to mean the party on whose behalf the bill of lading has been signed, that is, the party contracting to carry the goods …
>
> [15] I can well understand that a shipper or transferee of a bill of lading would recognise the need to consult the detailed conditions on the reverse of the bill in any one of numerous contingencies which might arise and for which those conditions make provision. He would appreciate that the rights and obligations of the parties under the contract are regulated by those detailed conditions. But I have great difficulty in accepting that a shipper or transferee of a bill of lading would expect to have to resort to the detailed conditions on the reverse of the bill (and to persevere in trying to read the conditions until reaching conditions 33 and 35) in order to discover who he was contracting with. And I have even greater difficulty in accepting that he would expect to do so when the bill of lading contains, on its face, an apparently clear and unambiguous statement of who the carrier is … I am further fortified in taking this view of market practice by noting its adoption (since 1994) in the ICC Uniform Customs and Practice for Documentary Credits … Article 23(v) makes plain that banks will not examine terms and conditions on the back of the bill of lading. The ICC's Position Paper No 4 reiterates that the name of the carrier must appear as such on the front of the bill and that banks will not examine the contents of the terms and conditions of carriage …
>
> [17] I would note, lastly on this point, that the decision of the Court of Appeal majority has not earned the approval of some academic commentators expert in this field …

[18] I agree with these opinions and would hold, in agreement with Colman J and Rix LJ, and for essentially the reasons which they gave, that the bill contained or evidenced a contract of carriage made with CPS as carrier.

Lord Hoffmann: [80] . . . The construction given to the bill of lading must be objective and uniform and, in the case of the identity of the carrier, determined by an unequivocal statement on the face of the document . . .

[85] . . . I think that if the carrier is plainly identified by the language on the front of the document, one never gets to the demise clause on the back.

Lord Hobhouse: [128] In my judgment the salient fact is that the signatures contradict the form. The signature is not neutral or equivocal, nor, for that matter is the form. Where the (original) parties . . . have expressly agreed that Container Pacific Shipping [*sic*] shall be the contracting party, they have implicitly agreed that inconsistent clauses will be overriden. The special words, typed or stamped, placed in the signature box demonstrate a special agreement. Effect must be given to that agreement. The contracts contained in these bills of lading are contracts with Continental Pacific Shipping . . .

[129] There are two observations to make about this conclusion. The first is that 'shipped on board' bills of lading . . . will normally have been preceded by some anterior contract . . . However, there is no evidence or finding on this aspect so it cannot assist either side on the appeal. The second observation is that the claimants are subsequent holders of the bills of lading by endorsement. Their contractual rights must be ascertained by reference to the bill of lading document itself.

Note

The works cited in para 17 of Lord Bingham's judgment were Debattista, C, 'Is the end in sight for chartering demise clauses' (2001) Lloyd's List; Gaskell, N *et al*, *Contracts for the Carriage of Goods by Land, Sea and Air*, Yates, D (Editor in Chief), London: Lloyds of London; Girvin, S and Bennett, H, 'English Maritime Law 2000' (2002) LMCLQ 76. The decision is considered in Girvin, S, 'Himalaya clauses and tort in the House of Lords' (2003) LMCLQ 311.

3 THE BILL OF LADING IN THE HANDS OF A CHARTERER

A bill of lading issued to a charterer is normally a receipt, not a new contract, at least while it remains in the charterer's hands.

Rodoconachi v Milburn (1886) 18 QBD 67, CA

Facts

The plaintiffs chartered the defendants' ship to carry a cargo of cotton seed from Alexandria to the United Kingdom. The cargo was shipped under the charterparty at Alexandria by and on account of the charterers. A bill of lading was issued which contained an exception which was not in the charterparty and which purported to relieve the shipowners from liability for damage arising 'from any act, neglect, or default of the pilot, master, or mariners'. The cargo was lost by the negligence of the master.

Held

Lindley LJ: . . . The authorities shew that *prima facie*, and in the absence of express provision to the contrary, the bill of lading as between the charterers and the shipowners is to be looked upon as a mere receipt for the goods. There is nothing here to shew any intention to the contrary; so

far from there having been in fact any *animus contrahendi* when the bill of lading was signed, the jury have found upon the evidence that there was none, and that the bill of lading was taken as a mere receipt . . .

4 THE TERMS OF THE CONTRACT: INCORPORATION OF CHARTERPARTIES IN BILLS OF LADING

Where bills of lading are issued to a shipper by a shipowner in respect of goods loaded on a chartered ship, both the charterer and the owner may wish to ensure that the shipowner's rights and duties as against the holder of the bill of lading are the same as those contained in the charter. The shipowner may want to avoid exposure to risks or claims that he has not agreed in the charter to undertake; and the charterer will want to avoid consequential claims to indemnify the owner: see Chapter 15. These aims can sometimes be achieved. If the obligations that will arise under the bills of lading are inescapable, one solution may be to make the charter mirror the bills. Where the parties have unfettered freedom of contract, another approach is to see that relevant clauses of the charter are reprinted as terms of the bills of lading. This requires time and effort so that it may be tempting to try to achieve the same result by a single clause in the bill of lading that purports to incorporate some or all of the terms of the charter by reference. Some forms do this in a well planned way, with the charter attached to and forming an appendix to the bill of lading. Other forms refer specifically to the charter clauses that are to be incorporated so that there is no doubt what was intended. But in many of the cases mentioned in this section the incorporation clause used very general words. The extract from the *Varenna* reveals the general approach taken by English courts to interpretation of incorporation clauses, as well as the history of the interpretation of some forms of words.

***Skips A/S Nordheim v Syrian Petroleum, The Varenna* [1984] QB 599**

Facts

Crude oil was shipped at Tartous for carriage to Wilhelmshaven under a bill of lading signed by the master of the *Varenna*. The shipowners brought proceedings against the consignee on the bills of lading to recover demurrage alleged to be due under the charter, the charterers having defaulted. The consignees sought to stay the proceedings at a preliminary stage on the grounds that the charter contained an agreement that any disputes would be settled by arbitration and that this agreement had been incorporated into the bill of lading. The bill of lading provided that the cargo was: 'to be delivered (subject to the undermentioned conditions and exception) . . . unto order P or to their assigns upon payment of freight as per charterparty, all conditions and exceptions of which charterparty including the negligence clause, are deemed to be incorporated in bill of lading.'

Held

Hobhouse J: . . . [Counsel for the consignees] advanced and developed an argument . . . that the word 'condition' must, in the context, be read as 'term'.

The shipowners submitted that the word 'condition' has, in the context of an incorporation clause in a bill of lading, a well-recognised limited meaning and does not suffice to incorporate an arbitration clause and, secondly, that in any event the provisions of this charterparty are not clear enough . . .

The question of the incorporation of charterparty provisions, and specifically arbitration clauses, into bills of lading has been the subject of many cases. The problems discussed in these cases arise primarily from the simple fact that charterparties by their nature normally contain many more provisions and stipulations than are relevant to the simple contract of bailment between a bill of lading holder and a shipowner. The courts have therefore recognised that *prima facie* only provisions directly germane to the subject matter of the bill of lading, that is the shipment, carriage and delivery of goods, should be incorporated: *The Annefield* [1971] P 168. A charterparty arbitration clause is not normally germane to the bill of lading contract and therefore a clear intention to incorporate it has to be found. Although earlier cases may have disclosed an element of judicial prejudice against arbitration clauses (*TW Thomas & Co v Portsea Steamship* [1912] AC 1) that element is wholly absent from the more recent authorities and is not the basis on which they have proceeded. Some decisions have also reflected the principle that exclusions of liability, if they are to be relied upon by the carrier, must be clearly expressed.

Another point which is apparent from the authorities, and indeed from any consideration of principle, is that the primary task of the court is to construe the bill of lading. The bill of lading contract is the contract between the parties before the court and it is in that document that their intention must be found: *The Rena K* [1979] QB 377 and *Gray v Carr* (1871) LR 6 QB 522, 537, *per* Brett J. The breadth of the intention disclosed by the bill of lading is critical. There are many gradations of such intention . . . The oldest and narrowest form of wording was 'he or they paying freight as per charterparty': see *Abbott on Merchant Ships and Seamen*, 5th ed (1827), p 286. Then there was a wider form 'paying freight and all other conditions as per charterparty': see, for example, *Russell v Niemann* (1864) 17 CBNS 163. Express reference to 'exceptions' or to 'negligence clause' were introduced: see, for example, *The Northumbria* [1906] P 292. Also in this century much wider expressions came into use such as: 'The terms, conditions and exceptions contained in the charterparty': see, for example, *Crossfield v Kyle Shipping* [1916] 2 KB 885, or 'all the terms, conditions, clauses and exceptions contained in the said charterparty': see, for example, *The Merak* [1965] P 223. For many years it has been commonplace to find bills of lading using any of these various alternatives. Sometimes wider forms are used, sometimes narrower ones . . .

In this type of situation . . . where a particular type of clause has received a certain judicial interpretation and become established as such in commercial law, a later tribunal will not substitute its own view of that clause's meaning for that previously stated.

This proposition is essential to the proper recognition of contractual intention in commercial transactions. In the present context of bill of lading clauses this principle has been expressly stated and acted on in more than one case . . .

It is also a well-recognised principle that courts do not distinguish between similar forms of wording unless there are significant differences between them. Mere verbal changes in the way a well-known clause is expressed do not form the basis for attributing a different meaning to the clause . . .

The use of the word 'conditions' in bill of lading charterparty incorporation clauses has a long history, going back to at least the middle of the last century. It has throughout been consistently interpreted as meaning the conditions which have to be performed on the arrival of the ship by the consignee who is asserting his right to take delivery of the goods. Typically such a condition is the discharge of any lien on the goods or the performance of any unloading obligations . . .

The 19th century decisions on the words, 'deliver unto order or assigns they paying freight for the goods and all other conditions as per charterparty' were undoubtedly based on an *ejusdem generis* construction derived from the reference to freight: see *Serraino & Sons v Campbell* [1891] 1 QB 283 and the cases cited therein. In the present century the emphasis has simply been upon the use of the word 'conditions' as opposed to the wider words 'terms' or 'clauses' . . .

The position is that over some 150 years the question whether the word 'condition' should be construed as a synonym for 'term' or 'clause' has been before the courts on many occasions and

on every occasion the wider construction has been rejected. There can be no doubt that the narrower construction represents the established meaning in the present context of bills of lading and charterparties.

It is in recognition of this meaning of the word 'conditions' that the alternative wider words 'terms' and 'clauses' have been and are used by parties when they wish to effect a wider incorporation . . .

The correct construction of the present bill of lading therefore is that when it refers to conditions it refers only to conditions properly so called to be performed by the consignee on the arrival of the vessel. On no view is an arbitration clause such a condition. An arbitration clause is a collateral provision: *Heyman v Darwins Ltd* [1942] AC 356. It is a clause or a term. It is not a condition . . .

The consignees' application accordingly is dismissed.

On appeal

Donaldson MR: . . . The issue, in a nutshell, is whether the wording of the bill of lading is apt to introduce the provisions of the charterparty arbitration clause and apply it to the bill of lading contract . . .

The starting point for the resolution of this dispute must be the contract contained in or evidenced by the bill of lading, for this is the only contract to which the shipowners and the consignees are both parties. What the shipowners agreed with the charterers, whether in the charterparty or otherwise, is wholly irrelevant, save in so far as the whole or part of any such agreement has become part of the bill of lading contract. Such an incorporation cannot be achieved by agreement between the shipowners and the charterers. It can only be achieved by the agreement of the parties to the bill of lading contract and thus the operative words of incorporation must be found in the bill of lading itself.

Operative words of incorporation may be precise or general, narrow or wide. Where they are general, and in particular where they are general and wide, they may have the effect of incorporating more than can make any sense in the context of an agreement governing the rights and liabilities of the shipowner and of the bill of lading holder. In such circumstances, what one might describe as 'surplus', 'insensible' or 'inconsistent' provisions fall to be 'disincorporated', 'rejected' or ignored as 'surplusage'. But the starting point must always be the provisions of the bill of lading contract producing the initial incorporation. And what must be sought is incorporation, not notice of the existence or terms of another which is not incorporated . . .

[In] *TW Thomas & Co v Portsea Steamship* [1912] AC 1, [it was held that] . . . 'terms and conditions' only incorporated 'matters which have to be dealt with both by the shippers and the consignees in relation to the carriage, discharge and delivery of the cargo' . . . I can find no trace of *TW Thomas & Co v Portsea Steamship* ever having been doubted or modified and that decision is in my judgment fatal to the appeal . . .

As in my judgment the arbitration clause was never incorporated, it is unnecessary to consider whether, if it was, it has to be rejected as being insensible in view of its references to 'this charter', 'under this charter' and the appointment of arbitrators by 'owners and charterers'. Clearly the clause would have required 'manipulation' to use the colourful phrase of Lord Denning MR in *The Annefield* [1971] P 168, 184. Whether such manipulation could be justifed . . . is an interesting point but not one which, in my judgment, arises for decision on this appeal.

I would dismiss the appeal. [Oliver and Watkins LJJ delivered judgments agreeing that the appeal should be dismissed.]

Notes

1 In *The Federal Bulker* [1989] 1 Lloyd's Rep 103, p 105, CA, Bingham LJ explained why incorporation clauses in bills of lading receive special treatment:

Generally speaking, the English law of contract has taken a benevolent view of the use of general words to incorporate by reference standard terms to be found elsewhere. But in the present field

a different, and stricter, rule has developed, especially where the incorporation of arbitration clauses is concerned. The reason no doubt is that a bill of lading is a negotiable commercial instrument and may come into the hands of a foreign party with no knowledge and no ready means of knowledge of the terms of the charterparty. The cases show that a strict test of incorporation having, for better or worse, been laid down, the courts have in general defended this rule with some tenacity in the interests of commercial certainty. If commercial parties do not like the English rule, they can meet the difficulty by spelling out the arbitration provision in the bill of lading and not relying on general words to achieve incorporation.

2 The judgments in *The Varenna* show that a staged approach to the interpretation should be adopted. The operative words of incorporation must normally be found in the bill of lading itself, since incorporation can only be achieved by agreement of the parties to that contract. Normally, the language of the charterparty only becomes relevant at a second stage of the inquiry. If the language of a bill of lading is wide enough to effect a *prima facie* incorporation of a clause in a charterparty, the next question is whether that clause makes any sense at all in the context of the bill of lading contract. In *Hamilton & Co v Mackie & Sons* (1889) 5 TLR 677, Lord Esher MR said: '. . . the conditions of the charterparty must be read verbatim into the bill of lading as though they were printed there *in extenso*. Then, if it was found that any of the conditions of the charterparty on being so read were inconsistent with the bill of lading they were insensible, and must be disregarded.'

3 *Verbal manipulation*. If a general incorporation clause in a bill of lading catches terms in a charterparty, must those terms be read literally and rejected if they are inappropriate in the bill of lading contract, or is it possible to embark on a wider search for the parties' intentions? In *The Varenna* and *The Nerano* [1996] 1 Lloyd's Rep 1, CA, it seems to have been accepted that the wish to incorporate a particular clause might be so clearly expressed as to require, 'by necessary implication, some modification of the language incorporated so as to adapt it to the new contract into which it is inserted': *The Varenna*, *per* Oliver LJ, above.

4 A bill of lading was issued to shippers by shipowners in respect of goods shipped on board a vessel which was under charter. The bill of lading provided that 'all terms and conditions, liberties, exceptions and arbitration clause of the charter party, dated as overleaf, are herewith incorporated'. The arbitration clause in question referred to disputes 'between the Owners and the Charterers'. The Court of Appeal held that by identifying and specifying the charterparty arbitration clause, the parties to the bill of lading contract had agreed to arbitrate and that to give effect to that intention, the words in the clause had to be construed as applying to those parties; the words in the clause would therefore be manipulated or adapted so that they covered disputes arising under the bill of lading contract: *The Nerano*.

5 The result of this line of development so far as arbitration clauses are concerned is the decision in *The Delos* [2001] 1 Lloyd's Rep 703, where it was held that to incorporate an arbitration clause required an express reference to it in the bill of lading, or, if general words could be construed to include it, that they did so only when the arbitration clause in the charterparty itself expressly provided that bills were to be subject to its provisions, so that no 'manipulation' was required for that result to be achieved.

6 But 'verbal manipulation' in search of the parties' intentions is problematic. In *Miramar Maritime Corp v Holborn Oil Trading Ltd* [1984] 1 AC 676, the bill of lading provided for the incorporation of 'all the terms whatsoever of the said charter except the rate and payment of freight'. It was argued, on the basis of *dicta* in *The Annefield*, that this resulted in the incorporation in the bill of lading of the

demurrage clause in the charterparty and that, because the clause was directly germane to the shipment, carriage and delivery of goods, a degree of verbal manipulation of the clause was permissible and 'charterer' in the demurrage clause could and should be read as 'consignee' or 'bill of lading holder'. If correct, this argument would have meant that every consignee of every parcel of goods carried on a chartered voyage using the standard forms in question might become liable for an unknown and wholly unpredictable sum for demurrage without any ability on his part to prevent it. The House of Lords rejected the claim. Lord Diplock said:

> My Lords, I venture to assert that no businessman who had not taken leave of his senses would intentionally enter into a contract which exposed him to a potential liability of this kind; and this, in itself, I find to be an overwhelming reason for not indulging in verbal manipulation of the actual contractual words used in the charterparty so as to give to them this effect when they are treated as incorporated in the bill of lading . . . [W]here in a bill of lading there is included a clause which purports to incorporate the terms of a specified charterparty, there is not any rule of construction that clauses in that charterparty which are directly germane to the shipment, carriage or delivery of goods and impose obligations upon the 'charterer' under that designation, are presumed to be incorporated in the bill of lading with the substitution of (where there is a cesser clause), or inclusion in (where there is no cesser clause), the designation 'charterer', the designation 'consignee of the cargo' or 'bill of lading holder'.

7 *Freight*. 'Freight payable as per charterparty' was held in *India Steamship Co v Louis Dreyfus Sugar Ltd, The Indian Reliance* [1997] 1 Lloyd's Rep 52 to incorporate the whole of the relevant charter's terms as to the payment of freight, not only the rate of freight payable but also 'the manner of payment, when and where and to whom freight shall be payable'. However, the carrier may be entitled to redirect payment to himself: *Tradigrain SA v King Diamond Shipping SA, The Spiros C* [2000] 2 Lloyd's Rep 319, CA.

8 Failure to insert, in a space provided in a bill of lading, the date of the relevant charter will not automatically negative incorporation: *The San Nicholas* [1976] 1 Lloyd's Rep 8; *The SLS Everest* [1981] 2 Lloyd's Rep 389.

9 An incorporation clause in a bill of lading will not normally have the effect of incorporating oral terms which have not been reduced into writing: *The Heidberg* [1994] 2 Lloyd's Rep 287; but such a clause may affect incorporation where the charter contract is contained in or evidenced by a recap telex and a standard form to which the telex refers: *The Epsilon Rosa* [2003] EWCA Civ 938; [2003] 2 Lloyd's Rep 509.

CHAPTER 7

THE BILL OF LADING AS A RECEIPT

One of the functions of a bill of lading is to act as a receipt. But as the materials in Chapter 1 show, this is a receipt of a special type. It is sometimes said that a bill of lading is like a cloakroom ticket because it must be produced in order to obtain delivery. A better comparison treats a bill of lading as being, by virtue of the contract between the parties, the key to the floating warehouse. The extracts in the first part of this chapter deal with this feature of a bill of lading contract. The cases in the second part deal with the other aspect of the bill of lading as a receipt: its use as evidence to prove disputed facts in claims made against carriers for loss or damage to goods.

1 DELIVERY AGAINST PRODUCTION OF AN ORIGINAL BILL OF LADING

The Stettin (1889) 14 PD 142

Facts

The plaintiffs shipped 57 barrels of seed oil on the steamship *Stettin* in London under a bill of lading providing for delivery at a German port to the named consignee or to his assigns. The master delivered the goods at the port of discharge to the consignee without the production of the bill of lading. An attempt was made to prove that under German law, a shipowner was entitled to deliver goods to a named consignee without insisting on the production of the bill of lading.

Held

> **Butt J:** German advocates have been called on both sides, but, as they differ, I must, in this divergence of opinion, decide what, in the result, the German law appears to me to be.
>
> Having considered the reasons given by these advocates for their opinions, I have come to the conclusion that, on this point, German law does not essentially differ from English law.
>
> According to English law and the English mode of conducting business, a shipowner is not entitled to deliver goods to the consignee without the production of the bill of lading. I hold that the shipowner must take the consequences of having delivered these goods to the consignee without the production of either of the two parts of which the bill of lading consisted. There will be judgment for the plaintiffs with, if necessary, a reference to the registrar to ascertain the amount of damage.

Note

Straight consigned bills. In recent years there has been uncertainty about the nature of the carrier's duty on delivery where the bill of lading does not require delivery to bearer or to a named consignee 'or order', but simply specifies the name of the consignee. After a full review of the authorities the Singapore Court of Appeal held in *Voss v APL Co Pte Ltd* [2002] 2 Lloyd's Rep 707 that presentation upon delivery is required even in the case of a straight bill. This conclusion has now been followed in England: *The Rafaela S* [2003] EWCA Civ 556; [2003] 2 Lloyd's Rep 113. And see Treitel, G, 'Straight bills of lading' (2003) 119 LQR 608.

2 A CARRIER IS ENTITLED TO DELIVER AGAINST PRODUCTION OF ONE ORIGINAL BILL

Bills of lading are traditionally issued in sets with a minimum of three originals. This practice originated in the days of sail, when the merchant would retain one copy and would send two others by different vessels in the hope that at least one would arrive. The practice of issuing sets of multiple originals has continued, although there is a clear danger of fraud when a set of originals is separated. Cargo interests, rather than carriers, bear this risk.

Glyn Mills Currie & Co v East and West India Dock Co
(1882) 7 App Cas 591

Facts

Twenty hogsheads of sugar were shipped in Jamaica on the *Mary Jones* and consigned to Cottam & Co in London. The master signed a set of three bills of lading marked 'First', 'Second', and 'Third', respectively, which made the goods deliverable to Cottam & Co, or their assigns, freight payable in London, 'the one of the bills being accomplished, the others to stand void'. During the voyage Cottam & Co endorsed the bill of lading marked 'First' to a bank in consideration of a loan. Upon the arrival of the ship at London the goods were landed and placed in the custody of a dock company in their warehouses. The dock company *bona fide* and without notice or knowledge of the bank's claim delivered the goods to other persons who produced delivery orders signed by Cottam & Co.

Held

Lord Blackburn: . . . If there were only one part of the bill of lading, the obligation of the master under such a contract would be clear, he would fulfil the contract if he delivered to Cottam & Co on their producing the bill of lading unindorsed; he would also fulfil his contract if he delivered the goods to anyone producing the bill of lading with a genuine indorsement by Cottam & Co. He would not fulfil his contract if he delivered them to anyone else, though if the person to whom he delivered was really entitled to the possession of the goods, no one might be entitled to recover damages from him for that breach of contract. But at the request of the shipper, and in conformity with ancient mercantile usage, the master has affirmed to three bills of lading all of the same tenor and date, the one of which bills being accomplished the others to stand void.

. . . But where the person who produces a bill of lading is one who – either as being the person named in the bill of lading which is not indorsed, or as actually holding an indorsed bill – would be entitled to demand delivery under the contract, unless one of the other parts had been previously indorsed for value to some one else, and the master has no notice or knowledge of anything except that there are other parts of the bill of lading, and that therefore it is possible that one of them may have been previously indorsed, I think the master cannot be bound, at his peril, to ask for the other parts.

. . . unless this was the practice, the business of a shipowner could not be carried on, unless bills of lading were made in only one part . . .

. . . where the master has notice that there has been an assignment of another part of the bill of lading, the master must interplead or deliver to the one who he thinks has the better right, at his peril if he is wrong. And I think it probably would be the same if he had knowledge that there had been such an assignment, though no one had given notice of it or as yet claimed under it. At all events, he would not be safe, in such a case, in delivering without further inquiry. But I think that when the master has not notice or knowledge of anything but that there are other parts of the bill of lading, one of which it is possible may have been assigned, he is justified or excused in delivering

> according to his contract to the person appearing to be the assign of the bill of lading which is produced to him . . .

(Lord Selborne LC, Lord O'Hagan, Lord Watson and Lord Fitzgerald agreed with Lord Blackburn. Earl Cairns also delivered a judgment in favour of dismissing the appeal.)

Notes

1 *Interpleader*. Rules of procedure in England allow a party in possession of property, satisfied that it must be delivered to one of two or more claimants but unsure who has the better right, to take and rely on the directions of the court.

2 See further in Wilson, J, 'The presentation rules revisited' (1995) LMCLQ 289.

3 A REASONABLE EXCUSE FOR NON-PRODUCTION?

Papers are vulnerable and original bills of lading are sometimes lost or delayed and do not reach the place of delivery until after the arrival of the cargo. In some circumstances English law excuses a person who accepts a reasonable explanation for non-production of an important document. This approach is not applied to carriers who contract to deliver only against production of an original bill of lading, as Lord Denning explained in *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576, PC, below:

> It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading . . . The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are therefore liable in conversion unless likewise so protected.

There are statements in one or two later cases that appear to suggest that a carrier can deliver without insisting on production of a bill of lading where its absence is satisfactorily accounted for*: Barclays Bank Ltd v Commissioners of Customs & Excise* [1963] 1 Lloyd's Rep 81, p 88; *The Sormovskiy 3068* [1994] 2 Lloyd's Rep 266. However, these suggestions can now be discounted. The view taken by Lord Denning and by Lord Blackburn in *Glyn Mills*, above, was reasserted in *The Houda*, where it was said (*per* Neill LJ) that the simple working rule is that a shipowner who delivers without production of a bill of lading does so at his peril.

Kuwait Petroleum Corp v I & D Oil Carriers Ltd, The Houda
[1994] 2 Lloyd's Rep 541, CA

Facts

In 1990, on the invasion of Kuwait, the *Houda* was in the course of loading. She sailed with a part cargo of oil on board. Bills of lading signed by the master were left in Kuwait and never recovered. The charterers argued that they were entitled to demand that the vessel give delivery without production of the bills of lading.

Held

> **Neill LJ:** [Carriers] do not fulfil their contractual obligations if the cargo is delivered to a person who cannot produce the bill of lading. Of course if such delivery is made and the person to whom the cargo is delivered proves to be the true owner no damages would be recoverable . . .
>
> It is of course open to a shipowner to decide that he is adequately protected by a letter of indemnity and delivery in the absence of the bill of lading, but in my judgment the rights of a time

charterer to give orders do not entitle him to insist that cargo should be discharged without production of the bill of lading.

Leggatt LJ: . . . Under a bill of lading contract a shipowner is obliged to deliver goods upon production of the original bill of lading. Delivery without production of the bill of lading constitutes a breach of contract even when made to the person entitled to possession. But a shipowner is not discharged by delivery to the holder if he has notice or knowledge of any defect of title . . .

In practice, if the bill of lading is not available, delivery is effected against an indemnity. Where the bill of lading is lost, the remedy, in default of agreement, is to obtain an order of the court that on tendering a sufficient indemnity the loss of the bill of lading is not to be set up as a defence . . .

Note

The rights of a time charterer to give orders are considered in Chapter 15.

4 DELIVERY AGAINST A FORGED BILL OF LADING

***Motis Exports Ltd v Dampskibsselskabet AF 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg* (Maersk Line)**
[1999] 1 Lloyd's Rep 837

Facts

The plaintiffs shipped goods under bills of lading for carriage by Maersk Line to Cotonou and Abidjan in West Africa where forgeries were used to obtain delivery. The fact that the bills presented were forged was neither known nor reasonably apparent to the defendants, who argued that in the circumstances they were not liable in contract or tort or alternatively were protected by a clause in the bill of lading contract which relieved them from all liability after discharge over the ship's rail.

Held

Rix J: [Is] a forged bill of lading as good as a genuine bill of lading for the purposes of the 'simple working rule' [that delivery without production of a bill of lading is at the shipowner's peril]? The question only has to be asked, to make it seem unlikely that the answer will be in the positive.

I suppose the question can be asked in two forms. First, is a shipowner entitled to deliver against a forged bill of lading? Second, can a shipowner be obliged to deliver against a forged bill of lading? . . . Clearly, if the forgery is known or suspected, or if the shipowner is on notice of the possibility of forgery, the answer to both questions must be 'No' . . .

Let me suppose, however, that the forgery could not reasonably be detected. Can a shipowner be obliged to deliver against such a bill? It is impossible to think that he can. He may of course be deceived, but if he obstinately refuses, despite his ignorance of the deception, to deliver against the forged bill, can he be liable for that refusal to the holder of the forged bill? It cannot be. He may have acted in ignorance, but he did right . . .

Now suppose that the question is whether the shipowner is entitled to deliver, that is to say has a defence in delivering, against a forged bill, in ignorance of the forgery? If that is so, it can only be by reason of an implied term. It is hard to think, however, that it is necessary to imply such a term. It would favour the shipowner at the expense of the true owner of the goods. It would subvert the rule that a bill of lading is the key to the warehouse. Certainly no true owner would think that such an implication would be reasonable. It is wrong to imply a term unless it is both reasonable and necessary. The fact is that the law does not in general protect those who act on forgeries, but rather those whose true title is attacked by forgery . . .

I do not think that the question turns on a matter of policy, but in any event I would agree with the submission of Mr Meeson [counsel] that policy favours the same answer. If a shipowner was

> entitled to deliver goods against a forged bill of lading, then the integrity of the bill as the key to a floating warehouse would be lost. Moreover, as between shipowner and true goods owner, it is the shipowner who controls the form, signature and issue of his bills, even if as a matter of practice he may delegate much of that to his time charterers or their agents. If one of two innocent people must suffer for the fraud of a third, it is better that the loss falls on the shipowner, whose responsibility it is both to look to the integrity of his bills and to care for the cargo in his possession and to deliver it aright, rather than on the true goods' owner, who holds a valid bill and expects to receive his goods in return for it.
>
> In my judgment, therefore, it is no defence to a shipowner or to the defendants in this case, innocently to be deceived by production of a forged bill of lading into release of cargo. When the proper bill of lading is produced, he has no defence. He cannot say: I have already delivered the goods without production of the original bill of lading. Nor does it avail him to say: although I have already delivered the goods without production of the original bill of lading, I did so without negligence in return for a worthless forgery . . .

There was no appeal against this part of Rix J's decision. The defendants did appeal, unsuccessfully, on the ground that they were protected by the clause excluding liability for loss after discharge over the ship's rail.

5 EXEMPTION CLAUSES

Clauses which attempt to excuse the carrier from obligations relating to delivery are not unusual. The two cases included in this section reveal different approaches that cannot easily be reconciled, except perhaps on the ground mentioned in the last paragraph of the extract from *Rambler Cycle*. The court in the *Chartered Bank* case read the contract without giving any special significance to any one part. In *Rambler*, on the other hand, the court claimed to be able to identify one part of the contract that it was sure the parties must have thought was more important than another, even though the parties had not said so expressly. At least one part of the reasoning in *Rambler* has become weaker with passage of time: the point based on the *Cap Palos*, a deviation case, would be unlikely to be influential today.

Chartered Bank of India, Australia and China v British India Steam Navigation Co Ltd [1909] AC 369, PC

Facts

The bank held, as security for a loan, bills of lading relating to goods carried to Penang on the steamship *Teesta*, one of a line of steamers belonging to British India Steam Navigation. On arrival in Penang, the cargo was delivered overside into lighters and taken to the wharf by landing agents. The goods were taken away by fraud without production of the bills of lading by a representative of the receivers acting in collusion with a representative of the landing agents.

Held

> **Lord Macnaghten:** . . . Both here and in the courts below the respondent company disclaimed all liability, relying on conditions subject to which the bills of lading were expressed to be issued. They are printed at the foot of the bill of lading, and attention is called to them in the body of the bill. The only conditions material in the present case are those intended to be applicable on the arrival of the carrying vessel at the port of destination. They are contained in the following clause:
>
> > The company is to have the option of delivering these goods or any part thereof into receiving ship or landing them at the risk and expense of the shipper or consignee as per scale of

> charges to be seen at the agent's office, and is also to be at liberty until delivery to store the goods or any part thereof in receiving ship, godown, or upon any wharf, the usual charges therefor being payable by the shipper or consignee. The company shall have a lien on all or any part of the goods against expenses incurred on the whole or any part of the shipment. In all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee.

On behalf of the respondents the contention was that the obligations they undertook were fulfilled by delivering the goods to the landing agents, and that at any rate their liability ceased when the goods were once 'free of the ship's tackle'.

On the other hand it was said on behalf of the bank that the landing agents were neither the assigns nor the agents of the shippers or consignees, and that the goods had never been delivered in accordance with the bills of lading. As regards the provision for cesser of liability, the suggestion was that it applied only to the interval between the removal of the goods from the ship and their being landed on the quay.

. . . Now it may be conceded that the goods in question were not delivered according to the exigency of the bills of lading by being placed in the hands of the landing agents, and it may be admitted that bills of lading cannot be said to be spent or exhausted until the goods covered by them are placed under the absolute dominion and control of the consignees. But their Lordships cannot think that there is any ambiguity in the clause providing for cesser of liability. It seems to be perfectly clear. There is no reason why it should not be held operative and effectual in the present case. They agree with the learned Chief Justice that it affords complete protection to the respondent company.

Their Lordships therefore will humbly advise His Majesty that the appeal should be dismissed.

***Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576, PC**

Facts

Rambler shipped bicycle parts on *Glengarry* under a bill of lading which provided for delivery to order or assigns. The purchasers of the goods were named as the notify party. After discharge of the goods at Singapore, the carrier's agents (relying on an indemnity agreement with the purchasers and their bank) delivered the goods to the purchasers without insisting on production of the bill of lading. The purchasers could not produce the bill of lading because they had not paid the purchase price and taken up the documents.

Held

Lord Denning: . . . It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading. In this case it was 'unto order or his or their assigns', that is to say, to the order of the Rambler Cycle Company, if they had not assigned the bill of lading, or to their assigns, if they had. The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are therefore liable in conversion unless likewise so protected.

In order to escape the consequences of the misdelivery, the appellants say that the shipping company is protected by clause 2 of the bill of lading, which says that:

> During the period before the goods are loaded on or after they are discharged from the ship on which they are carried by sea, the following terms and conditions shall apply to the exclusion of any other provisions in this bill of lading that may be inconsistent therewith, *viz*,

> '(a) so long as the goods remain in the actual custody of the carrier or his servants' (here follows a specified exception); '(b) whilst the goods are being transported to or from the ship' (here follows another specified exemption); '(c) in all other cases the responsibility of the carrier, whether as carrier or as custodian or bailee of the goods, shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely after they are discharged therefrom'.

The exemption, on the face of it, could hardly be more comprehensive, and it is contended that it is wide enough to absolve the shipping company from responsibility for the act of which the Rambler Cycle Company complains, that is to say, the delivery of the goods to a person who, to their knowledge, was not entitled to receive them. If the exemption clause upon its true construction absolved the shipping company from an act such as that, it seems that by parity of reasoning they would have been absolved if they had given the goods away to some passer-by or had burnt them or thrown them into the sea. If it had been suggested to the parties that the condition exempted the shipping company in such a case, they would both have said: 'Of course not.' There is, therefore, an implied limitation on the clause, which cuts down the extreme width of it: and, as a matter of construction, their Lordships decline to attribute to it the unreasonable effect contended for.

But their Lordships go further. If such an extreme width were given to the exemption clause, it would run counter to the main object and intent of the contract. For the contract, as it seems to their Lordships, has, as one of its main objects, the proper delivery of the goods by the shipping company, 'unto order or his or their assigns', against production of the bill of lading. It would defeat this object entirely if the shipping company was at liberty, at its own will and pleasure, to deliver the goods to somebody else, to someone not entitled at all, without being liable for the consequences. The clause must therefore be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract: see *Glynn v Margetson & Co* [1893] AC 351, 357; *GH Renton & Co Ltd v Palmyra Trading Corporation of Panama* [1956] 1 QB 462, 501.

To what extent is it necessary to limit or modify the clause? It must at least be modified so as not to permit the shipping company deliberately to disregard its obligations as to delivery. For that is what has happened here. The shipping company's agents in Singapore acknowledged: 'We are doing something we know we should not do.' Yet they did it. And they did it as agents in such circumstances that their acts were the acts of the shipping company itself. They were so placed that their state of mind can properly be regarded as the state of mind of the shipping company itself. And they deliberately disregarded one of the prime obligations of the contract. No court can allow so fundamental a breach to pass unnoticed under the cloak of a general exemption clause: see *The Cap Palos* [1921] P 458, 471.

The appellants placed much reliance, however, on a case which came before their Lordships' Board in 1909, *Chartered Bank of India, Australia and China v British India Steam Navigation Co Ltd* [1909] AC 369. There was there a clause which said that in all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle. The goods were discharged at Penang and placed in a shed on the jetty. Whilst there a servant of the landing agents fraudulently misappropriated them in collusion with the consignees. Their Lordships' Board held that the shipping company were protected by the clause from any liability.

Their Lordships are of opinion that that case is readily distinguishable from the present, as the courts below distinguished it, on the simple ground that the action of the fraudulent servant there could in no wise be imputed to the shipping company. His act was not its act. His state of mind was not its state of mind. It is true that, in the absence of an exemption clause, the shipping company might have been held liable for his fraud, see *United Africa Co Ltd v Saka Owoade* [1955] AC 130. But that would have been solely a vicarious liability. Whereas in the present case the action of the shipping agents at Singapore can properly be treated as the action of the shipping company itself … their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

6 ILLEGAL INDEMNITY AGREEMENTS

If a bill of lading cannot be produced when the carrier is ready to give delivery, it is common for cargo interests to offer an indemnity instead. There can be commercial reasons for refusing to accept such an offer, since no simple agreement for an indemnity is any better than the credit of the person offering it. There may be other reasons for a refusal. The decision in *Brown Jenkinson* dealt with an indemnity offered by a shipper rather than a receiver of cargo, but the judgments are based on common principles.

Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd
[1957] 2 QB 621, CA

Facts

The defendants (Dalton) sold 100 barrels of orange juice to a company in Rotterdam who resold to a purchaser in Hamburg. The plaintiffs were loading brokers for the vessel on which the orange juice was to be shipped. They informed the defendants that the barrels were old, frail and leaking and that a claused bill of lading was appropriate. At the defendants' request and on a promise of an indemnity, the plaintiffs signed a clean bill of lading stating that the barrels were 'shipped in apparent good order and condition'. On delivery in Hamburg, the barrels were leaking and the shipowners had to make good the loss. The plaintiffs sued the defendants under the agreement to indemnify, the benefit of which had been assigned to them by the shipowners. The defendants refused to pay, alleging that the contract of indemnity was illegal, because it had as its object the making by the shipowners of a fraudulent misrepresentation.

Held

Morris LJ: The question which is raised in this appeal is whether, on the facts of this particular case, an agreement to indemnify against the consequences of issuing a clean bill of lading is enforceable. The case is one in which the issuing of a clean bill of lading was not justified having regard to the condition of the goods which were shipped . . .

To the claim made in the action on the contract of indemnity, the defendants advance the defence that it is unenforceable, because it was founded on an illegal consideration. This plea comes with singular ill grace from those at whose request the procedure at the time of shipment was adopted: they are prepared to condemn their own conduct, in order to save their own pocket. But the legal issue which arises must be determined, and it is perhaps of a nature which transcends in importance and, in any event, cannot be affected by any considerations as to the relative merits of the attitudes of the parties.

It is, I think, clear that the plaintiffs did not desire that anyone should be defrauded. In agreeing with the defendants, they did not have any such desire as their real purpose . . . But the question which here arises is whether the contract sued upon was founded upon an illegal consideration. An agreement is illegal and unenforceable if it has as its object the commission of a tort . . . It is said that the contract here is illegal because it had as its object the making by the shipowners of a fraudulent misrepresentation. The question arises whether this is so: if so, the further question arises whether the position is effected by the circumstance that the claims made upon the shipowners were satisfied . . .

On the facts as found, and indeed on the facts which are not in dispute, the position was therefore that, at the request of the defendants, the plaintiffs made a representation which they knew to be false and which they intended should be relied upon by persons who received the bill of lading, including any banker who might be concerned. In these circumstances, all the elements of the tort of deceit were present. Someone who could prove that he suffered damage by relying on the

representation could sue for damages. I feel impelled to the conclusion that a promise to indemnify the plaintiffs against any loss resulting to them from making the representation is unenforceable. The claim cannot be put forward without basing it upon an unlawful transaction. The promise upon which the plaintiffs rely is in effect this: if you will make a false representation, which will deceive indorsees or bankers, we will indemnify you against any loss that may result to you. I cannot think that a court should lend its aid to enforce such a bargain.

The conclusion thus reached is one that may seem unfortunate for the plaintiffs, for I gain the impression that they did not pause to realise the significance and the implications of what they were asked to do. There was evidence that the practice of giving indemnities upon the issuing of clean bills of lading is not uncommon. That cannot in any way alter the analysis of the present transaction, but it may help to explain how the plaintiffs came to accede to the defendants' request. There may perhaps be some circumstances in which indemnities can properly be given. Thus if a shipowner thinks that he has detected some faulty condition in regard to goods to be taken on board, he may be assured by the shipper that he is entirely mistaken: if he is so persuaded by the shipper, it may be that he could honestly issue a clean bill of lading, while taking an indemnity in case it was later shown that there had in fact been some faulty condition. Each case must depend upon its circumstances. But even if it could be shown that there existed to any extent a practice of knowingly issuing clean bills when claused bills should have been issued, no validating effect for any particular transaction could in consequence result.

. . . It is said that a result of issuing a clean bill of lading is that a shipowner deprives himself of certain defences to claims that may be made against him. In this way advantage in one sense results for indorsees of the bill of lading and disadvantages for the shipowner. The shipowner deprives himself of the possibility of setting up certain defences, if he is sued. He cannot assert that the goods, which he has carried, were in defective condition when he received them on his ship, if he has stated on the bill of lading that they were in good condition . . . It was pointed out by Mr Roche that though there may be an estoppel against the shipowner, the holder of a clean bill of lading may still be in great difficulties if defective goods are shipped. He may have resold the goods and he may find that his purchaser will not accept, and he may sometimes experience great practical difficulties in suing the shipowner if, for example, the shipowner is a foreign shipowner. If he sues the shipowner, the latter may be entitled to rely on some clause in the bill of lading which protects him: furthermore, some time limit may prove fatal to a claim. But in any event buyers and bankers who act on the faith of clean bills of lading are not seeking law suits.

Some of the considerations to which I have referred may denote that in this particular case the plaintiffs, not being actuated by bad intentions, did not realise the viciousness of the transaction. When at the later period inquiries were being made on behalf of the continental underwriters, the plaintiffs acted with commendable frankness and made no attempt to suppress any disclosure . . .

But whatever features there are in this case which possibly enable one to approach it with a measure of sympathetic understanding as to how the plaintiffs came to act as they did, the undisputed facts show that a short point is involved. It may be stated thus. Can A, who does what B asks him to do, enforce against B a promise made in the following terms: 'If you will at my request make a statement which you know to be false and which you know will be relied upon by others and which may cause them loss, then, if they hold you liable, I will indemnify you?' In my judgment, the assistance of the courts should not be given to enforce such a promise . . .

Pearce LJ (agreed with Morris LJ that the appeal should be allowed): . . . The real difficulty that arises in the case is due to the fact that the plaintiffs, whatever may have been the defendants' intentions, appear from the evidence not to have contemplated that anybody would ultimately be defrauded. Theirs was a slipshod and unthinking extension of a known commercial practice to a point at which it constituted fraud in law. In the last 20 years it has become customary, in the short-sea trade in particular, for shipowners to give a clean bill of lading against an indemnity from the shippers in certain cases where there is a *bona fide* dispute as to the condition or packing of the goods. This avoids the necessity of rearranging any letter of credit, a

> matter which can create difficulty where time is short. If the goods turn out to be faulty, the purchaser will have his recourse against the shipping owner, who will in turn recover under his indemnity from the shippers. Thus no one will ultimately be wronged.
>
> This practice is convenient where it is used with conscience and circumspection, but it has perils if it is used with laxity and recklessness. It is not enough that the banks or the purchasers who have been misled by clean bills of lading may have recourse at law against the shipping owner. They are intending to buy goods, not law suits. Moreover, instances have been given in argument where their legal rights may be defeated or may not recoup their loss. Trust is the foundation of trade; and bills of lading are important documents. If purchasers and banks felt that they could no longer trust bills of lading, the disadvantage to the commercial community would far outweigh any conveniences provided by the giving of clean bills of lading against indemnities.
>
> The evidence seemed to show that, in general, the practice is kept within reasonable limits. In trivial matters and in cases of *bona fide* dispute, where the difficulty of ascertaining the correct state of affairs is out of proportion to its importance, no doubt the practice is useful. But here the plaintiffs went outside those reasonable limits. They did so at the defendants' request without, as it seems to me, properly considering the implications of what they were doing. They thought that they could trust the defendants' agreement to indemnify them. In that they were in error . . .

(Lord Evershed MR dissented on the grounds that personal dishonesty, which was not present, was necessary before the misrepresentation could be said to be fraudulent.)

7 THE BILL OF LADING AS EVIDENCE IN A CARGO CLAIM

The effect of a statement contained in a bill of lading depends on the nature of the statement, its content and the identity of the person who wishes to rely on it. The cases in this chapter deal with statements relating to quantity, condition and quality of goods, and the date of the bill of lading.

7.1 Evidence of quantity

At common law a statement in a bill of lading as to quantity ('received, 10 bales of silk') was *prima facie* evidence of the truth of the facts stated: *Smith v Bedouin Steam Navigation* [1896] AC 70. But *prima facie* evidence is capable of being explained and displaced. Under the rule in *Grant v Norway* (1850) 10 CB 665 a shipowner who was able to prove that, in a bill signed by the master, a statement of quantity was incorrect because the goods had never been loaded, could escape liability even to an endorsee of that bill of lading who had purchased the goods in reliance on the statement. The justification for this rule was said to be that it is no part of the duty of a master to sign a bill of lading for goods that both the master and the shipper know or ought to know have not been received, and that everyone dealing with a bill of lading understands this limitation on the master's powers and accepts the risk that a bill of lading may contain an inaccurate and unreliable statement of the quantity. The first part of this justification was correct; the second was not and the rule in *Grant v Norway* was consequently unpopular. Nevertheless, it survived unchanged for most of the last century, even though it made no sense in the context in which it operated and was inconsistent with the general approach taken by English law to the liability of principals for the fraud of their agents. The rule has now been altered by s 4 of the Carriage of Goods by Sea Act 1992 (see Chapter 8) which makes a statement that goods have been received or loaded conclusive evidence in favour of a person who has

become the lawful holder of the bill, provided that the bill is signed by the master or some other person with authority to sign from the carrier.

At common law it was also possible to prevent a statement of quantity amounting to *prima facie* evidence by use of a phrase such as 'weight or quantity unknown'. This rule too has been modified by statute: when the Hague-Visby Rules (see Chapter 10) apply to a contract, then with exceptions, the carrier must on request issue a bill of lading showing the number of packages or pieces or the quantity or weight as furnished in writing by the shipper.

Attorney-General of Ceylon v Scindia Steam Navigation Co Ltd [1962] AC 60, PC

Facts

Bills of lading acknowledged receipt of 100,652 bags of rice 'weight, contents and value when shipped unknown' for carriage from Burma to Ceylon. Only 100,417 bags were delivered. The appellants claimed damages.

Held

Lord Morris of Borth-y-Gest: ... The first question which arises is whether the plaintiff established that 100,652 bags were shipped at Rangoon for delivery to the Director of Food Supplies at Colombo. The onus of proving that fact undoubtedly rested upon the plaintiff. It was forcibly pointed out by the respondent that the plaintiff had chosen to rely for proof solely upon producing the bills of lading, and that the plaintiff had not traced the bills of lading to their source or supported them by producing and proving mate's receipts and tally men's books. The respondent further submitted that the bills of lading did not yield *prima facie* evidence of the number of bags that had been shipped.

... three bills of lading were actually issued. They contained respectively the admissions or acknowledgments that 2,187 bags and 47,992 bags and 50,473 bags 'being marked and numbered as per margin' were shipped. Their Lordships consider that, though these statements in the bills of lading as to the numbers of bags shipped do not constitute conclusive evidence as against the shipowner, they form strong *prima facie* evidence that the stated numbers of bags were shipped unless it be that there is some provision in the bills of lading which precludes this result. Was there, then, any such provision in the present case? There was a condition in the terms: 'weight, contents and value when shipped unknown'. That meant that in signing a bill of lading acknowledging the receipt of a number of bags there was a disclaimer of knowledge in regard to the weight or contents or value of such bags. There was, however, no disclaimer as to the numbers of bags. Their Lordships cannot agree with the view expressed in the judgment of the Supreme Court that the conditions in the bills of lading disentitled the plaintiff from relying upon the admissions that bags to the numbers stated in the bills of lading were taken on board.

The present case differs from *New Chinese Antimony Co Ltd v Ocean Steamship Co Ltd* [1917] 2 KB 664. In that case a bill of lading for antimony oxide ore stated that 937 tons had been shipped on board: in the margin was a typewritten clause: 'A quantity said to be 937 tons', and in the body of the bill of lading (printed in ordinary type) was a clause: 'weight, measurement contents and value (except for the purpose of estimating freight) unknown.' It was held that the bill of lading was not even *prima facie* evidence of the quantity of ore shipped, and that in an action against the shipowners for short delivery the onus was upon the plaintiff of proving that 937 tons had in fact been shipped ...

In *Hogarth Shipping Co Ltd v Blyth, Greene, Jourdain & Co Ltd* [1917] 2 KB 534 a captain signed a bill of lading for a specified number of bags of sugar: one of the exceptions and conditions of the bill of lading read 'weight, measure, quality, contents and value unknown'. It was held by Lush J that the bill of lading was conclusive only as to the number of bags in the sense of skins or receptacles and not as to their contents.

Even though the plaintiff called no evidence from Rangoon and took the possibly unusual course of depending in the main upon the production of the bills of lading, their Lordships conclude that the bills of lading did form strong *prima facie* evidence that the *SS Jalaveera* had received the stated numbers of bags for shipment to Colombo and delivery to the Director of Food Supplies. (See *Henry Smith & Co v Bedouin Steam Navigation Co Ltd* [1896] AC 70, HL.) The shipowners would, however, be entitled to displace the *prima facie* evidence of the bills of lading by showing that the goods or some of them were never actually put on board: to do that would require very satisfactory evidence on their part. In his speech in the case last cited Lord Halsbury said (page 76):

> To my mind, the cardinal fact is that the person properly appointed for the purpose of checking the receipt of the goods has given a receipt in which he has acknowledged, on behalf of the person by whom he was employed, that those goods were received. If that fact is once established, it becomes the duty of those who attempt to get rid of the effect of that fact to give some evidence from which your Lordships should infer that the goods never were on board at all.

Unless the shipowners showed that only some lesser number of bags than that acknowledged in the bills of lading was shipped then the shipowners would be under obligation to deliver the full number of bags. (See *Harrowing v Katz & Co* (1894) 10 TLR 400, CA; *Hain Steamship Co Ltd v Herdman & McDougal* (1922) 11 LlL Rep 58 and *Royal Commission on Wheat Supplies v Ocean Steam Ship Co.*)

Though by relying upon the bills of lading the plaintiff presented *prima facie* evidence that 100,652 bags (marked and numbered as in the margins of the bills) were shipped, the bills of lading were not even *prima facie* evidence of the weight or contents or value of such bags. This was the result of the incorporation in the bills of lading of the provision above referred to. (See *New Chinese Antimony Co Ltd v Ocean Steamship Co Ltd*, above.) It was for the plaintiff to prove the contents of the bags and the weight of the bags, and it was for him to prove his loss by proving what it was that the bags contained and by proving what was the value of what the bags contained. The respondent company submitted that such proof was lacking. The respondent company further submitted (a) that there was evidence which displaced the *prima facie* evidence of the shipment of 100,652 bags and which led to the conclusion that there never were 235 missing bags, and (b) that if, alternatively, 100,652 bags were in fact shipped, the evidence showed that all the contents of such bags were discharged at Colombo – with the result that the liability of the respondent company would be limited to the value of 235 empty bags.

In support of the respondent company's submission under (a) above it was urged that it was improbable that 235 bags had been put on board at Rangoon and had then been in some manner removed. It was further urged that inasmuch as the ship sailed directly from Rangoon to Colombo and carried no other cargo than was shipped by the State Agricultural Marketing Board Union of Burma, and that it was not suggested that any rice was retained in the ship's hold after discharge at Colombo, the probabilities were that the number of bags shipped was not 100,652 but 100,417. Their Lordships cannot accept the view that these circumstances are of sufficient weight to displace the *prima facie* evidence of the shipment of 100,652 bags. Nor do their Lordships consider that any useful purpose would be served by speculating as to possible explanations as to what might have happened. It was for the shipowners to explain away their acknowledgment of the number of bags that they had received.

On the basis that 100,652 bags were shipped the evidence clearly established a short delivery of 235 bags. The result of the double tally at the time of discharge was that it was satisfactorily proved that only 100,417 bags were discharged. It was not contended by Mr Michael Kerr, appearing for the respondent company, that the 235 original bags were in fact discharged and were missed in the two tallies at Colombo.

It remains to be considered whether the plaintiff proved the loss that he alleged: linked with the points raised in that issue are those which are involved in the submission of the respondent company referred to under (b) above.

It was for the plaintiff to prove what was in the missing bags. Their Lordships consider that there was abundant evidence that the missing bags contained rice . . . On the assumption that the bags contained rice the next question is whether there was evidence as to their weight. The provision of the bill of lading which has been quoted above expressly precludes any dependence upon the particulars as to weight which were declared by the shipper . . .

In this connection reference may again be made to the decision of Lush J in *Hogarth Shipping Co Ltd v Blyth, Greene, Jourdain & Co Ltd,* above. In his judgment Lush J pointed out that if a certain number of bags had been lost, and if one had to ascertain what was in the bags that were lost, then as a matter of evidence one would almost necessarily infer that the lost bags were bags containing similar goods to those which were not lost . . .

In the present case their Lordships consider that it was shown that there was a short delivery of 235 bags and that such bags had been shipped with rice in them, and that each had weighed approximately 160 lbs . . .

7.2 Evidence of quality

It may be reasonable in many cases to expect a carrier to be able to make accurate statements of quantity. But statements about the quality of goods fall into a different category.

Cox, Paterson & Co v Bruce & Co (1886) 18 QBD 147, CA

Facts

A bill of lading signed by the master in respect of a shipment of bales of jute stated that a specified proportion of the bales were marked with particular marks. The marks were an indication of their superior quality. On discharge it was found that the number of bales of superior quality had been overstated. The Court of Appeal first rejected an argument by the endorsee of the bill of lading based on breach of a special term of the contract. The court went on to reject a more general argument based on estoppel.

Held

Lord Esher MR: . . . it is said that, because the plaintiffs are indorsees for value of the bill of lading without notice, they have another right, that they are entitled to rely on a representation made in the bill of lading that the bales bore such and such marks, and that there is consequently an estoppel against the defendants. That raises a question as to the true meaning of the doctrine in *Grant v Norway* (1851) 10 CB 665. It is clearly impossible, consistently with that decision, to assert that the mere fact of a statement being made in the bill of lading estops the shipowner and gives a right of action against him if untrue, because it was there held that a bill of lading signed in respect of goods not on board the vessel did not bind the shipowner. The ground of that decision, according to my view, was not merely that the captain has no authority to sign a bill of lading in respect of goods not on board, but that the nature and limitations of the captain's authority are well known among mercantile persons, and that he is only authorised to perform all things usual in the line of business in which he is employed. Therefore the doctrine of that case is not confined to the case where the goods are not put on board the ship. That the captain has authority to bind his owners with regard to the weight, condition, and value of the goods under certain circumstances may be true; but it appears to me absurd to contend that persons are entitled to assume that he has authority, though his owners really gave him no such authority, to estimate and determine and state on the bill of lading so as to bind his owners the particular mercantile quality of the goods before they are put on board, as, for instance, that they are goods containing such and such a percentage of good or bad material, or of such and such a season's growth. To ascertain such matters is obviously quite outside the scope of the functions and capacities of a ship's captain and of the contract of carriage with which he has to do. It was said that he ought to see that the

quality marks were not incorrectly inserted in the bill of lading. But, apart from the special terms of the contract with regard to the quality marks, with which I have already dealt, I do not think it was his duty to put in these quality marks at all; all he had to do was to insert the leading marks . . .

7.3 Evidence of condition

At common law a statement in a bill of lading of the apparent order and condition in which goods are received by a carrier ('received, 10 bales of silk in apparent good order and condition') is *prima facie* evidence in favour of the shipper. When the bill of lading reaches the hands of a bona fide third party who has given value – a consignee or endorsee of an order bill – the carrier is not ordinarily permitted to deny the truth of this kind of statement. The two cases in this section explain how this conclusion can be justified at common law. But this is far from saying that the carrier who issues a clean bill of lading guarantees that the goods were received in good order. 'Apparent' means no more than apparent on an external inspection: *The Peter der Grosse* (1875) 1 PD 414. The Hague-Visby Rules, when they apply (Chapter 10), oblige a carrier to make a statement as to apparent order and condition, which is treated as *prima facie* evidence in the hands of the shipper: proof to the contrary is not admissible when the bill has been transferred to a third party acting in good faith.

Silver v Ocean Steamship Co Ltd [1930] 1 KB 416, CA

Facts

Frozen eggs were shipped at Shanghai for delivery in London. They were packed in rectangular metal cases which were not protected by padding. The cases were said to have been damaged before loading.

Held

Scrutton LJ: On May 25 a bill of lading is signed stating that a number of tins are shipped 'in apparent good order and condition'. After issuing such a bill can the ship prove that at that time: (1) the tins were perforated or punctured, or (2) that they were insufficiently packed, or must it be taken that on shipment the tins, so far as reasonable inspection would discover, were not perforated or punctured and were by all reasonable inspection sufficiently packed?

. . . Two questions seem to arise at this stage. First, under the law prior to the Carriage of Goods by Sea Act 1924 [which applied by agreement] a shipowner who received goods which he signed for 'in apparent good order and condition' to be delivered in the like good order and condition, and who delivered them not in apparent good order and condition, had the burden of proving exceptions which protected him for the damage found. The present bill of lading runs 'Shipped in apparent good order and condition for delivery subject to Conditions', etc. Has any difference been made in the old law by this wording? In my opinion no difference has been made. I agree with the view expressed by Wright J in *Gosse Millard v Canadian Government Merchant Marine* [1927] 2 KB 432, on similar words, that there is still an obligation to deliver in the like apparent good order and condition unless the shipowner proves facts bringing him within an exception covering him. Lord Sumner in *Bradley & Sons v Federal Steam Navigation Co* (1927) 27 LIL Rep 395, 396, appears to express the same view.

The second point of law is this. It has been decided by Channell J in *Compania Naviera Vasconzada v Churchill & Sim* [1906] 1 KB 237 and affirmed by the Court of Appeal in *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co* [1924] 1 KB 575 that the statement as to 'apparent good order and condition' estops (as against the person taking the bill of lading for value or presenting it to get delivery of the goods) the shipowner from proving that the goods were not in apparent good order and condition when shipped and therefore from alleging that there were at shipment external defects in them which were apparent to reasonable inspection. Art III, r 4, of the Carriage

of Goods by Sea Act 1924, which says the bill shall be *prima facie* evidence (not *prima facie* evidence only, liable to be contradicted), can hardly have been meant to render the above decisions inapplicable. For the information relates to the shipowner's knowledge; he is to say what is 'apparent', that is, visible by reasonable inspection to himself and his servants, and on the faith of that statement other people are to act, and if it is wrong, act to their prejudice.

I am of opinion that r 4 of Art III has not the effect of allowing the shipowner to prove that goods which he has stated to be in apparent good order and condition on shipment were not really in apparent good order and condition as against people who accepted the bill of lading on the faith of the statement contained in it. Apparent good order and condition was defined by Sir R Phillimore in *The Peter der Grosse* (1875) 1 PD 414, 420 as meaning that 'apparently, and so far as met the eye, and externally, they were placed in good order on board this ship'. If so, on the *Churchill & Sim* decision (above) the shipowner is not allowed to reduce his liability by proving or suggesting contrary to his statement in the bill that the goods in respect of matters externally reasonably visible were not in good condition when shipped.

Now what was reasonably apparent to the shipowner's servants loading at Shanghai at night but under clusters of electric lights? The ultimate damage was classed by the surveyors as (1) serious damage where the tins were gashed or punctured, damage easily discernible in handling each tin; (2) minor damage, pinhole perforations, which on tins covered with rime were not easily discernible but which were found when the tins were closely examined. I have considered the evidence and I find that the first class of damage was apparent to reasonable examination; the second, having regard to business conditions, was not apparent. The result of this is that the shipowner is estopped against certain persons from proving or suggesting that there were gashes or serious damage when the goods were shipped. He may raise the question whether there was not minor or pinprick damage at that time, but having regard to the small quantity of goods rejected for visible damage I should not estimate the amount of such minor damage at shipment as very high.

***Canadian and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46, PC**

Facts

The appellants were holders of a bill of lading covering sugar shipped at Demerera on the respondents' steamship *Colborne* for delivery at Montreal. The bill of lading stated that the sugar was 'Received in apparent good order and condition'. But it was also endorsed 'Signed under guarantee to produce ship's clean receipt'. The sugar was found to be damaged on arrival.

Held

Lord Wright: … If the statement at the head of the bill, 'Received in apparent good order and condition', had stood by itself, the bill would have been a 'clean' bill of lading, an expression which means, at least in a context like this, that there was no clause or notation modifying or qualifying the statement as to the condition of the goods. But the bill did in fact on its face contain the qualifying words 'Signed under guarantee to produce ship's clean receipt': that was a stamped clause clear and obvious on the face of the document, and reasonably conveying to any business man that if the ship's receipt was not clean the statement in the bill of lading as to apparent order and condition could not be taken to be unqualified. If the ship's receipt was not clean, the bill of lading would not be a clean bill of lading, with the result that the estoppel which could have been set up by the indorsee as against the shipowner if the bill of lading had been a clean bill of lading, and the necessary conditions of estoppel had been satisfied, could not be relied on. That type of estoppel is of the greatest importance in this common class of commercial transactions; it has been upheld in a long series of authoritative decisions … But if the statement is qualified, as in the opinion of their Lordships and the judges of the Supreme Court it was, the estoppel fails …

8 INCORRECTLY CLAUSED BILLS OF LADING

There is little authority in English law dealing with the liability of a carrier who unnecessarily clauses a bill of lading. In *The David Agmashenebeli*, the court concluded that the carrier's duty is limited to making and expressing an honest and reasonable assessment of the goods.

The David Agmashenebeli [2002] EWHC 104; [2003] 1 Lloyd's Rep 92

Facts

A bulk cargo of urea was carried from Kotka, Finland, to Behai, South China. Despite protests, the shipowners insisted that the bills of lading must be claused: 'cargo discoloured also foreign materials eg Plastic, Rust, Rubber, Stone, Black particles found in cargo.' The contract for the sale of the urea provided for payment against clean bills of lading. The buyer's bank declined to accept the claused bills when they were presented. Terms of settlement were agreed between buyer and seller and the cargo was released to the buyer at a reduced price, the market price having fallen. The shippers brought proceedings against the shipowners alleging that the bills had been improperly claused and that they had suffered damage as a result. The total overall discoloration in the cargo was found to be about 1% and the quantity of contaminants miniscule.

Held

Colman J: . . . Clean bills of lading are essential documents for the purpose of triggering the right to receive payment under documentary credits issued in respect of contracts for the international sale of goods. If claused bills of lading are presented under such documentary credits they will ordinarily be rejected by the buyers' banks and sellers will be unable to obtain payment in the absence of special agreements with the buyers to permit the banks to make payment. Indeed, the inability of sellers to present clean bills of lading may operate as a repudiatory breach of the sale contract . . .

The Clausing Issue: Discussion

It is necessary to keep in mind two areas of distinction which underlie the analysis of this issue.

Firstly, a bill of lading has two distinct functions: (i) as evidence of the contract of carriage and (ii) as a receipt and document of title to the goods laden on board.

Secondly, whether the carrier's duty in respect of the statement in the bill of lading as to the apparent order and condition is of a contractual nature is a distinct issue from the question what scope that duty has and in particular whether it is duty of care or analogous to a duty of care or whether it is merely a duty honestly to state the apparent order and condition of the goods.

The starting point in this analysis is to identify the function of the statement of the order and condition of the goods in a bill of lading. For this purpose it is necessary to go back to the issue of the bill. It is the shipper or the shipper's agent who in the ordinary way tenders the bill to the carrier or the carrier's agent, usually the master, for signature. In so doing, the shipper invites the carrier to acknowledge the truth of the statement in the tendered bill as to the order and condition of the goods which the shipper has delivered into the possession of the carrier pursuant to the contract of affreightment. In determining whether the carrier by the master's or other agent's signature accepts contractual responsibility for the accuracy of the statement as to the condition of the goods it is relevant to take account of the fact that it is the shipper or his agent who is delivering the goods and that accordingly any such statement would be as to facts of which he must already have actual or imputed knowledge. Further, because the shipper already has that

knowledge he cannot be said to rely on the accuracy of the statement. His requirement goes no further than the need to obtain from the carrier a receipt for the goods in appropriate form. The tender for signature of a bill which states the order and condition of the goods is thus an invitation to the carrier to express his acknowledgment of the truth of the statements in the bill. As such it is an invitation to make a representation of fact as distinct from a binding promise as to the accuracy of the represented facts. The purpose of making that representation is to record the carrier's evidence as to his receipt of the goods and as to their apparent condition when he did receive them for carriage. Given that bills of lading are negotiable instruments, the specific function of recording that evidence is to inform subsequent holders of the facts represented, for those facts are likely to be relevant to their exercise of contractual rights against sellers of the goods or, indeed, the carriers themselves.

Against this background, it is not difficult to see why it has been said in many of the authorities on the Harter Act, the Hague Rules and the Hague-Visby Rules that those codes stop short of imposing on the carrier any contractual obligation as to the accuracy of that which is stated in the bill as to the order and condition of the goods.

Moreover, the wording of Article III Rules 3, 4 and 5 of the Hague Rules and their successor, the Hague-Visby Rules, is clearly consistent with this analysis. It imposes a contractual duty to issue a bill of lading containing the information specified but by Rule 4 provides only that such statements are to be *prima facie* evidence of the facts stated . . .

That the effect of Article III Rule 3 is to impose *some* contractual duty on the carrier is beyond argument. The master or carrier's agent must at least issue to the shipper on demand a bill of lading showing the specified information. Refusal to issue any bill of lading accurate or not in respect of the goods received on board would thus be a breach of the contract of carriage in respect of which the shipowner would be liable to the shipper. But that duty is more specifically defined in as much as Rule 3(a), (b) and (c) specify those matters which the bill of lading is required to show, including 'the apparent order and condition of the goods'.

A refusal to issue a bill which made any statement as to the apparent order and condition of the goods would thus be a failure to comply with the contractual obligation imposed by the rule.

If there is a contractual obligation to the shipper that the bill of lading should state the apparent order and condition of the goods, how is that duty to be performed? In my judgment, the general effect of the authorities is that the duty requires that the master should make up his mind whether in all the circumstances the cargo, in so far as he can see it in the course and circumstances of loading, appears to satisfy the description of its apparent order and condition in the bills of lading tendered for signature. If in doubt, a master may well consider it appropriate to ask his owners to provide him with expert advice, but that is a matter for his judgment. In the normal case, however, he will be entitled to form his own opinion from his own observations and the failure to ask for expert advice is unlikely to be a matter of criticism. For this purpose the law does not cast upon the master the role of an expert surveyor. He need not possess any greater knowledge or experience of the cargo in question than any other reasonably careful master. What he is required to do is to exercise his own judgment on the appearance of the cargo being loaded. If he honestly takes the view that it is not or not all in apparent good order and condition and that is a view that could properly be held by a reasonably observant master, then, even if not all or even most such masters would necessarily agree with him, he is entitled to qualify to that effect the statement in the bill of lading. This imposes on the master a duty of a relatively low order but capable of objective evaluation . . . In so far as the observations of the Court of Appeal in *The Arctic Trader* [1996] 2 Lloyd's Rep 449, which were strictly *obiter*, suggest any higher duty on the master, I am not persuaded that they accurately express the effect of Article III Rule 3.

Likewise, the extent to which and the terms in which the master considers it appropriate to qualify the bills of lading statement as to the order and condition of the cargo is again a matter for his judgment. Reasonably careful masters might use different words to describe the reason why

> and the extent to which the cargo was not in their view in apparent good order and condition. In many cases they may only have a limited command of English and little knowledge of the nature of the cargo. The approach which, in my judgment, properly reflects the master's duty is that the words used should have a range of meaning which reflects reasonably closely the actual apparent order and condition of the cargo and the extent of any defective condition which he, as a reasonable observant master, considers it to have.
>
> Against this background, the shipowners' duty is to issue a bill of lading which records the apparent order and condition of the goods according to the reasonable assessment of the master. That is not, as I have indicated, any contractual guarantee of absolute accuracy as to the order and condition of the cargo or its apparent order and condition. There is no basis, in my judgment, for the implication of any such term either on the proper construction of Article III Rule 3 or at common law. The shipper is taken to know the actual apparent order and condition of his own cargo. What the Hague-Visby Rules require is no more than that the bill of lading in its capacity of a receipt expresses that which is apparent to the master or other agent of the carrier, according to his own reasonable assessment . . .

Notes

1 On the facts, Colman J concluded that the actual pre-loading condition of the cargo did not justify the language used in the bills of lading, but equally did not justify the issue of clean bills. An appropriate clause would also have led to the rejection of the bills by the buyer's bank, so that the shipper could not show that the master's acts had caused them any loss.

2 On the law, Colman J rejected alternative submissions that a higher duty of care should be implied as a term of the contract or arose by virtue of the bailment relationship. A claim that the carrier was liable in tort for failure to take reasonable care not to misrepresent the apparent order and condition of the goods was also rejected on the grounds that tort liability would inhibit masters, might cause delay and should not be superadded to the international code contained in the Hague and Hague-Visby Rules: 'At least where the Hague Rules or Hague-Visby Rules govern the bills of lading, the third "test" in *Caparo v Dickman* [1990] 2 AC 605 – that it is fair, just and reasonable to impose a duty of care in all the circumstances – is not satisfied.'

3 In *The Arctic Trader*, referred to in the extract above, it was held in the High Court that no term could be implied into a time charter that the shipowner would take reasonable care to clause mate's receipts if the cargo was not in apparent good order and condition. The Court of Appeal concluded that the existence of such a duty was not relevant on the facts because the shipowner could not have been in breach of it. But in the course of the judgment it was said that 'one should not, in our judgment, lose sight of the fact that the duty is to make an accurate statement in the circumstances of the case'.

4 See further, Parker, B, 'Liability for incorrectly clausing bills of lading' (2003) LMCLQ 201.

9 INCORRECTLY DATED BILLS OF LADING

The date is a material part of a bill of lading. In the case of a shipped bill of lading, the insertion of a particular date is a representation that the goods have actually been loaded on or before the specified time: *Stumore, Weston & Co v Breen* (1886) 12 App Cas 698. It was held in the next case that the principle on which *Grant v Norway*, above, was based – that a shipowner is not responsible for unauthorised misstatements by the master – does not apply to the way that a bill of lading is dated.

The Saudi Crown [1986] 1 Lloyd's Rep 261

Facts

The plaintiffs agreed to purchase ricebran extract that was to be shipped under bills of lading dated on or before 15 July 1982. Bills were issued, signed by agents for the carrier, dated July 15, but loading of the cargo was not completed until July 26. The plaintiffs claimed damages for misrepresentation as to the date when the cargo was loaded and said that if the bills of lading had been correctly dated they would have rejected them. It was submitted that their agents had no authority to ante-date the bills so that the carrier was not liable for their agents' acts.

Held

> **Sheen J:** [If the agents] were authorized to sign bills of lading on behalf of the shipowners, as is admitted, they must have had authority to insert the name of the place at which and the date on which each bill of lading was issued. It is clearly within the authority of an agent to put the date of issue on a bill of lading. If that agent puts the wrong date on the bill of lading he may do so by mistake or deliberately. It can be assumed that the agent has no actual authority to insert the wrong date on a bill of lading but the question is: can that affect any liability of the principal which may arise from the fact that his agent was acting within the scope of his apparent authority when inserting the wrong date?
>
> . . . The general principle is well known. An innocent principal is civilly responsible for the fraud of his authorizied agent, acting within his authority, to the same extent as if it was his own fraud. See Lord Macnaghten in *Lloyd v Grace Smith and Co* [1912] AC 716 at p 736 . . .
>
> Putting the correct date on a bill of lading is a routine clerical task which does not require any skill. An erroneous date may be inserted negligently or fraudulently. There is nothing on the document to put its recipient on enquiry. The date may or may not be of any materiality. But when it is material, as in this case, it seems to me that great injustice may be done to the innocent third party if he is left to pursue whatever remedy he may have against a person of unknown financial means in some distant land . . .
>
> If the bills of lading had been correctly dated the plaintiffs would have rejected them. In their claim for damages for misrepresentation the plaintiffs are not relying upon the rights of suit which they have by reason of being endorsees of the bills of lading. The complaint made by the plaintiffs is that they were induced to become endorsees by reason of a misrepresentation as to the date when the cargo was loaded. That misrepresentation was made by the agents of the shipowners in the course of their normal duties. It was a fraud committed by the defendants' representatives in the course of their employment . . .
>
> The parties have . . . agreed that if I find in favour of the plaintiffs in respect of their right to claim for loss of opportunity to reject the bills of lading by reason of fraudulent misrepresentation as to the date on which the cargo was shipped the amount of the damages to which the plaintiffs are entitled is £20,967.66. Accordingly I hold that the plaintiffs are entitled to judgment.

Notes

1 The decision in *The Saudi Crown*, and a statement, *obiter*, to the same effect at first instance in *The Starsin* [2000] 1 Lloyd's Rep 85, were followed in *Alimport v Soubert Shipping Co Ltd* [2000] 2 Lloyd's Rep 447 where an owner's bill of lading was signed on behalf of the master by the time charterer's agent. Cf *The Hector* [1998] 2 Lloyd's Rep 287, p 298.

2 In *Standard Chartered Bank v Pakistan National Shipping Corp (No 2)* [2003] UKHL 43; [2003] 1 Lloyd's Rep 227, *Lalazar* was chartered to carry bitumen in drums from Badar Abbas to Ho Chi Min City by O Ltd, a cif seller and the beneficiary under a letter of credit which required shipment to be effected not later than 25 October.

Loading was delayed. By agreement with M, managing director of O Ltd, on 8 November, before the goods had been shipped, PNSC issued bills of lading dated 25 October. In a letter signed by M, O Ltd presented the falsely dated bills of lading to SCB to obtain payment under the letter of credit. SCB paid, but were unable to obtain reimbursement from the issuing bank because of discrepancies in the documents that SCB had not noticed. SCB sued PNSC, O Ltd and M for deceit, alleging that they had all joined in issuing a false bill of lading intending it to be used to obtain payment from SCB. All were held liable. On appeal to the House of Lords, M argued that he was not personally liable because his acts had been those of O Ltd. He was held to be personally liable: 'No one can escape liability for fraud by saying "I wish to make it clear that I am committing this fraud on behalf of someone else"' (*per* Lord Hoffmann). For an analysis of this case, see Parker, B, 'Bills of lading and banker's commercial credits' (2003) LMCLQ 1.

3 Liability of agent to principal. In *Stumore, Weston & Co v Breen*, bills of lading dated 12 and 14 September were signed by the master on 19 September. The House of Lords held that the master was liable in negligence and breach of duty to his owners, who had compensated consignees who had relied on the incorrect date.

CHAPTER 8

THE BILL OF LADING AS A DOCUMENT OF TITLE

1 MERCANTILE CUSTOM

The common law rules dealing with the transfer of bills of lading are derived from the custom of merchants. The leading case involved competing claims to a single cargo from the Netherlands. A City of London jury of merchants was asked to give a special verdict on specific questions that were put to them. The judgment of the Court of King's Bench on the verdict crystallised, as part of the common law, the mercantile custom identified by the jury.

***Lickbarrow v Mason* (1794) 5 Term Rep 683**

Facts

In 1786, Turing & Son of Middelburg shipped a cargo of corn (beans, according to one report) on the *Endeavour* for delivery at Liverpool. A set of four original bills of lading were signed by the master. The bills were drawn 'unto order or assigns'. Turing kept one bill, sent another with the ship and endorsed the remaining two in blank and forwarded them to the buyer, James Freeman of Rotterdam. Freeman passed the bills to Lickbarrow. Hearing that Freeman, who had not paid cash for the goods, was bankrupt, Turing endorsed the last bill to Mason. On arrival of the *Endeavour* Mason took delivery and sold the goods. It was argued that Turing had lost any right to stop the goods in transit when Freeman passed the bills to Lickbarrow, to whom it was said that title had passed.

Held

The jury on a special verdict found that (p 685):

> by the custom of merchants, bills of lading, expressing goods or merchandises to have been shipped by any person or persons to be delivered to order to assigns, have been, and are, at any time after such goods have been shipped, and before the voyage performed, for which they have been or are shipped, negotiable and transferable by the shipper or shippers of such goods to any other person or persons by such shipper or shippers endorsing such bills of lading with his, her, or their name or names, and delivering or transmitting the same so indorsed, or causing the same to be so delivered or transmitted to such other person or persons; and that by such indorsement and delivery, or transmission, the property in such goods hath been, and is transferred and passed to such other person or persons. And that, by the custom of merchants, indorsements of bills of lading in blank, that is to say, by the shipper or shippers with their names only, have been, and are, and may be, filled up by the person or persons to whom they are so delivered or transmitted as aforesaid, with words ordering the delivery of the goods or contents of such bills of lading to be made to such person or persons; and, according to the practice of merchants the same, when filled up, have the same operation and effect, as if the same had been made or done by such shipper or shippers when he, she, or they indorsed the same bills of lading with their names as aforesaid.

2 INTENTION OF THE PARTIES

The verdict in *Lickbarrow v Mason* did not say that endorsement and delivery of an order bill of lading always moves the ownership of goods at sea to the endorsee, or if this only happens where the parties so intend. Later cases make the position clear.

***Sanders Bros v Maclean & Co* (1883) 11 QBD 327, CA**

Held

Bowen LJ: The law as to the indorsement of bills of lading is as clear as in my opinion the practice of all European merchants is thoroughly understood. A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to some one rightfully claiming under it, remains in force as a symbol, and carries with it . . . the full ownership of the goods . . .

The above effect and power belong to any one of the set of original bills of lading which is first dealt with by the shipper . . .

3 NATURE OF THE INTEREST PASSED

The nature of the interest passed depends on the intention of the parties; property in goods on a ship at sea may pass independently of a bill of lading.

***Sewell v Burdick, The Zoe* (1884) 10 App Cas 74**

Facts

Goods were shipped under bills of lading making them deliverable to the shipper or assigns. Freight was payable at destination. After the goods had arrived and been warehoused the shipper endorsed the bills of lading in blank and deposited them with the defendant bankers as security for a loan. The defendants did not take possession or claim delivery of the goods. The shipowner brought an action against the lender to recover the freight due under the bill of lading. They argued that the endorsement and delivery of a bill of lading necessarily passed the general property in the goods to the defendants, even if this was not what the parties had intended.

The House of Lords held that the endorsement and delivery of a bill of lading did not necessarily move an absolute or general interest in the property in the goods to the endorsee, but only such an interest in the property as the parties intended to transfer. The result was that the passing of an openly endorsed bill of lading to a lender would only impose bill of lading contractual liabilities on the lender under the Bills of Lading Act 1855 (now repealed and replaced by the Carriage of Goods by Sea Act 1992: see below) if and when the latter acquired a general property in the goods by exercising his rights under the pledge.

Held

Lord Selborne LC: . . . In principle the custom of merchants as found in *Lickbarrow v Mason* (above) seems to be as much applicable and available to pass a special property at law by the indorsement (when that is the intent of the transaction) as to pass the general property when the transaction is, eg one of sale. In principle also there seems to be nothing in the nature of a contract to give security by the delivery of a bill of lading indorsed in blank, which requires more in order to give it full effect, than a pledge accompanied by a power to obtain delivery of the goods when they arrive, and (if necessary) to realise them for the purpose of the security. Whether the indorsee when he takes delivery to himself may not be entitled to assume, and may not be held to

assume towards the shipowner, the position of full proprietor, is a different question. But, so long at all events as the goods are *in transitu*, there seems to be no reason why the shipper's title should be displaced any further than the nature and intent of the transaction requires.

Lord Blackburn: . . . I think that all the judges below were of opinion that if the right reserved was the general right to the property at law, what was transferred being only a pledge (conveying no doubt a right of property and an immediate right to the possession, so that the transferee would be entitled to bring an action at law against anyone who wrongfully interfered with his right), though 'a' property, and 'a' property against the indorser, passed 'upon and by reason of the indorsement', yet the property did not pass. And I agree with them. I do not at all proceed on the ground that this being an indorsement in blank followed by a delivery of the bill of lading so indorsed, had any different effect from what would have been the effect if it had been an indorsement to the appellants by name.

Lord Bramwell: . . . I take this opportunity of saying that … the property does not pass by the indorsement, but by the contract in pursuance of which the indorsement is made. If a cargo afloat is sold, the property would pass to the vendee, even though the bill of lading was not indorsed. I do not say that the vendor might not retain a lien, nor that the non-indorsement and non-handing over of the bill of lading would not have certain other consequences. My concern is to shew that the property passes by the contract. So if the contract was one of security – what would be a pledge if the property was handed over – a contract of hypothecation, the property would be bound by the contract, at least as to all who had notice of it, though the bill of lading was not handed over.

Notes

1 Endorsement and delivery of an order bill of lading will not pass a title to the endorsee if the transferee has none to give. Although the verdict in *Lickbarrow* contains the word 'negotiable', a bill of lading is not a negotiable document in the sense in which a bill of exchange is negotiable. It cannot give to the transferee a better title than the transferor has got, but it can by endorsement and delivery give as good a title. 'Negotiable', when used in relation to a bill of lading, means simply transferable. The transferee of the bill can only acquire such interest as the transferor is capable of transferring: *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, PC; *The Future Express* [1993] 2 Lloyd's Rep 542, CA, p 547.

2 *Right to possession*. Endorsement and delivery of a bill of lading is capable of passing a right to possession: *The Berge Sisar* [2001] UKHL 17, para 18; [2002] 2 AC 205, although whether it actually has this effect depends on the intention of the parties, objectively ascertained: *P&O Nedlloyd v Utaniko* [2003] EWCA Civ 83, para 41; [2003] 1 Lloyd's Rep 239.

4 ORDER OR ASSIGNS

The verdict in *Lickbarrow* deals with a bill of lading made out 'unto order or assigns'. What is the position if these magic words are omitted?

CP Henderson & Co v The Comptoir D'Escompte de Paris
(1873) LR 5 PC 253

Held

Sir Robert P Collier: It appears that a bill of lading was made out, which is in the usual form, with this difference, that the words 'or order or assigns' are omitted. It has been argued that, notwithstanding the omission of these words, this bill of lading was a negotiable instrument, and there is some authority at *nisi prius* for that proposition; but, undoubtedly, the general view of the

> mercantile world has been for some time that, in order to make bills of lading negotiable, some such words as 'or order or assigns' ought to be in them. For the purposes of this case, in the view their Lordships take, it may be assumed that this bill of lading was not a negotiable instrument.

Note

Order, bearer and straight consigned bills. A bill of lading making goods deliverable to a named person 'or order' or 'or order or assigns' is an order bill and is transferable by endorsement and delivery. A bill making goods deliverable to bearer or to '[name left blank] or order' is a bearer bill and can pass from hand to hand by delivery. An order bill endorsed in blank is also treated as a bearer bill. A bill making goods deliverable to a named person only is a straight consigned bill and is not a document by which title to goods can be transferred by endorsement and delivery: *Lickbarrow v Mason* (1793) 2 Term Rep 63, p 71, *per* Ashhurst J; *The Rafaela S* [2002] EWHC 593, para 21, [2002] 2 Lloyd's Rep 403; *The Chitral* [2000] 1 Lloyd's Rep 529; such a document is not a bill of lading for the purposes of the Carriage of Goods by Sea Act 1992 (see below) although it may be a sea waybill under the Act.

5 EXHAUSTION OF TRANSFERABILITY

How long does a bill of lading remain 'negotiable and transferable'? Can a bill of lading be used to transfer title only when goods are loaded on board a ship at sea and so are incapable of physical delivery? Or does efficient and secure commerce demand a different rule? Can a bill of lading continue to be used to transfer title and the right to possession when the cargo has been landed, or perhaps even when part of the cargo has been handed over to the receiver? The latest possible moment must surely be when delivery is given against production of a bill of lading, given the traditional statement that accompanies the signature of a bill: 'In witness whereof the Master of the said vessel has signed … original Bills of Lading all of this tenor and date one of which being accomplished the others to stand void.'

Barclays Bank Ltd v Commissioners of Customs & Excise
[1963] 1 Lloyd's Rep 81

Facts

A bill of lading was issued at Rotterdam by Bristol Steam Navigation Company Ltd in respect of a consignment of washing machines shipped on the motor vessel *Echo* for delivery at Cardiff to order of shippers or assigns. The goods were landed and warehoused to the order of the shipowners. Two months later B, the holder of the bill of lading, pledged it to the plaintiffs as security. The plaintiffs subsequently presented the bill of lading to the carriers and received a delivery order addressed to the warehouse, but before delivery could be obtained, the goods were seized on behalf of the defendants who were judgment creditors of B. The question for the court was whether on the date of the pledge, the bills of lading were still documents of title to the goods, by endorsement and delivery of which the rights and property in the goods would be transferred.

Held

> **Diplock LJ** (sitting as an additional Judge of the Queen's Bench Division): . . . The contention of the Customs and Excise is that as soon as (1) a contract of carriage by sea is complete, or at any rate the contract of carriage evidenced by the bill of lading is complete, and (2) the bill of lading is

in the hands of the person entitled to the property in, and possession of, the goods, and is in a form which would entitle him upon mere presentation to obtain delivery of the goods from the shipowner – that is indorsed to him or indorsed in blank – it ceases to be a document of title by delivery and indorsement of which the rights and property in the goods can be transferred. This is indeed a startling proposition of law which, if correct, would go far to destroy the value of a bill of lading as an instrument of overseas credit. It would mean that no bank could safely advance money on the security of a bill of lading without first making inquiries at the port of delivery, which may be at the other side of the world, as to whether the goods had been landed with the shipowner's lien, if any, discharged or released. It would also mean that no purchaser of goods could rely upon delivery and indorsement to him of the bill of lading as conferring upon him any title to the goods without making similar inquiries, for it would follow that once the goods had been landed and any lien of the shipowner released or discharged, the owner of the goods could divest himself of the property in them without reference to the bill of lading. It would also follow that the shipowner, once the goods had been landed in the absence of any lien, could not safely deliver the goods to the holder of the bill of lading upon presentation because the property in and right to possession of the goods, might have been transferred by the owner to some other person. To hold that this was the law would be to turn back the clock to 1794 before the acceptance by the court of the special verdict of the jury as to custom of merchants in the case of *Lickbarrow v Mason* (1794) 5 Term 683, and which laid the foundation for the financing of overseas trade and the growth of commodity markets in the 19th century.

The contract for the carriage of goods by sea, which is evidenced by a bill of lading, is a combined contract of bailment and transportation under which the shipowner undertakes to accept possession of the goods from the shipper, to carry them to their contractual destination and there to surrender possession of them to the person who, under the terms of the contract, is entitled to obtain possession of them from the shipowners. Such a contract is not discharged by performance until the shipowner has actually surrendered possession (that is, has divested himself of all powers to control any physical dealing in the goods) to the person entitled under the terms of the contract to obtain possession of them.

So long as the contract is not discharged, the bill of lading, in my view, remains a document of title by indorsement and delivery of which the rights of property in the goods can be transferred. It is clear law that where a bill of lading or order is issued in respect of the contract of carriage by sea, the shipowner is not bound to surrender possession of the goods to any person whether named as consignee or not, except on production of the bill of lading (see *The Stettin* (1889) 14 PD 142). Until the bill of lading is produced to him, unless at any rate, its absence has been satisfactorily accounted for, he is entitled to retain possession of the goods and if he does part with possession he does so at his own risk if the person to whom he surrenders possession is not in fact entitled to the goods.

. . . It is not necessary in this case to consider what is a much more difficult question of law . . . as to what the position would be if the shipowners had given a complete delivery to B of the goods without production of the bill of lading, at the date when they were entitled under its terms to deliver, and B had subsequently purported to pledge the goods by deposit of the bill of lading. That question does not arise because in this case not only had complete delivery of possession not been given to B, but no delivery of possession at all at the relevant time on 2 June had been given. In my opinion the pledge made on 2 June by deposit of the bill of lading was a valid pledge and as a consequence I think that I can give judgment for the plaintiffs in this case.

Notes

1 In *Enichem Anic SpA v Ampelos Shipping Co Ltd, The Delfini* [1990] 1 Lloyd's Rep 252, at first instance, it was said that where short delivery was alleged, the bill of lading ceased to be a document of title when the majority of the cargo was delivered. On appeal, Mustill J said that it was clear from *Meyerstein v Barber* (1870) LR 4 HL 317, especially at pp 330 and 335, that when the goods have been actually delivered at

destination to the person entitled to them, or placed in a position where the person is entitled to immediate possession, the bill of lading is exhausted 'and will not operate at all to transfer the goods to any person who has either advanced money or has purchased the bill of lading'. It was also said to be clear that until the buyer has actually received delivery, the fact that the goods have been discharged at destination subject (say) to a lien for freight, does not entail that the bill is exhausted.

2 *Carriage of Goods by Sea Act 1992*. The Act, below, provides for the statutory transmission of rights of action under the bill of lading contract from the shipper to a person who becomes the holder of a transferable bill of lading: s 2(1). But, with exceptions, no rights of suit pass once the bill of lading has ceased to carry the right as against the carrier to possession of the goods: s 2(2).

6 STATUTORY TRANSFER OF RIGHTS OF ACTION

The cases included in the first part of this chapter show that the ownership of cargo on board a ship on bill of lading terms may be transferred by endorsement and delivery of an order bill of lading. However, at common law the transfer of the property in the goods did not pass to the endorsee the contractual rights and duties contained in the bill of lading. The result was that if the cargo was lost or damaged by the carrier, an endorsee who had purchased the goods while they were at sea could not normally make a claim for damages against the contracting carrier on the basis of the contract contained in or evidenced by the bill of lading; nor could the carrier make a claim under the bill of lading for freight or other charges against anyone other than the party on whose behalf the goods were shipped. Several devices were employed to minimise the inconvenience of this position.

One possibility where the consignee was the owner of the goods was to find as a fact that that the bill of lading contract had been entered into by the consignor as agent for the consignee, so that the consignee named in the bill of lading might sue or be sued on its terms. This solution was, however, of little use where the goods were only purchased after the carriage contract had been concluded. An alternative approach – the rule in *Dunlop v Lambert* (1839) Cl & Fin 600 – permitted the shipper to sue and recover substantial damages on behalf of the consignee or endorsee to whom the goods had been sold. A third possibility was to treat presentation of the bill of lading and the giving and taking of delivery of the cargo at discharge as facts from which a contract between the carrier and the receiver – a *Brandt* contract – could be implied.

These three devices could help in individual cases, but they did not provide a comprehensive and reliable solution. In 1855 Parliament offered assistance. The Bills of Lading Act 1855 provided a statutory transfer of rights of action in cases where the general property in the goods on a ship passed on or by reason of the consignment or endorsement of the bill of lading. However, this scheme came to be regarded in the 20th century as too narrow and restrictive. It did not operate when property passed independently of the consignment or endorsement of the goods or in cases – such as a sale of goods forming part of an undivided bulk – where the property could not pass at all while the goods were at sea. Also, the Act only applied to bills of lading, not to other contractual forms such as sea waybills and ship's delivery orders or of course to electronic commerce. The English and Scottish Law Commissions, in a joint report *Rights of Suit in Respect of Carriage of Goods by Sea* (Law Com 196, London: HMSO; Scot

Law Com 130) proposed changes. The 1855 Act was repealed and replaced by the Carriage of Goods by Sea Act 1992. The 1992 Act follows the statutory assignment model of the 1855 Act, but abandons the idea that the transmission of rights of action against the carrier should be linked to the passing of property in the goods carried. The passing of contractual rights is also separated from the passing of liabilities.

7 CARRIAGE OF GOODS BY SEA ACT 1992

An Act to replace the Bills of Lading Act 1855 with new provision with respect to bills of lading and certain other shipping documents (16 July 1992, in force 16 September 1992).

1 Shipping documents etc to which Act applies

(1) This Act applies to the following documents, that is to say:

(a) any bill of lading;

(b) any sea waybill; and

(c) any ship's delivery order.

(2) References in this Act to a bill of lading:

(a) do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement; but

(b) subject to that, do include references to a received for shipment bill of lading.

(3) References in this Act to a sea waybill are references to any document which is not a bill of lading but:

(a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and

(b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract.

(4) References in this Act to a ship's delivery order are references to any document which is neither a bill of lading nor a sea waybill but contains an undertaking which:

(a) is given under or for the purposes of a contract for the carriage by sea of the goods to which the document relates, or of goods which include those goods; and

(b) is an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person.

(5) The Secretary of State may by regulations make provision for the application of this Act to cases where a telecommunication system or any other information technology is used for effecting transactions corresponding to:

(a) the issue of a document to which this Act applies;

(b) the indorsement, delivery or other transfer of such a document; or

(c) the doing of anything else in relation to such a document.

(6) Regulations under subsection (5) above may:

(a) make such modifications of the following provisions of this Act as the Secretary of State considers appropriate in connection with the application of this Act to any case mentioned in that subsection; and

(b) contain supplemental, incidental, consequential and transitional provision;

and the power to make regulations under that subsection shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

2 Rights under shipping documents

(1) Subject to the following provisions of this section, a person who becomes:

(a) the lawful holder of a bill of lading;

(b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract; or

(c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order,

shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.

(2) Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill:

(a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or

(b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.

(3) The rights vested in any person by virtue of the operation of subsection (1) above in relation to a ship's delivery order:

(a) shall be so vested subject to the terms of the order; and

(b) where the goods to which the order relates form a part only of the goods to which the contract of carriage relates, shall be confined to rights in respect of the goods to which the order relates.

(4) Where, in the case of any document to which this Act applies:

(a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but

(b) subsection (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person,

the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised.

(5) Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives:

(a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage; or

(b) in the case of any document to which this Act applies, from the previous operation of that subsection in relation to that document;

but the operation of that subsection shall be without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill and, in relation to a ship's delivery order, shall be without prejudice to any rights deriving otherwise than from the previous operation of that subsection in relation to that order.

3 Liabilities under shipping documents

(1) Where subsection (1) of section 2 of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subsection:

(a) takes or demands delivery from the carrier of any of the goods to which the document relates;

(b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or

(c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods,

that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract.

(2) Where the goods to which a ship's delivery order relates form a part only of the goods to which the contract of carriage relates, the liabilities to which any person is subject by virtue of the operation of this section in relation to that order shall exclude liabilities in respect of any goods to which the order does not relate.

(3) This section, so far as it imposes liabilities under any contract on any person, shall be without prejudice to the liabilities under the contract of any person as an original party to the contract.

4 Representations in bills of lading

A bill of lading which:

(a) represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel; and

(b) has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading,

shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment.

5 Interpretation etc

(1) In this Act:

'bill of lading', 'sea waybill' and 'ship's delivery order' shall be construed in accordance with section 1 above;

'the contract of carriage':

(a) in relation to a bill of lading or sea waybill, means the contract contained in or evidenced by that bill or waybill; and

(b) in relation to a ship's delivery order, means the contract under or for the purposes of which the undertaking contained in the order is given;

'holder', in relation to a bill of lading, shall be construed in accordance with subsection (2) below;

'information technology' includes any computer or other technology by means of which information or other matter may be recorded or communicated without being reduced to documentary form; and

'telecommunication system' has the same meaning as in the Telecommunications Act 1984.

(2) References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say:

(a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;

(b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill;

(c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates;

and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith.

(3) References in this Act to a person's being identified in a document include references to his being identified by a description which allows for the identity of the person in question to be varied, in accordance with the terms of the document, after its issue; and the reference in section 1(3)(b) of this Act to a document's identifying a person shall be construed accordingly.

(4) Without prejudice to sections 2(2) and 4 above, nothing in this Act shall preclude its operation in relation to a case where the goods to which a document relates:

(a) cease to exist after the issue of the document; or

(b) cannot be identified (whether because they are mixed with other goods or for any other reason);

and references in this Act to the goods to which a document relates shall be construed accordingly.

(5) The preceding provisions of this Act shall have effect without prejudice to the application, in relation to any case, of the rules (the Hague-Visby Rules) which for the time being have the force of law by virtue of section 1 of the Carriage of Goods by Sea Act 1971.

6 Short title, repeal, commencement and extent

(1) This Act may be cited as the Carriage of Goods by Sea Act 1992.

(2) The Bills of Lading Act 1855 is hereby repealed.

(3) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed; but nothing in this Act shall have effect in relation to any document issued before the coming into force of this Act.

(4) This Act extends to Northern Ireland.

8 TRANSFER OF CONTRACTUAL RIGHTS

The 1992 Act transfers to and vests 'all rights of suit under the contract of carriage' in the holder of a shipping document. In the *East West Corp* case [2003] EWCA Civ 83; [2003] 2 All ER 700, below, 'rights of suit' was said at trial to mean all the rights arising under the contract. But what is meant by 'the contract of carriage'? Section 5 of the Act provides that in the case of a bill of lading these words are to be treated as meaning 'the contract contained in or evidenced by that bill'. What then is the position where a bill of lading was not originally a contract at all, but merely a receipt issued to a charterer? And what if the bill, when issued, was no more than 'some evidence' of a contract. Does s 5 mean that other evidence of the terms of the contract is also admissible against a holder?

Leduc & Co v Ward (1888) 20 QBD 475, CA

Facts

The plaintiffs were endorsees of a bill of lading which contained the usual exception of sea perils and stated that the goods were shipped:

> in apparent good order and condition on the steamship *Austria*, now lying in the port of Fiume, and bound for Dunkirk, with liberty to call at any ports in any order, and to deviate for the purpose of saving life or property; 3,123 bags of rape seed, being marked and numbered as per margin, and to be delivered in the like good order and condition at the aforesaid port of Dunkirk unto order or assigns.

The ship, instead of proceeding direct for Dunkirk, sailed for Glasgow, and was lost, with her cargo, off the mouth of the Clyde, by perils of the sea. In an action brought by the plaintiffs against the shipowners for non-delivery of the goods, evidence was given to show that the shippers of the goods, at the time when the bill of lading was given, knew that the vessel was intended to proceed via Glasgow.

Held

> **Lord Esher MR:** In this case the plaintiffs, the owners of goods shipped on board the defendants' ship, sue for non-delivery of the goods at Dunkirk in accordance with the terms of the bill of lading. The defence is that delivery of the goods was prevented by perils of the sea. To that the plaintiffs reply that the goods were not lost by reason of any perils excepted by the bill of lading, because they were lost at a time when the defendants were committing a breach of their contract by deviating from the voyage provided for by the bill of lading. The plaintiffs were clearly indorsees of the bill of lading to whom the property passed by reason of the indorsement; and, therefore, by the Bills of Lading Act [1855], the rights upon the contract contained in the bill of lading passed to them. The question, therefore, arises what the effect of that contract was. It has been suggested that the bill of lading is merely in the nature of a receipt for the goods, and that it contains no contract for anything but the delivery of the goods at the place named therein. It is true that, where there is a charterparty, as between the shipowner and the charterer the bill of lading may be merely in the nature of a receipt for the goods, because all the other terms of the contract of carriage between them are contained in the charterparty; and the bill of lading is merely given as between them to enable the charterer to deal with the goods while in the course of transit; but, where the bill of lading is indorsed over, as between the shipowner and the indorsee the bill of lading must be considered to contain the contract, because the former has given it for the purpose of enabling the charterer to pass it on as the contract of carriage in respect of the goods . . .
>
> The terms of the Bills of Lading Act shew that the legislature looked upon a bill of lading as containing the terms of the contract of carriage . . .

Note

An unequivocal explanation of the position is contained in the judgment in *The Heidberg* [1994] 2 Lloyd's Rep 287 where Judge Diamond QC said:

> Bills of lading are transferrable documents which come into the hands of consignees and indorsees who may be the purchasers of goods or banks. The transferee of the bill of lading does not, however, take precisely the same contract as that made between the shipper and the shipowner (of which the bill of lading is merely the evidence). What is transferred to the consignee or indorsee consists, and consists only, of the terms which appear on the face and reverse of the bill of lading. Thus collateral oral terms are not transferred; see *Leduc v Ward* (1888) QBD 475; *The Ardennes* [1951] 1 KB 55. This rule facilitates the use of bills of lading in international commerce since it enables a prospective transferee of a bill of lading to see, merely by inspecting the bill, whether it conforms to his contract (whether it be a sale contract or a letter of credit) and what rights and obligations will be transferred to him if he takes up the bill. The transferee, or prospective transferee, need not enquire whether any collateral oral agreements have been made between the shipper and the shipowner as, for example, a waiver by the shipper of any obligation undertaken by the shipowner in the bill . . .

9 TRANSMISSION OF LIABILITIES UNDER THE 1992 ACT

The 1992 Act provides that liabilities under shipping documents pass to the holder of the document only when the holder takes or demands delivery or makes a claim under the contract. This part of the Act was new, although it was intended to reflect the broad effect of previous law. The new provisions were considered by the House of Lords for the first time in the *Berge Sisar*. For analysis of the case, see 'Further Reading', below.

Borealis AB v Stargas Ltd, The Berge Sisar [2001] UKHL 17; [2002] 2 AC 205

Facts

Stargas sold liquid propane to Borealis and chartered the *Berge Sisar* to carry the propane from Saudi Arabia to Sweden. Bills of lading were signed by the master. On arrival routine sampling showed that the propane was contaminated and Borealis, to whom title to the propane had passed, refused to receive the cargo and sold it on to Dow who had facilities to deal with it in a contaminated condition. The cargo was delivered to Dow, without production of the bills of lading, on the instructions of the charterers and against a letter of indemnity from them. Nearly two months later the bills of lading were endorsed to Borealis and then endorsed on to Dow. Bergesen, the shipowners, alleged that the cargo became contaminated before it was loaded and claimed damages for costs of cleaning the ship from the charterers and also from Borealis, under the terms of the 1992 Act.

Held

Lord Hobhouse: 17 The question raised . . . is whether Bergesen has a good arguable case in contract against Borealis. The question breaks down into two subsidiary questions. First, did Borealis ever become liable to Bergesen under section 3 of the 1992 Act? It is the case of Bergesen that Borealis became liable when they received the endorsed bills of lading from Stargas on 19 or 20 January 1994 . . . If the answer to this question is in the affirmative, the second subsidiary question is whether Borealis ceased to be so liable when they endorsed the bills of lading over to Dow Europe on 20 January. Bergesen submit that, once liable, Borealis remained liable under section 3(1) of the Act notwithstanding that they had endorsed the bills of lading over to another. Borealis submitted that they did cease to be liable . . .

The drafting of the 1992 Act

30 This Act . . . makes separate provision for the rights and the liabilities of a bill of lading holder. Section 2(1) makes being the lawful holder of the bill of lading the sole criterion for the right to enforce the contract which it evidences and this transfer of the right extinguishes the right of preceding holders to do so: section 2(5). There are two qualifications: in simplified terms, the holder can sue and recover damages on behalf of another with an interest in the goods (section 2(4)), and the transfer of a bill of lading after it has ceased to give a right to the possession of the goods does not confer any right of suit against the carrier unless the transfer was pursuant to an earlier contract or to the revesting of that right after a rejection by a buyer: sections 2(2) and 5(2). In the present case the provisions of section 2 do not give rise to any problem. Until, anyway, the discharge of the propane from the vessel at Terneuzen to Dow Europe in the second half of November 1993, the bills of lading remained effective to give a right to the possession to the cargo as against Bergesen. Both the contract between Stargas and Borealis and that between Borealis and Dow Europe were made before that time. Therefore, Borealis and Dow Europe were in January 1994 successively holders of the bills of lading who came within the provisions of section 2(1) and (2) and the extended definition of 'holder' in section 5(2).

31 . . . Section 3(1) imposes additional requirements before a holder of a bill of lading comes under any contractual liability to the carrier. The solution adopted by the draftsman was to use the principle that he who wishes to enforce the contract against the carrier must also accept the corresponding liabilities to the carrier under that contract. This . . . is a principle of mutuality . . .

32 In giving effect to this intention, section 3 of the Act postulates first that the holder in question must be a person in whom the contractual rights of suit have been vested by section 2(1). The language of section 2(1) adopts and is identical to the corresponding words in section 1 of the 1855 Act: 'shall have transferred to and vested in him all rights of suit.' Section 3(1)(a) and (b) relate to a person who, being a person who has those rights, chooses to exercise them either (a) by taking or demanding delivery of the goods or (b) by making a claim under the contract of carriage contained in or evidenced by the bill of lading. Both involve an enforcement by the endorsee of the contractual rights against the carrier transferred to him by section 2(1). Under (a) it is by enjoying or demanding the performance of the carrier's contractual delivery obligation. Under (b) it is by claiming a remedy for some breach by the carrier of the contract of carriage. Each of (a) and (b) involves a choice by the endorsee to take a positive step in relation to the contract of carriage and the rights against the carrier transferred to him by section 2(1). It has the character of an election to avail himself of those contractual rights against the carrier. There are however difficulties which neither the drafting nor the report faces up to. Whilst taking delivery is a clear enough concept – it involves a voluntary transfer of possession from one person to another – making a 'demand' or 'claim' does not have such a specific character and, what is more, may be tentative or capable of being resiled from, a point commented upon by Millett LJ in the Court of Appeal [1999] QB 863, 884c–d. Delivery brings an end to the actual bailment of the goods and is (save in special circumstances) the final act of contractual performance on the part of the carrier. Claims or demands may on the other hand be made at any stage (although usually only made after the end of the voyage) and there may at the time still be performance obligations of the carrier yet to be performed.

33 To 'make a claim' may be anything from expressing a view in the course of a meeting or letter as to the liability of the carrier to issuing a writ or arresting the vessel. A 'demand' might be an invitation or request, or perhaps, even implied from making arrangements; or it might be a more formal express communication, such as would have sufficed to support an action in detinue. From the context in the Act and the purpose underlying section 3(1), it is clear that section 3 must be understood in a way which reflects the potentially important consequences of the choice or election which the bill of lading holder is making. The liabilities, particularly when alleged dangerous goods are involved, may be disproportionate to the value of the goods; the liabilities may not be covered by insurance; the endorsee may not be fully aware of what the liabilities are. I would therefore read the phrase 'demands delivery' as referring to a formal demand made to the carrier or his agent asserting the contractual right as the endorsee of the bill of lading to have the carrier deliver the goods to him. And I would read the phrase 'makes a claim under the contract of carriage' as referring to a formal claim against the carrier asserting a legal liability of the carrier under the contract of carriage to the holder of the bill of lading.

34 But this is not the end of this problem. The use of the word 'demand' is problematic . . . If the carrier accedes to the demand and gives delivery as demanded, the demand is subsumed in the taking of delivery. If the carrier rejects the demand, a new scenario arises: is the endorsee going to make a claim against the carrier for refusing to comply with the demand? If the endorsee chooses to let the matter drop and not to make a claim, what significance of the demand remains? What principle of mutuality requires that the endorsee shall nevertheless be made subject to the liabilities of a contracting party? What if the endorsee chooses to endorse over the bill of lading to another to whom the carrier is willing to and does deliver the goods? The task of the judge, arbitrator or legal adviser attempting to construe section 3(1) is not an easy one and it is necessary to try and extract from it some self-consistent structure.

35 So far I have been concentrating on paragraphs (a) and (b). Paragraph (c) presents further problems. It raises the relatively common situation where the vessel and its cargo arrive at the

destination before the bills of lading have completed their journey down the chain of banks and buyers. The intended receiver has not yet acquired any rights under section 2(1). He is not entitled to demand delivery of the goods from the carrier. He may or may not be the owner of the goods but he quite probably will not at that time have the right to the possession of the goods; an earlier holder of the bill of lading may be a pledgee of the goods. This situation is dealt with commercially by delivering the goods against a letter of indemnity provided by the receiver (or his bank) which will include an undertaking by the receiver to surrender the bill of lading to the carrier as soon as it is acquired and will include any other stipulations and terms which the situation calls for. It may well at that time, either expressly or by implication, give rise to a *Brandt v Liverpool* type of contract (*Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575) on the terms of the bill of lading. But again the question arises: what is the character and the role of the demand referred to in paragraph (c)? *Ex hypothesi*, the intended receiver had no right to make the demand and the carrier had no obligation to accede to it unless there was some other contract between the receiver and the carrier, eg a charterparty, which gave rise to that right and obligation in which case sections 2 and 3 have no application to that transaction. Paragraph (c) clearly involves an anticipation that the section 2(1) rights will be transferred to the receiver. The parenthesis which follows emphasises this: 'by virtue … of having the rights vested in him.' This shows that it is a necessary condition of the receiver's becoming liable under section 3(1) that the rights are vested in him by the operation of section 2(1). The inclusion of the word 'demanded' remains problematical. A rightly rejected demand for delivery by one who is not entitled to delivery is an act devoid of legal significance. What is significant is if the carrier decides (voluntarily) to accede to the demand and deliver the goods to the receiver notwithstanding the non-arrival of the bill of lading. Paragraph (c) does not include the making of a claim. The draftsman has accepted the irrelevance of a claim made by one who has no contractual standing to make it. Unless facts occur which give a relevance to the inclusion of the word 'demanded' in paragraph (c), in my view the scheme of sections 2 and 3 requires that any such demand be treated as irrelevant for the purposes of section 3(1) and that the Act be construed accordingly. A 'demand' made without any basis for making it or insisting upon compliance is not in reality a demand at all. It is not a request made 'as of right', which is the primary dictionary meaning of 'demand'. It is not accompanied by any threat of legal sanction. It is a request which can voluntarily be acceded to or refused as the person to whom it is made may choose. Accordingly it will be unlikely in the extreme that paragraph (c) will ever apply save where there has been an actual delivery of the cargo.

36 Taking delivery in paragraphs (a) and (c) means, as I have said, the voluntary transfer of possession from one person to another. This is more than just co-operating in the discharge of the cargo from the vessel. Discharge and delivery are distinct aspects of the international carriage of goods … Although the normal time for delivering cargo to the receiver may be at the time of its discharge from the vessel, that is not necessarily so. There may be a through contract of carriage. The goods may need to be unpacked from a container. The vessel may need to discharge its cargo without delay into a terminal. The discharge of the vessel is a necessary operation in the interests of the ship as well as of the cargo and requires the co-operation of others besides the shipowner. Providing that co-operation should not be confused with demanding delivery. The unloading of one cargo is for the shipowner the necessary preliminary to the loading of the next. Damaged or contaminated cargoes may need especial discharge because they may cause damage or pollution. Any unnecessary delays will cost the shipowner money and a loss to the charterer through incurring demurrage or forfeiting dispatch. Where the vessel is operating under a charterparty it is more likely than not that the obligation to discharge will be that of the charterer. The charterer will be responsible for providing or arranging a berth at which the vessel can discharge. Where the cargo is a bulk cargo which has been sold by the charterer to the intended receiver, the contract of sale may require the buyer to perform the seller's charterparty obligations in relation to the discharge of the vessel. The delivery to which section 3 is referring is that which involves a full transfer of the possession of the relevant goods by the carrier to the holder of the bill of lading. The surrender of the relevant endorsed bill of lading to the carrier or his agent before or at the time of delivery will ordinarily be an incident of such delivery. Where that is not done, the carrier

will ordinarily require a letter of indemnity. The letter of indemnity will probably be the best evidence of what arrangement has been and will probably contain appropriate express terms . . .

The facts: the 'demand'

38 It will be apparent that in my judgment what occurred fell far short of amounting to the making of any demand for delivery on the part of Borealis. The vessel was under charter to Stargas. It was Stargas (or their agents) who gave orders to Bergesen. It was Stargas who offered and then gave the letter of indemnity to Bergesen against their agreement to deliver to Borealis without production of the bills of lading. The only thing done by Borealis appears to have been to direct the master to their import jetty and then, having allowed her to berth there, to take the routine samples from the cargo tanks before clearing the vessel for discharge into their terminal. These are exactly the type of co-operative acts, assisting the shipowners and charterers, to which I have referred earlier and which cannot on any view be treated as a demand by Borealis to deliver. Further, the trade in which these parties were involved necessitates the routine sampling of the cargo before it can be decided whether the vessel can be allowed to discharge its cargo into the terminal. It is elementary that in the ordinary course the nature and quality of the cargo must be established first. As the facts of the present case illustrate, it is always possible that the cargo may unexpectedly turn out to be contaminated or have some other characteristic which makes it unfit or unsafe for discharge into the terminal. What occurred did not get even as far as the stage of expressing their willingness to receive this cargo into their terminal. It fell a long way short of amounting to any demand or request that it should be. Once Borealis knew what the true characteristics of the cargo were, they refused to accept it from the ship.

39 It follows that, as a matter of fact, Bergesen have failed on the agreed primary facts to make out even an arguable case that Borealis demanded the delivery of this cargo. If the facts had disclosed something more positive on the part of Borealis, it is difficult to visualise that it could have had an appropriately unequivocal character or could have amounted to a demand for the purposes of paragraph (c) of section 3(1). The considerations discussed in paragraphs 35 and 36 above would apply both as a matter of the proper use of language and as a matter of the interpretation of section 3(1) in its schematic context including the guidance given by a consideration of the joint report of the Law Commission and the Scottish Law Commission on rights of suit in respect of carriage of goods by sea (Law Com No 196; Scot Law Com No 130).

The secondary question: endorsement on and section 3(1)

40 The answer which I have given to the question whether there was a demand is decisive of the appeals. If there was no demand by Borealis, there cannot be any liability of Borealis under section 3(1) whatever answer is given to the secondary question which was decisive in the Court of Appeal. The secondary question is easily formulated: when an endorsee of a bill of lading who has both had transferred to and vested in him all the rights of suit under the contract of carriage pursuant to section 2(1) and become subject to the liabilities under that contract pursuant to section 3(1), does he cease to be so liable when he endorses over the bill of lading to another so as to transfer his rights of suit to that other?

41 The remarkable thing is that the report does not refer to this question at all and the Act contains no express provision covering it even though there are express provisions dealing with similar matters such as section 2(5) (extinction of rights) and section 3(3) (preservation of liabilities). It clearly was not foreseen as being a live issue . . .

43 I agree with the sentiment of Professor Reynolds (1999) LMCLQ 161 that it is likely that the particular facts will be of importance in any subsequent case concerning the interrelation of sections 2 and 3 of the Act. It is possible that the conduct of one or other party may give rise to estoppels as where one party has been led to exercise forbearance in reliance upon some conduct of the other. In most cases there will be other documents or agreements to take into account besides the bill of lading such as charterparties, letters of indemnity, non-separation agreements, or ad hoc agreements. With these caveats, I will shortly state my conclusion on the

secondary question itself as a matter of the construction of the 1992 Act unqualified by any special factors.

44 I consider that there are two principles which are stated in the report and reflected in the drafting of the Act which show an intention on the part of the draftsman to preserve the decision in *Smurthwaite v Wilkins* 11 CBNS 842. The first is the intention to preserve the well tried and familiar of the 1855 Act . . .

45 The second principle is that of mutuality (or, if preferred, reciprocity or fairness). I have already quoted passages from the report demonstrating that this was the guiding principle in arriving at the recommendations which have led to section 3(1). Section 3(1) is drafted following this principle because it makes it fundamental that, for a person to be caught by section 3(1), he must be the person in whom the rights of suit under the contract of carriage are vested pursuant to section 2(1). The liability is dependent upon the possession of the rights. It follows that, as there is no provision to the contrary, the Act should be construed as providing that, if the person should cease to have the rights vested in him, he should no longer be subject to the liabilities. The mutuality which is the rationale for imposing the liability has gone. There is no longer the link between benefits and burdens. I have already commented upon the fact that the report refers to *Smurthwaite v Wilkins* and adopts it without criticism. It was in that case that Erle CJ said, at p 848:

> the contention is that the consignee or assignee shall always remain liable, like the consignor, although he has parted with all interest and property in the goods by assigning the bill of lading to a third party before the arrival of the goods. The consequences which this would lead to are so monstrous, so manifestly unjust, that I should pause before I consented to adopt this construction of the Act of Parliament.

I recognise, and emphasise yet again, that it is likely that individual cases will be more complicated than that here visualised by Erle CJ and other factors are likely to come into play which, maybe decisively, will affect the respective rights and liabilities of the relevant parties. But as a matter of the construction of the Act *per se*, what he says remains apt and reflects the same principle as that adopted by the report and is supported, not contradicted, by the Act.

10 RIGHT TO SUE AFTER EXTINCTION OF SHIPPER'S CONTRACTUAL RIGHTS

Where rights under a bill of lading are transferred by s 2 of the 1992 Act, the transfer extinguishes the shipper's entitlement to those rights. In the next case, *East West Corp*, it was held that the shipper's rights in contract are extinguished even where the shipper remains the owner of the goods, the consignee is merely the shipper's agent and has no interest in the goods at all. But in these circumstances, if the shipper's rights in contract have been extinguished, can an action be brought in tort for negligence or conversion or alternatively by the shipper as bailor?

P & O Nedlloyd BV v Utaniko Ltd Dampskibsselskabet AF 1912 A/S (Maersk Line v East West Corp) [2003] EWCA Civ 83; [2003] 2 All ER 700

Facts

The claimants agreed to sell goods to a buyer in Chile, cash against delivery. The goods – watches, clocks and miscellaneous other items – were packed in containers and shipped in Hong Kong on liner services operated by the defendants, Maersk and P & O Nedlloyd. On discharge, the containers were warehoused and subsequently released to the buyer by the carriers' agents without presentation of the bills of lading. The bills of lading named the claimants as shippers and the buyer as the notify party. The goods

were consigned to the order of named Chilean banks. The bills of lading were endorsed by the claimants and sent to the banks to obtain payment from the buyer in return for the bills of lading. The goods remained the property of the claimants at all times and the banks had no property interest in them. The buyer did not pay for the goods. The banks returned the bills of lading to the claimants without indorsing them. At trial, Thomas J held the 1992 Act had transferred to the banks not only the shippers' rights of suit in contract but also their right to possession of the goods, so that they had no right of action as bailors; nevertheless as owners of the goods they could sue in tort for negligence. Both the shippers and the carriers appealed.

Held

Mance LJ:

Title to sue – the claim in bailment and/or as reversionary owners

42 . . . In the present case, leaving aside the effect of the 1992 Act, the Chilean banks were named as consignees, and the bills were transferred to them, not as pledgees, but simply for convenience, so that they could freely use them to collect the price for the respondents. They were to hold them (and if it ever became material, the goods which they represented or symbolised) for the respondents. I do not accept the appellants' proposition that the Chilean banks must themselves have had the sole or any right to immediate possession in order to be able to pass on such a right by endorsing and delivering the bills to the intended receivers against payment of the price. An authorised agent can transfer a right belonging to his principal, and so *a fortiori* can an agent who appears from the language and his physical possession of the bill to be the person entitled thereto. Although the Chilean banks had physical possession of the bills, I would therefore doubt that they thereby acquired at common law a sufficient possessory title in respect of the goods to sue in tort for loss of or damage to the goods . . .

43 . . . Prior to the 1992 Act, the right to possession of goods and the contractual rights under a bill of lading could be held in different hands . . . The appellants submit that the effect of the 1992 Act is to ensure that the two are held in the same hands. The contractual right to delivery vests in a holder of the bill under s 2(1). The right to immediate possession which suffices to found a claim in bailment must, they submit, vest in the (sole) person having the contractual right to delivery. They point out that Lord Hobhouse in *The Berge Sisar* said at para 31 that it was the contractual rights, not the proprietary rights (be they general or special) that were, under the Act, to be relevant. That is no doubt so, wherever there is an overlap. But it does not answer the question whether or when contractual and proprietary or possessory rights do overlap.

44 The first observation to be made on the appellants' submission is that the 1992 Act does not expressly modify any rights other than contractual rights. The definition of a holder is in terms of possession of the bill, not in terms of any possessory right in respect of the goods that such possession may bring with it . . . The mischief at which the 1992 Act was aimed was that rights under the bill of lading contract could remain vested in persons other than those having the property or risk in the goods. This might occur either because the general property did not pass at all, or because it did not pass upon or by reason of the endorsement of the bill, so that the 1855 Act was of no assistance. The remedy adopted by the 1992 Act was to transfer contractual rights to any holder of the bill, as defined in s 5(2). The result is, however, to create a new class of cases in which the bill of lading contract may be vested in a person other than the person at risk. The pendulum has thus swung.

45 The question is whether the statutory transfer carries with it anything more than purely contractual rights. Again, it seems to me that this may be a false question. Even if the Act were treated as giving the transferee of contractual rights a sufficient possessory interest to hold the shipowners responsible, in circumstances where none was intended or could, therefore, prior to the Act have passed, it does not follow that the transferor loses all right to immediate possession

or, therefore, all right of suit in bailment. If it were necessary, however, I would conclude that the sole effect of the 1992 Act is on contractual rights, and, where there is no intention to pass any possessory right, possessory rights sounding in bailment remain unaffected. But in my view it is unnecessary even to reach any such conclusion. Whatever the position in that regard, I do not consider that the 1992 Act can be treated as working an automatic transfer of any rights in bailment, so that they enure *exclusively* to the person entitled under its provisions to exercise the contractual rights. Were that the case, it would simply increase the difficulties that the Law Commission recognised might arise from creating a new class of cases in which the bill of lading contract is vested in someone other than the person at risk.

46 Not only is there nothing express in the 1992 Act to that effect, but the Law Commission clearly did not contemplate it. Their report at paragraphs 2.39 said this:

> Even in those ex ship or arrival contracts where the seller retains risk and property during transit, and yet transfers the bill of lading to someone who has no interest in suing having suffered no loss, there would be nothing in our recommendations to prevent the seller suing in tort by reason of being the owner of the goods, which he can do under the present law.

In paragraphs 2.45 and 5.24 the report explained the Law Commission's decision not to recommend any exclusion of the right of an owner to sue in tort … So it is clear that the Law Commission contemplated that claims by owners against carriers as bailees would remain possible and in some circumstances counterbalance the automatic transfer of contractual rights instituted by the Act. The Law Commission cannot have thought that the 1992 Act would itself frustrate such claims, by working an automatic transfer of any immediate right of possession necessary to found such a claim. On the contrary, the Law Commission regarded claims in bailment by goods owners as some mitigation of the transfer of all contractual rights to persons who could in some cases have no conceivable interest in pursuing them. Such persons could indeed in some circumstances have a very considerable disincentive to the pursuit of any claim – for example where a claim against shipowners for cargo lost by sinking might elicit a counterclaim that the ship sank because the cargo was dangerous and caught fire, so that the claimant should indemnify the shipowners for the loss of their ship.

47 I see nothing impossible or surprising in the idea that one party should, as a result of the statutory transfer, possess the contractual right to delivery against the contracting carrier, while another person, the real owner and party at risk, should possess a right of suit in bailment against anyone, including the carrier, for loss or damage caused by their negligence as bailees in possession of the goods. It does not mean that the shipping lines were exposed to conflicting claims, since they were entitled and bound to deliver against an original bill of lading (*Barber v Meyerstein*, above, and *Glyn Mills v The East and West India Dock Co* (1882) LR 7 AC 591). Like the judge, I would also question whether it would be any justification for delivery to someone, who was not entitled to the goods and did not present such a bill, that those making such delivery thought reasonably that the recipient was the person entitled, and had received an apparently reasonable explanation for the absence of the bill (cf *The Sormorksy 3068* [1994] 2 Lloyd's Rep 266, *Motis Exports Ltd v Dampskibsselskabet AF 1912* [1999] 1 Lloyd's Rep 837; [2000] 1 Lloyd's Rep 213). Quite apart from this, there are certain cases in which two different persons, such as an owner entitled to immediate possession and an immediate bailor or person in possession, are both entitled to pursue claims for the same loss or damage, with no major practical problems arising for reasons identified in Palmer, N, *Bailment*, 2nd ed, 1991, London: Sweet & Maxwell, at pp 335 and 354 *et seq*.

48 The appellants' case could, on the other hand, lead to some surprising consequences. If an owner loses any immediate right of possession of the goods, together with any right of suit in bailment, as soon as the bill of lading and contractual rights pass to a holder under the 1992 Act, even though the holder is no more than an agent, the owner must, on the appellants' case, be unable to sue *anyone* in bailment. If the disability derives from a deemed transfer of the immediate right to possession as soon as there is any transfer of contractual rights, there is no obvious basis to limit it. So, on the appellants' case, the effect of the 1992 Act must have been to preclude

actions in bailment not merely against the contracting carrier, but also against any sub-contractor or bailee who loses or damages the goods.

49 I can summarise my conclusions as follows:

i The appellants were under the bills of lading the original bailors of the containerloads of goods to the respondents . . .

ii That bailment continued despite the delivery of the bills of lading to the Chilean banks named in them as consignees, and despite the transfer of contractual rights under the bills to such banks under the 1992 Act . . .

iii Whether or not the Chilean banks themselves acquired sufficient possessory title to pursue claims in bailment is not the critical issue: paragraphs 27, 37–38 and 45. Having said that:

  a In my view, they did not: paragraphs 42 and 45.

  b But, assuming that they did, they were never more than agents at will in relation to the respondents, who retained a sufficient immediate right to possession throughout to enable them to pursue claims in bailment: paragraphs 38 and 44–48.

  c Even if that were wrong, the respondents could claim for any loss of or damage to their reversionary proprietary interest, and any such claim would (contrary to the appellants' apparent concession) constitute a claim in or to be determined by the same principles as govern a claim in bailment: paragraphs 31–32.

50 In these circumstances, it is unnecessary to examine the authorities and arguments deployed for and against the proposition that, if the appellants had no other potential responsibility towards the respondents, they must at least be regarded as owing the respondents an ordinary duty of care. *The Aliakmon* rejected such a proposition in a case where the buyer at risk was attempting to hold the carriers responsible in negligence, without having any proprietary or possessory basis for so doing. The House of Lords was unable to understand how any purely tortious duty of care could be treated as modified so to equate with the intricate blend of responsibilities and liabilities constituted by the Hague Rules, which governed the shipowners' bill of lading liability (p 818). Similar considerations would have presented a formidable impediment to the recognition of any purely tortious duty, if I had not concluded that the appellants owed duties towards the respondents in or paralleling those owed in bailment, notwithstanding the delivery to the Chilean banks of the bills of lading. On that basis, well-recognised duties exist in law and the doctrine of bailment on terms is potentially available as a controlling mechanism. So it is unnecessary for me to consider further whether the impediment would have been insuperable. It simply does not arise . . .

86 In summary:

i The respondents are unable to claim in contract, whether as original parties or as principals of the Chilean banks, or on any other basis . . .

ii The respondents retained the right to immediate possession of the goods at all material times, and were on that basis entitled to hold the appellants responsible in bailment for any loss or damage resulting from breach by the appellants of duty as bailees: paragraphs 49(i), (ii) and (iii)(b).

iii Even if that was not so, the respondents would have been entitled by virtue of their reversionary proprietary interest as owners to hold the appellants responsible in or on a basis analogous to bailment for any loss or damage caused to such respondents' interest: paragraph 49(iii)(c).

iv The appellants were in breach of duty in bailment, or alternatively on a basis analogous to bailment, by virtue of their failure either to deliver up the goods to a person entitled to them against presentation of an original bill of lading or, when they parted with possession of the goods to third parties, to arrange for such third parties to be under any similar obligation

regarding delivery up; and such breach was causative of the loss by the respondents of their goods: paragraph 68.

v The doctrine of bailment on terms applies to afford the appellants with the benefit, in relation to the respondents, of any relevant exemptions or protective conditions in the terms of the appellants' bills of lading: paragraph 69.

vi Upon the true construction of such bills of lading, there are no relevant exemptions or protective conditions . . .

Notes

1 Endorsement of the returned bills of lading by the banks might seem a simple way to avoid the need to find any other cause of action against the carriers. But holders of commercial documents are often reluctant to make voluntary endorsements, fearing that it may expose them to claims.

2 *Claim in bailment*. This decision is another example of a general trend which treats bailment not just as a description of the relationship between persons and things but as a cause of action *sui generis*, arising out of possession of goods and independent of both contract and tort: thus 'the claims were put before the judge under the heads of bailment, conversion and negligence' (para 51). Bailment's apparent emancipation from its earlier dependence on forms of action in contract and tort has not been fully explored by appeal courts in England, where the position rests more on assumption than authority.

3 The Court of Appeal did not deal with the shipper's tort claim in negligence but was clearly concerned that such an action might unfairly circumvent the bill of lading terms. Would this be so? The 1992 Act extinguishes the shipper's rights in contract when another becomes holder of the bill of lading: it does not extinguish the carrier's rights.

4 The approach taken in the Court of Appeal treats the rights arising as between bailor and bailee as the same as but separable from those arising under the bill of lading contracts. A bailment can of course come into existence without any need for a contract. But the bailments in question here – and the duties of the carriers as bailees for reward – only arose under a contract. 'Bailment and contract often go hand in hand': see the section dealing with the doctrine of bailment on terms in the next chapter. This decision treats them as parting company where the 1992 Act transfers and extinguishes the shipper's rights in contract.

FURTHER READING

Beatson, J and Cooper, J, 'Rights of suit in respect of carriage of goods by sea' (1991) LMCLQ 196

Howard, T, 'The Carriage of Goods by Sea Act 1992' (1993) 24 JMLC 181

Reynolds, F, 'The Carriage of Goods by Sea Act 1992' (1993) LMCLQ 436

Reynolds, F, 'The Carriage of Goods by Sea Act put to the test' (1999) LMCLQ 161

Toh Kian Sing, 'Conflict of Laws and the Carriage of Goods by Sea Act 1992' (1994) LMCLQ 280

Treitel, G, 'Bills of lading: liabilities of transferee' (2001) LMCLQ 344

Treitel, G, 'The legal status of straight bills of lading' (2003) 119 LQR 608

CHAPTER 9

CARRIAGE CONTRACTS AND THIRD PARTIES

At common law, in general, a third party cannot claim the benefit of, and is not bound by, a term of a contract made between others. The last chapter dealt with the special statutory scheme created by the Carriage of Goods by Sea Act 1992 for the holders of bills of lading and sea waybills, equivalent electronic transactions and ship's delivery orders. The cases in this chapter deal with the common law devices by which rights and liabilities may be transmitted to third parties, but the chapter opens with the general legislation – the Contracts (Rights of Third Parties) Act 1999 – which enables third parties to enforce contractual terms. The 1999 Act tries to avoid interfering with the operation of the earlier statute by providing that it shall confer no rights on third parties in the case of any of the shipping contracts covered by the 1992 scheme, apart from the right, where the general requirements of the 1999 Act are satisfied, to rely on an exclusion or limitation of liability clause.

1 CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

An Act to make provision for the enforcement of contractual terms by third parties (11 November 1999. Date in force: see s 10(2)).

1 Right of third party to enforce contractual term

(1) Subject to the provisions of this Act, a person who is not a party to a contract (a 'third party') may in his own right enforce a term of the contract if–

(a) the contract expressly provides that he may, or

(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

(4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.

(5) For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly).

(6) Where a term of a contract excludes or limits liability in relation to any matter references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation.

(7) In this Act, in relation to a term of a contract which is enforceable by a third party–

'the promisor' means the party to the contract against whom the term is enforceable by the third party, and

'the promisee' means the party to the contract by whom the term is enforceable against the promisor.

2 Variation and rescission of contract

(1) Subject to the provisions of this section, where a third party has a right under section 1 to enforce a term of the contract, the parties to the contract may not, by agreement, rescind the contract, or vary it in such a way as to extinguish or alter his entitlement under that right, without his consent if–

(a) the third party has communicated his assent to the term to the promisor,

(b) the promisor is aware that the third party has relied on the term, or

(c) the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it.

(2) The assent referred to in subsection (1)(a)–

(a) may be by words or conduct, and

(b) if sent to the promisor by post or other means, shall not be regarded as communicated to the promisor until received by him.

(3) Subsection (1) is subject to any express term of the contract under which–

(a) the parties to the contract may by agreement rescind or vary the contract without the consent of the third party, or

(b) the consent of the third party is required in circumstances specified in the contract instead of those set out in subsection (1)(a) to (c).

(4) Where the consent of a third party is required under subsection (1) or (3), the court or arbitral tribunal may, on the application of the parties to the contract, dispense with his consent if satisfied–

(a) that his consent cannot be obtained because his whereabouts cannot reasonably be ascertained, or

(b) that he is mentally incapable of giving his consent.

(5) The court or arbitral tribunal may, on the application of the parties to a contract, dispense with any consent that may be required under subsection (1)(c) if satisfied that it cannot reasonably be ascertained whether or not the third party has in fact relied on the term.

(6) If the court or arbitral tribunal dispenses with a third party's consent, it may impose such conditions as it thinks fit, including a condition requiring the payment of compensation to the third party.

(7) The jurisdiction conferred on the court by subsections (4) to (6) is exercisable by both the High Court and a county court.

3 Defences etc available to promisor

(1) Subsections (2) to (5) apply where, in reliance on section 1, proceedings for the enforcement of a term of a contract are brought by a third party.

(2) The promisor shall have available to him by way of defence or set-off any matter that–

(a) arises from or in connection with the contract and is relevant to the term, and

(b) would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.

(3) The promisor shall also have available to him by way of defence or set-off any matter if–

(a) an express term of the contract provides for it to be available to him in proceedings brought by the third party, and

(b) it would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.

(4) The promisor shall also have available to him–

(a) by way of defence or set-off any matter, and

(b) by way of counterclaim any matter not arising from the contract,

that would have been available to him by way of defence or set-off or, as the case may be, by way of counterclaim against the third party if the third party had been a party to the contract.

(5) Subsections (2) and (4) are subject to any express term of the contract as to the matters that are not to be available to the promisor by way of defence, set-off or counterclaim.

(6) Where in any proceedings brought against him a third party seeks in reliance on section 1 to enforce a term of a contract (including, in particular, a term purporting to exclude or limit liability), he may not do so if he could not have done so (whether by reason of any particular circumstances relating to him or otherwise) had he been a party to the contract.

4 Enforcement of contract by promisee

Section 1 does not affect any right of the promisee to enforce any term of the contract.

5 Protection of party promisor from double liability

Where under section 1 a term of a contract is enforceable by a third party, and the promisee has recovered from the promisor a sum in respect of–

(a) the third party's loss in respect of the term, or

(b) the expense to the promisee of making good to the third party the default of the promisor,

then, in any proceedings brought in reliance on that section by the third party, the court or arbitral tribunal shall reduce any award to the third party to such extent as it thinks appropriate to take account of the sum recovered by the promisee.

6 Exceptions

(1) Section 1 confers no rights on a third party in the case of a contract on a bill of exchange, promissory note or other negotiable instrument.

(2) Section 1 confers no rights on a third party in the case of any contract binding on a company and its members under section 14 of the Companies Act 1985.

(2A) Section 1 confers no rights on a third party in the case of any incorporation document of a limited liability partnership or any limited liability partnership agreement as defined in the Limited Liability Partnerships Regulations 2001 [in force 6 April 2001].

(3) Section 1 confers no right on a third party to enforce–

(a) any term of a contract of employment against an employee,

(b) any term of a worker's contract against a worker (including a home worker), or

(c) any term of a relevant contract against an agency worker.

(4) In subsection (3)–

(a) 'contract of employment', 'employee', 'worker's contract', and 'worker' have the meaning given by section 54 of the National Minimum Wage Act 1998,

(b) 'home worker' has the meaning given by section 35(2) of that Act,

(c) 'agency worker' has the same meaning as in section 34(1) of that Act, and

(d) 'relevant contract' means a contract entered into, in a case where section 34 of that Act applies, by the agency worker as respects work falling within subsection (1)(a) of that section.

(5) Section 1 confers no rights on a third party in the case of–

(a) a contract for the carriage of goods by sea, or

(b) a contract for the carriage of goods by rail or road, or for the carriage of cargo by air, which is subject to the rules of the appropriate international transport convention,

except that a third party may in reliance on that section avail himself of an exclusion or limitation of liability in such a contract.

(6) In subsection (5) 'contract for the carriage of goods by sea' means a contract of carriage–

(a) contained in or evidenced by a bill of lading, sea waybill or a corresponding electronic transaction, or

(b) under or for the purposes of which there is given an undertaking which is contained in a ship's delivery order or a corresponding electronic transaction.

(7) For the purposes of subsection (6)–

(a) 'bill of lading', 'sea waybill' and 'ship's delivery order' have the same meaning as in the Carriage of Goods by Sea Act 1992, and

(b) a corresponding electronic transaction is a transaction within section 1(5) of that Act which corresponds to the issue, indorsement, delivery or transfer of a bill of lading, sea waybill or ship's delivery order.

(8) In subsection (5) 'the appropriate international transport convention' means –

(a) in relation to a contract for the carriage of goods by rail, the Convention which has the force of law in the United Kingdom under section 1 of the International Transport Conventions Act 1983,

(b) in relation to a contract for the carriage of goods by road, the Convention which has the force of law in the United Kingdom under section 1 of the Carriage of Goods by Road Act 1965, and

(c) in relation to a contract for the carriage of cargo by air–

(i) the Convention which has the force of law in the United Kingdom under section 1 of the Carriage by Air Act 1961, or

(ii) the Convention which has the force of law under section 1 of the Carriage by Air (Supplementary Provisions) Act 1962, or

(iii) either of the amended Conventions set out in Part B of Schedule 2 or 3 to the Carriage by Air Acts (Application of Provisions) Order 1967.

7 Supplementary provisions relating to third party

(1) Section 1 does not affect any right or remedy of a third party that exists or is available apart from this Act.

(2) Section 2(2) of the Unfair Contract Terms Act 1977 (restriction on exclusion etc of liability for negligence) shall not apply where the negligence consists of the breach of an obligation arising from a term of a contract and the person seeking to enforce it is a third party acting in reliance on section 1.

(3) In sections 5 and 8 of the Limitation Act 1980 the references to an action founded on a simple contract and an action upon a specialty shall respectively include references to an action brought in reliance on section 1 relating to a simple contract and an action brought in reliance on that section relating to a specialty.

(4) A third party shall not, by virtue of section 1(5) or 3(4) or (6), be treated as a party to the contract for the purposes of any other Act (or any instrument made under any other Act).

8 Arbitration provisions

(1) Where–

(a) a right under section 1 to enforce a term ('the substantive term') is subject to a term providing for the submission of disputes to arbitration ('the arbitration agreement'), and

(b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996,

the third party shall be treated for the purposes of that Act as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party.

(2) Where–

(a) a third party has a right under section 1 to enforce a term providing for one or more descriptions of dispute between the third party and the promisor to be submitted to arbitration ('the arbitration agreement'),

(b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996, and

(c) the third party does not fall to be treated under subsection (1) as a party to the arbitration agreement,

the third party shall, if he exercises the right, be treated for the purposes of that Act as a party to the arbitration agreement in relation to the matter with respect to which the right is exercised, and be treated as having been so immediately before the exercise of the right.

9 Northern Ireland

(1) In its application to Northern Ireland, this Act has effect with the modifications specified in subsections (2) and (3).

(2) In section 6(2), for 'section 14 of the Companies Act 1985' there is substituted 'Article 25 of the Companies (Northern Ireland) Order 1986'.

(3) In section 7, for subsection (3) there is substituted–

'(3) In Articles 4(a) and 15 of the Limitation (Northern Ireland) Order 1989, the references to an action founded on a simple contract and an action upon an instrument under seal shall respectively include references to an action brought in reliance on section 1 relating to a simple contract and an action brought in reliance on that section relating to a contract under seal.'

(4) In the Law Reform (Husband and Wife) (Northern Ireland) Act 1964, the following provisions are hereby repealed–

(a) section 5, and

(b) in section 6, in subsection (1)(a), the words 'in the case of section 4' and 'and in the case of section 5 the contracting party' and, in subsection (3), the words 'or section 5'.

10 Short title, commencement and extent

(1) This Act may be cited as the Contracts (Rights of Third Parties) Act 1999.

(2) This Act comes into force on the day on which it is passed but, subject to subsection (3), does not apply in relation to a contract entered into before the end of the period of six months beginning with that day.

(3) The restriction in subsection (2) does not apply in relation to a contract which–

(a) is entered into on or after the day on which this Act is passed, and

(b) expressly provides for the application of this Act.

(4) This Act extends as follows–

(a) section 9 extends to Northern Ireland only,

(b) the remaining provisions extend to England and Wales and Northern Ireland only.

2 *HIMALAYA* CLAUSES

Over the last 50 years, a great deal of effort and imagination has been devoted to the search for ways in which – consistent with the doctrines of privity of contract and consideration – the benefit of terms of contracts for the carriage of goods by sea can be extended to the carrier's employees and agents. Crew, sub-carriers, commercial associates and stevedores all reasonably expect to be able to rely on at least some of the terms secured by carriers; carriers and many shippers share the same expectation, at least at the moment a bill of lading contract is made. Two common law devices have had some success: the *Himalaya* clause, considered in this section, and the doctrine of bailment on terms, which is dealt with next. But these devices do not provide a reliable and comprehensive solution, one that is good for all cases; hence the need for legislation. In addition to the Carriage of Goods by Sea Act 1992 and the Contracts (Rights of Third Parties) Act 1999, the Hague-Visby Rules make a limited statutory alteration to the common law position.

The Mahkutai [1996] AC 650, PC

Facts

Time charterers of *Mahkutai* issued a bill of lading in respect of a cargo of plywood, which was to be carried from Jakarta to Shantou, People's Republic of China. At Shantou the cargo was found to have been damaged by sea water. Cargo owners brought proceedings in Hong Kong against the shipowners. The shipowners sought to stay proceedings on the grounds that the charterer's bill provided for the exclusive jurisdiction of the courts of Indonesia and that they were entitled to the benefit of this agreement by virtue of a *Himalaya* clause or the doctrine of bailment on terms. For the judgment on this last point, see the next section of this chapter.

Held

Lord Goff of Chieveley: . . . In the present case, shipowners carrying cargo shipped under charterers' bills of lading are seeking to claim the benefit of a *Himalaya* clause in the time charterers' bills of lading, or in the alternative to invoke the principle of bailment on terms. However, they are seeking by these means to invoke not an exception or limitation in the ordinary sense of those words, but the benefit of an exclusive jurisdiction clause. This would involve a significantly wider application of the relevant principles; and, to judge whether this extension is justified, their Lordships consider it desirable first to trace the development of the principles through the cases . . .

The Midlands Silicones case

This was a test case in which it was sought to establish a basis upon which stevedores could claim the protection of exceptions and limitations contained in the bill of lading contract . . . [The stevedores argued, among other things, that they had contracted with the receivers through the agency of the shipowners and could claim the benefit of the Hague Rules limitation of liability that was incorporated in the bill of lading.]

. . . Lord Reid in the *Midlands Silicones* case, while rejecting the agency argument on the facts of the case before him, nevertheless indicated how it might prove successful in a future case. He said ([1962] AC 446 at 474):

> I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these

> provisions should apply to the stevedore (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.

It was essentially on this passage that the *Himalaya* clause (called after the name of the ship involved in *Adler v Dickson* [1955] 1 QB 158) was later to be founded . . .

The Eurymedon and The New York Star

Their Lordships have already quoted the terms of cl 4 (the *Himalaya* clause) of the bill of lading in the present case. For the purposes of this aspect of the case, the essential passage reads as follows:

> Without prejudice to the foregoing, every such servant, agent and sub-contractor shall have the benefit of all exceptions, limitations, provision, conditions and liberties herein benefiting the Carrier as if such provisions were expressly made for their benefit, and, in entering into this contract, the Carrier, to the extent of these provisions, does so not only on [his] own behalf, but also as agent and trustee for such servants, agents and sub-contractors.

The effectiveness of a *Himalaya* clause to provide protection against claims in tort by consignees was recognised by the Privy Council in *The Eurymedon* [1975] AC 154 and *The New York Star* [1981] 1 WLR 138 . . . In both cases, the bill of lading contract incorporated a one-year time bar, and a *Himalaya* clause which extended the benefit of defences and immunities to independent contractors employed by the carrier. The stevedores relied upon the *Himalaya* clause to claim the benefit of the time bar as against the consignees . . .

Critique of the Eurymedon principle

In *The New York Star* [1981] 1 WLR 138 at 144 Lord Wilberforce discouraged 'a search for fine distinctions which would diminish the general applicability, in the light of established commercial practice, of the principle'. He was there, of course, speaking of the application of the principle in the case of stevedores. It has however to be recognised that, so long as the principle continues to be understood to rest upon an enforceable contract as between the cargo owners and the stevedores entered into through the agency of the shipowner, it is inevitable that technical points of contract and agency law will continue to be invoked by cargo owners seeking to enforce tortious remedies against stevedores and others uninhibited by the exceptions and limitations in the relevant bill of lading contract . . .

Nevertheless, there can be no doubt of the commercial need of some such principle as this, and not only in cases concerned with stevedores; and the bold step taken by the Privy Council in *The Eurymedon*, and later developed in *The New York Star*, has been widely welcomed. But it is legitimate to wonder whether that development is yet complete. Here their Lordships have in mind not only Lord Wilberforce's discouragement of fine distinctions, but also the fact that the law is now approaching the position where, provided that the bill of lading contract clearly provides that (for example) independent contractors such as stevedores are to have the benefit of exceptions and limitations contained in that contract, they will be able to enjoy the protection of those terms as against the cargo owners. This is because (1) the problem of consideration in these cases is regarded as having been solved on the basis that a bilateral agreement between the stevedores and the cargo owners, entered into through the agency of the shipowners, may, though itself unsupported by consideration, be rendered enforceable by consideration subsequently furnished by the stevedores in the form of performance of their duties as stevedores for the shipowners; (2) the problem of authority from the stevedores to the shipowners to contract on their behalf can, in the majority of cases, be solved by recourse to the principle of ratification; and (3) consignees of the cargo may be held to be bound on the principle in *Brandt & Co v Liverpool Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575. Though these solutions are now perceived to be generally effective for their purpose, their technical nature is all too apparent; and the time may well come when, in an appropriate case, it will fall to be considered whether the courts should take what may legitimately be perceived to be the final, and perhaps inevitable, step in this development and recognise in these cases a fully-fledged exception to the doctrine of privity of

contract, thus escaping from all the technicalities with which courts are now faced in English law. It is not far from their Lordships' minds that, if the English courts were minded to take that step, they would be following in the footsteps of the Supreme Court of Canada . . .

Application of the Eurymedon principle

Their Lordships now turn to the application of the principle in *The Eurymedon* to the facts of the present case. Two questions arose in the course of argument which are specific to this case. The first is whether the shipowners qualify as 'sub-contractors' within the meaning of the *Himalaya* clause (cl 4 of the bill of lading). The second is whether, if so, they are entitled to take advantage of the exclusive jurisdiction clause (cl 19). Their Lordships have come to the conclusion that the latter question must be answered in the negative. It is therefore unnecessary for them to answer the first question; and they will proceed to address the question of the exclusive jurisdiction clause on the assumption that the shipowners can be regarded as sub-contractors for this purpose.

The exclusive jurisdiction clause

The *Himalaya* clause provides that, among others, sub-contractors shall have the benefit of 'all exceptions, limitations, provision, conditions and liberties herein benefiting the Carrier as if such provisions were expressly made for their benefit'. The question therefore arises whether the exclusive jurisdiction clause (cl 19) falls within the scope of this clause.

In *The Eurymedon* [1975] AC 154 at 169 and *The New York Star* [1981] 1 WLR 138 at 143 Lord Wilberforce stated the principle to be applicable, in the case of stevedores, to respectively 'exemptions and limitations' and 'defences and immunities' contained in the bill of lading. This is scarcely surprising. Most bill of lading contracts incorporate the Hague-Visby Rules, in which the responsibilities and liabilities of the carrier are segregated from his rights and immunities, the latter being set out primarily in art IV, rr1 and 2, exempting the carrier and the ship from liability or responsibility for loss of or damage to the goods in certain specified circumstances; though the limitation on liability per package or unit is to be found in art IV, r 5, and the time bar in art III, r 6. Terms such as these are characteristically terms for the benefit of the carrier, of which sub-contractors can have the benefit under the *Himalaya* clause as if such terms were expressly made for their benefit.

It however by no means follows that the same can be said of an exclusive jurisdiction clause . . . Such a clause can be distinguished from terms such as exceptions and limitations in that it does not benefit only one party, but embodies a mutual agreement under which both parties agree with each other as to the relevant jurisdiction for the resolution of disputes. It is therefore a clause which creates mutual rights and obligations. Can such a clause be an exception, limitation, provision, condition or liberty benefiting the carrier within the meaning of the clause?

First of all, it cannot in their Lordships' opinion be an exception, limitation, condition or liberty. But can it be a provision? That expression has, of course, to be considered in the context of the *Himalaya* clause; and so the question is whether an exclusive jurisdiction clause is a provision benefiting the carrier, of which servants, agents and sub-contractors of the carrier are intended to have the benefit, as if the provision was expressly made for their benefit. Moreover, the word 'provision' is to be found at the centre of a series of words, viz 'exceptions, limitations . . . conditions and liberties', all of which share the same characteristic, that they are not as such rights which entail correlative obligations on the cargo owners.

In considering this question, their Lordships are satisfied that some limit must be placed upon the meaning of the word 'provision' in this context. In their Lordships' opinion, the word 'provision' must have been inserted with the purpose of ensuring that any other provision in the bill of lading which, although it did not strictly fall within the description 'exceptions, limitations . . . conditions and liberties', nevertheless benefited the carrier in the same way in the sense that it was inserted in the bill for the carrier's protection, should enure for the benefit of the servants, agents and sub-contractors of the carrier. It cannot therefore extend to include a mutual agreement, such as an exclusive jurisdiction clause, which is not of that character.

Their Lordships draw support for this view from the function of the *Himalaya* clause. That function is, as revealed by the authorities, to prevent cargo owners from avoiding the effect of contractual defences available to the carrier (typically the exceptions and limitations in the Hague-Visby Rules) by suing in tort persons who perform the contractual services on the carrier's behalf. To make available to such a person the benefit of an exclusive jurisdiction clause in the bill of lading contract does not contribute to the solution of that problem. Furthermore, to construe the general words of the *Himalaya* clause as effective to make available to servants, agents or sub-contractors a clause which expressly refers to disputes arising under the contract evidenced by the bill of lading, to which they are not party, is not easy to reconcile with those authorities such as *TW Thomas & Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1 which hold that general words of incorporation are ineffective to incorporate into a bill of lading an arbitration clause which refers only to disputes arising under the charter.

Furthermore, it is of some significance to observe how adventitious would have been the benefit of the exclusive jurisdiction clause to the shipowners in the present case. Such a clause generally represents a preference by the carrier for the jurisdiction where he carries on business. But the same cannot necessarily be said of his servants, agents or sub-contractors. It could conceivably be true of servants, such as crew members, who may be resident in the same jurisdiction; though if sued elsewhere they may in any event be able to invoke the principle of *forum non conveniens*. But the same cannot be said to be true of agents, still less of sub-contractors. Take, for example, stevedores at the discharging port, who provide the classic example of independent contractors intended to be protected by a *Himalaya* clause. There is no reason to suppose that an exclusive jurisdiction clause selected to suit a particular carrier would be likely to be of any benefit to such stevedores; it could only conceivably be so in the coincidental circumstance that the discharging port happened to be in the country where the carrier carried on business. Exactly the same can be said of a shipowner who performs all or part of the carrier's obligations under the bill of lading contract, pursuant to a time or voyage charter. In such a case, the shipowner may very likely have no connection with the carrier's chosen jurisdiction. Coincidentally he may do so, as in the present case where the shipowners happened, like Sentosa, to be an Indonesian corporation. This of course explains why the shipowners in the present case wish to take advantage of the exclusive jurisdiction clause in Sentosa's form of bill of lading; but it would not be right to attach any significance to that coincidence.

In the opinion of their Lordships, all these considerations point strongly against the exclusive jurisdiction clause falling within the scope of the *Himalaya* clause. However, in support of his submission that the exclusive jurisdiction clause fell within the scope of the *Himalaya* clause in the present case, Mr Gross QC for the shipowners invoked the decision of the Privy Council in *The Pioneer Container* [1994] 2 AC 324. That case was however concerned with a different situation, where a carrier of goods sub-contracted part of the carriage to a shipowner under a 'feeder' bill of lading, and that shipowner sought to enforce an exclusive jurisdiction clause contained in that bill of lading against the owners of the goods. The Judicial Committee held that the shipowner was entitled to do so because the goods' owner had authorised the carrier so to sub-contract 'on any terms', with the effect that the shipowner as sub-bailee was entitled to rely on the clause against the goods' owner as head bailor. The present case is however concerned not with a question of enforceability of a term in a sub-bailment by the sub-bailee against the head bailor, but with the question whether a sub-contractor is entitled to take the benefit of a term in the head contract. The former depends on the scope of the authority of the intermediate bailor to act on behalf of the head bailor in agreeing on his behalf to the relevant term in the sub-bailment; whereas the latter depends on the scope of the agreement between the head contractor and the sub-contractor, entered into by the intermediate contractor as agent for the sub-contractor, under which the benefit of a term in the head contract may be made available by the head contractor to the sub-contractor. It does not follow that a decision in the former type of case provides any useful guidance in a case of the latter type; and their Lordships do not therefore find *The Pioneer Container* of assistance in the present case.

> In the event, for the reasons they have already given, their Lordships have come to the conclusion that the *Himalaya* clause does not have the effect of enabling the shipowners to take advantage of the exclusive jurisdiction clause in the bill of lading in the present case . . .

In this case Lord Goff of Chieveley said that it was inevitable that cargo owners would continue to invoke technical points of contract and agency law in order to circumvent *Himalaya*-based defences to tort claims. In the next case, *The Starsin,* the cargo owners invoked the Hague Rules, which led the Court to refine the analysis of nature of the agreement created by a *Himalaya* clause.

***Makros Hout BV v Agrosin Private Ltd, The Starsin* [2003] UKHL 12; [2003] 1 Lloyd's Rep 571**

Facts

Cargo owners sued shipowners in tort for negligence in stowing and caring for cargo which was carried under charterers' bills of lading. The shipowners claimed that they were protected by a *Himalaya* clause in the bills of lading which provided (paragraph numbers were added by the Court for ease of reference):

> 5 (1) It is hereby expressly agreed that no servant or agent of the carrier . . . including every independent contractor from time to time employed by the carrier shall in any circumstance whatsoever be under any liability whatsoever to the shipper, for any loss or damage . . .
>
> (2) without prejudice to the generality of the provisions of this Bill of Lading, every exemption limitation, condition and liberty herein contained and every right exemption from liability, defence and immunity . . . applicable to the carrier or to which the carrier is entitled hereunder shall also be available to and shall extend to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause, the carrier is or shall be deemed to be acting on behalf of . . . his servants or agents . . . including every independent contractor . . .
>
> (3) and all such persons shall to this extent be deemed to be parties to the contract contained in or evidenced by this Bill of Lading.
>
> (4) The shipper shall indemnify the carrier against any claim by third parties against whom the carrier cannot rely on these conditions . . .

The cargo owners argued that part 1 of this clause was inconsistent with Art III r 8 of the Hague Rules and was void. Five reasoned judgments were delivered. It was held that:

- The shipowners were 'independent contractors' for the purpose of cl 5.
- Reversing the Court of Appeal, that part 1 of the clause was not merely an agreement with the contracting carrier that the cargo owners would not sue servants, agents and independent contractors, but was a *Himalaya* agreement with the third parties, notwithstanding the apparent overlap between part 1 and 2 of the clause: 'Probably the draftsman thought it might be prudent to wear belt as well as braces.'
- By a majority, the resulting contract to which the shipowner became a party was one to which the Hague Rules applied, with the result that part 1 of the clause was rendered ineffective by Art III r 8. The result was that the defences to which the shipowner was entitled were only those which were compatible with the Hague Rules.

In the following judgment, a contract created by a *Himalaya* clause is referred to as a *Barwick* contract, after Sir Garfield Barwick CJ whose analysis of *Himalaya* clauses was adopted in *The New York Star.*

Held

Lord Hobhouse (after reviewing the decided cases, continued):

152 What emerges from these cases?

Where no bailment is involved, the only contract which should be looked at (save for the purpose of authority) is the bill of lading contract. It is in the bill of lading that the mutual contract between the relevant persons must be found.

The 'Barwick' contract, although mutual, does not involve an exchange of promises but, rather, an exchange of the performance of a service for protection in relation to that performance.

The requirement of consideration is real not fictional but can be achieved by entering upon performance and thereby converting an arrangement into a mutual contract in respect of that service.

Through the agency of the contracting carrier, the third party becomes a party to a contract contained in the bill of lading.

A complete exemption from all legal liability may be inconsistent with the enforceability of the clause.

The question of authority has not arisen in any of the cases but remains part of the necessary structure of the enforceability of the clause.

The point for examination in the present case is what is the effect of applying the principles in *The Eurymedon* and *The New York Star* to the facts of the present case and whether the shipowners' argument should succeed.

Discussion: the shipowners as a carrier:

153 The first point is that the shipowners are the actual owners of the ship named on the front of the bill of lading, the *Starsin*, and the employers of her crew. They took possession of the goods and carried them. The consideration which they are giving to the shipper in order to make clause 5 enforceable between them – to 'enact' the arrangement in the clause, to use Barwick CJ's language – is the actual carriage of the goods. That is the service – the 'act or acts' – which they are performing for the cargo owners. They assumed the possession of the goods as carriers by way of sub-bailment and entered into a bailee-bailor relationship with the shipper (see Lord Pearson, *sup*). The bill of lading previously contained an inchoate contract of carriage – or 'arrangement' – capable of becoming an enforceable contract when the shipowners enter upon the carriage of the shipper's goods. The shipowners have thus entered into a contract *of* carriage with the shipper. Both Lord Wilberforce and Barwick CJ treated the resultant contract as a mutual one but the mutuality arises from the performance of the service by the one party, here the carrying of the goods by the shipowners, and the agreement by the other that, should he do so, he shall be entitled to the stated protective provisions. Barwick CJ excluded an analysis involving an exchange of promises. Thus the person (the shipowners) performing the service (the carriage of the goods) does not promise in advance that he will do so nor that he will continue to do so. The 'Barwick' contract is not a contract with executory obligations; it is not a contract *for* the carriage of the goods. But it is a mutual contract *of* carriage which lasts as long as the shipowners remain the bailees of the goods as the actual performing carriers. The element of consideration and mutuality which the shipowners render to the shipper under the contract is their entering into this bailor/carrier relationship with the cargo owners and performing the carriage. In the event, they carried the cargo from Malaysia to Europe. Further, the contract is one which is 'covered' by a bill of lading. Thus both the relevant person, here the shipowners, and the contract come within the definitions of 'contract of carriage' and 'carrier' in Article I (b) and (a) of the Hague Rules. Likewise, a contract of carriage which lasts only so long as the carrier concerned remains in possession of the goods as a carrier conforms to the Hague Rules definition of 'carriage of goods' as covering 'the period from the time when the goods are loaded on to the time they are discharged from the ship': Article I(e). (See also Article VII and the standard 'Period of Responsibility' clause in the bills

of lading.) The scheme of the Hague Rules is that they deal with the terms of the carriage not the destination to which they should be carried . . .

155 It is argued that the 'Himalaya' clause contract is 'collateral' to the bill of lading contract and therefore is not to be affected by such considerations as the Hague Rules. Why the use of the epithet 'collateral' should have this effect is not clear. It does not address or affect the essential question: what is the 'Barwick' contract? In so far as a '*Himalaya*' clause may include additional stipulations as between the person issuing the bill of lading and the shipper such as jurisdiction clauses or covenants not to sue, it may well be correct to use the word 'collateral'. But even then the substance may have to be looked at not just the form: *The Hollandia* [1983] 1 AC 565. But, as regards the persons referred to in the clause, clause 5 says that it is, for the purposes of all the provisions of the clause, made on behalf of such persons and to that extent all such persons shall 'be deemed to be parties to the contract contained in or evidenced by this bill of lading'. As between those persons and the shipper the resultant contract is not 'collateral'; it is *the* contract. The purpose of the additional use of these express words is to procure that transferees of the bill of lading shall be bound as well as the shipper: see the final sentence of the quotes from Lord Reid (*sup*) and Lord Wilberforce (*sup*). Clause 5 deliberately makes the contract between such persons and the shipper part of the bill of lading contract so as to obtain the benefit of it against other persons besides the shipper. Were it not for the inclusion of these words in the clause the shipowners would not have been able to rely upon it as against any of the claimants in this litigation.

156 Then it is said that the contract is a 'contract of exemption'; it merely exempts the other person. This may be a valid observation where the completion of the 'Barwick' contract does not involve the assumption of any special relationship towards the cargo owner. But, when the completion of the 'Barwick' contract involves becoming the sub-bailee of the goods and the actual performing carrier, the 'Barwick' is a contract of carriage, albeit purportedly on terms of complete exemption. True the contract does not include promises or executory obligations and will come to an end as soon as the relationship ceases, but that does not prevent the contract from being a contract and, while it subsists, a contract of carriage. To deny that it is a contract of carriage is to ignore the fact that the service being provided (and which makes the contract enforceable between them) and its subject matter is the carriage of the goods by the shipowners for the goods' owner . . .

159 . . . [Clause 5] starts with a blanket and comprehensive exclusion of any liability whatsoever. It is upon this part of the clause that the shipowners rely as containing the exemption. It is drafted widely enough to cover a very wide range of persons (including 'any person who performs work on behalf of the vessel (*sic*) on which the goods are carried'). This part may present no problem for any entity, such as a stevedoring company, which is not a carrier and has no contract of carriage with the shipper. But for the shipowners it is by reason of clause 2 [a clause paramount incorporating the Hague Rules] as ineffective as the preceding paragraph. It is not until one gets to the next part of the paragraph which contains the words given effect to in *The Eurymedon* and *The New York Star*, that the conflict with clause 2 of the bill of lading is resolved . . . These words add the exemptions etc 'applicable to the carrier or to which the carrier is entitled hereunder'. This specifically avoids any conflict with clause 2. The exemptions applicable to the carrier under this bill of lading are those compatible with the Hague Rules as are those to which he is entitled. This part of the clause reflects the function of a *Himalaya* Clause. This is fatal to the shipowners' case. They want more but this is inconsistent with their reliance upon clause 5 as actual carriers and clause 2 . . .

162 Therefore, applying *The Eurymedon* and *The New York Star*, the shipowners' attempt to get round clause 2 of the bill of lading and the Hague Rules fails and accordingly their defence fails. It is reassuring that this conclusion also conforms to the judicial statements as to the purpose (or function) of the *Himalaya* clause and to the outcome which would be arrived at in jurisdictions which are not circumscribed by contractual criteria or by common law concerns with privity and consideration. Nor would a different conclusion have been arrived at under the Hague-Visby or Hamburg Rules. Nor would it be different if the Contracts (Rights of Third Parties) Act 1999 had

> applied; it would still have been necessary to see what exemptions this bill of lading on its proper construction, including clause 2, conferred upon the shipowners . . .

Notes

1 The House of Lords struggled here to fix the performing carrier with liability. Why do so? The shippers were content to make a contract with the charterers and to confer a wide express exemption on everyone else.

2 Under part 3 of the *Himalaya* clause in this case, the shipowner became a party to the bill of lading contract with the result that the Hague Rules applied and invalidated part 1 of the clause. The same result will not necessarily follow where the clause does not include this feature.

3 '*A complete exemption from all legal liability may be inconsistent with the enforceability of the clause*.' Why so? An agreement conferring complete exemption is not the same thing as an agreement without legal content. An agreement for a release is not invalid at common law; nor is an agreement to waive liability in tort.

3 BAILMENT ON TERMS

Recognition of the effectiveness of *Himalaya* clauses means that it is possible for the terms of a bill of lading to be invoked in some circumstances by someone who is not a holder of the bill or a party to the primary contract. A second common law device that may produce the same result is the doctrine of bailment on terms. This doctrine rests, according to the leading case, on the voluntary taking of possession of goods with an obligation to the owner to look after them on terms to which the owner of the goods has consented. The doctrine does not depend on the existence of a contract between the owner of cargo and the person in possession who loses or damages them, so that in appropriate circumstances it can be invoked by a sub-carrier or a stevedore who takes possession of goods on terms but is not in contract with their owner.

KH Enterprise (Cargo Owners) v Pioneer Container (Owners), *The Pioneer Container* [1994] 2 AC 324, PC

Facts

The plaintiffs were the owners of goods loaded on the containership *KH Enterprise* which sank with all her cargo off the coast of Taiwan following a collision in fog. Some of the containers were loaded under direct contract between the shipowners and the shippers. Others were on board under sub-contracts with Hanjin and Scandutch shipping lines, to each of whom the shipowners issued a single feeder bill of lading. There was no contract between the shipowners and the plaintiff owners of the 229 parcels of goods packed in the Hanjin and Scandutch containers. Under their contracts with the plaintiffs, both Hanjin and Scandutch had the right to subcontract all or part of their duties on any terms. The shipowners asked the court to stay the claims on the grounds that there was a bailment to them of the goods on the terms of their bills of lading, which provided by cl 26 that:

> This bill of lading contract shall be governed by Chinese law. Any claim or other dispute arising thereunder shall be determined at Taipei in Taiwan unless the carrier otherwise agrees in writing.

The Court of Appeal of Hong Kong held that all the plaintiffs were bound by the exclusive jurisdiction clause and stayed the proceedings. The plaintiffs appealed to the Privy Council. The Privy Council held that:

(1) by voluntarily receiving the goods into their custody from the shipping lines with notice that they were owned by other persons, the shipowners assumed the duty to the owners of the goods of a bailee for reward and were obliged to take reasonable care of the goods;

(2) the shipowners could invoke the terms on which the goods were sub-bailed to them, including the exclusive jurisdiction clause, because by agreeing to allow sub-contracting on any terms, the owners of the goods had consented to the sub-bailment and its terms.

Held

Lord Goff of Chieveley: … Their Lordships turn immediately to the central problem in the case, which is whether the shipowners can rely, as against the Scandutch and Hanjin plaintiffs, on the exclusive jurisdiction clause (clause 26) in the feeder bills of lading to which these plaintiffs were not parties. They think it right to observe, at the outset, that in commercial terms it would be most inconvenient if these two groups of plaintiffs were not so bound. Here is a ship, upon which goods are loaded in a large number of containers; indeed, one container may contain goods belonging to a number of cargo owners. One incident may affect goods owned by several cargo owners, or even (as here) all the cargo owners with goods on board. Common sense and practical convenience combine to demand that all of these claims should be dealt with in one jurisdiction, in accordance with one system of law. If this cannot be achieved, there may be chaos . . . It is scarcely surprising therefore that shipowners seek to achieve uniformity of treatment in respect of all such claims, by clauses designed to impose an exclusive jurisdiction and an agreed governing law, as in the present clause 26 in the shipowners' standard form of bill of lading. Within reason, such an attempt must be regarded with a considerable degree of sympathy and understanding.

However, so far as English law and the law of Hong Kong are concerned, a technical problem faces shipowners who carry goods, for example under the feeder bills of lading in the present case, where there is no contractual relationship between the shipowners and certain cargo owners. This is because English law still maintains, though subject to increasing criticism, a strict principle of privity of contract, under which as a matter of general principle only a person who is a party to a contract may sue upon it. The force of this principle is supported and enhanced by the doctrine of consideration, under which as a general rule only a promise supported by consideration will be enforceable at common law. How long these principles will continue to be maintained in all their strictness is now open to question . . . The present case is concerned with the question whether the law of bailment can here be invoked by the shipowners to circumvent this difficulty.

Bailment and sub-bailment

Their Lordships are here concerned with a case where there has been a sub-bailment – a bailment by the owner of goods to a bailee, followed by a sub-bailment by the bailee to a sub-bailee – and the question has arisen whether, in an action by the owner against the sub-bailee for loss of the goods, the sub-bailee can rely as against the owner upon one of the terms upon which the goods have been sub-bailed to him by the bailee . . . The question is whether the shipowners can in these circumstances rely upon the exclusive jurisdiction clause in the feeder bills of lading as against both groups of plaintiffs, notwithstanding that the plaintiffs in neither group were parties to the contract with the shipowners contained in or evidenced by such a bill of lading, having regard to the fact that the plaintiffs are seeking to hold the shipowners liable for failing to care for the goods so entrusted to them or failing to deliver them to the plaintiffs – in other words, for committing a breach of duty which is characteristic of a bailee.

The question whether a sub-bailee can in circumstances such as these rely upon such a term, and if so upon what principle he is entitled to do so, is one which has been considered in cases in the past, but so far neither by the House of Lords nor by the Privy Council. It has been much discussed by academic writers. Their Lordships are grateful to counsel for the citation to them of academic writings, especially Palmer, N, *Bailment*, 2nd ed, 1991: London: Sweet & Maxwell and

Bell, A, *Modern Law of Personal Property in England and Ireland*, 1989, London: Butterworths, to which they have repeatedly referred while considering the problems which have arisen for decision in the present case.

In approaching the central problem in the present case, their Lordships wish to observe that they are here concerned with two related questions. The first question relates to the identification of the relationship between the owner and the sub-bailee. Once that question is answered, it is possible to address the second question, which is whether, given that relationship, it is open to the sub-bailee to invoke as against the owner the terms upon which he received the goods from the bailee.

The relationship between the owner and the sub-bailee

Fortunately, authoritative guidance on the answer to the first question is to be found in the decision of the Privy Council in *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd* [1970] 1 WLR 1262, an appeal from the Court of Appeal of New South Wales. There two cases of clocks were shipped from Hamburg to Sydney. On arrival of the ship at Sydney the goods were unloaded, sorted and stacked on the wharf by the defendants, who were ship's agents and stevedores. The plaintiffs were the holders of the relevant bills of lading. When their agents sought delivery of the two cases from the defendants, one was missing and was never found. The plaintiffs sought to hold the defendants responsible as bailees of the goods. The Privy Council proceeded on the basis that there was a bailment to the shipowners, and a sub-bailment by the shipowners to the defendants; and that the defendants as sub-bailees received possession of the goods for the purpose of looking after them and delivering them to the holders of the bills of lading, who were the plaintiffs. Accordingly, the defendants 'took upon themselves an obligation to the plaintiffs to exercise due care for the safety of the goods, although there was no contractual relation or attornment between the defendants and the plaintiffs': see p 1267 *per* Lord Pearson, delivering the judgment of the Judicial Committee . . .

The terms of the collateral bailment between the owner and the sub-bailee

On the authority of the *Gilchrist Watt* case [1970] 1 WLR 1262, their Lordships have no difficulty in concluding that, in the present case, the shipowners became on receipt of the relevant goods the bailees of the goods of both the Hanjin plaintiffs and the Scandutch plaintiffs. Furthermore, they are of the opinion that the shipowners became the bailees of the goods for reward. In Pollock and Wright, *Possession in the Common Law*, 1888, Oxford: Stevens, it is stated that both the owner of the goods and the bailee have concurrently the rights of a bailor against the sub-bailee according to the nature of the sub-bailment. Their Lordships, like Lord Denning MR in *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, 729, consider that, if the sub-bailment is for reward, the obligation owed by the sub-bailee to the owner must likewise be that of a bailee for reward, notwithstanding that the reward is payable not by the owner but by the bailee. It would, they consider, be inconsistent in these circumstances to impose on the sub-bailee two different standards of care in respect of goods so entrusted to him.

But the question then arises whether, as against the owners (here the two groups of plaintiffs), the sub-bailees (here the shipowners) can invoke any of the terms on which the goods were sub-bailed to them, and in particular the exclusive jurisdiction clause (clause 26).

In *Morris v CW Martin & Sons Ltd* Lord Denning MR expressed his opinion on this point in clear terms, though on the facts of the case his opinion was *obiter*. He said, at p 729: 'The answer to the problem lies, I think, in this: the owner is bound by the conditions if he has expressly or impliedly consented to the bailee making a sub-bailment containing those conditions, but not otherwise.'

. . . In order to decide whether . . . to accept the principle so stated by Lord Denning MR, it is necessary to consider the relevance of the concept of 'consent' in this context. It must be assumed that, on the facts of the case, no direct contractual relationship has been created between the owner and the sub-bailee, the only contract created by the sub-bailment being that between the bailee and the sub-bailee. Even so, if the effect of the sub-bailment is that the sub-bailee voluntarily

receives into his custody the goods of the owner and so assumes towards the owner the responsibility of a bailee, then to the extent that the terms of the sub-bailment are consented to by the owner, it can properly be said that the owner has authorised the bailee so to regulate the duties of the sub-bailee in respect of the goods entrusted to him, not only towards the bailee but also towards the owner . . .

Such a conclusion, finding its origin in the law of bailment rather than the law of contract, does not depend for its efficacy either on the doctrine of privity of contract or on the doctrine of consideration. That this may be so appears from the decision of the House of Lords in *Elder Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] AC 522. In that case, shippers of cargo on a chartered ship brought an action against the shipowners for damage caused to the cargo by bad stowage, for which the shipowners were responsible. It is crucial to observe that the cargo was shipped under charterers' bills of lading, so that the contract of carriage contained in or evidenced by the bills of lading was between the shippers and the charterers. The shipowners nevertheless sought to rely, as against the shippers, upon an exception in the bill of lading which protected the charterers from liability for damage due to bad stowage. It was held that the shipowners were entitled to do so, the preferred reason upon which the House so held (*see Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446, 470, *per* Viscount Simonds, following the opinion of Fullagar J in *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* [1956] 1 Lloyd's Rep 346, 364; 95 CLR 43, 78) being found in the speech of Lord Sumner [1924] AC 522, 564:

> in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading.

Of course, there was in that case a bailment by the shippers direct to the shipowners, so that it was not necessary to have recourse to the concept of sub-bailment. Even so, notwithstanding the absence of any contract between the shippers and the shipowners, the shipowners' obligations as bailees were effectively subject to the terms upon which the shipowners implicitly received the goods into their possession. Their Lordships do not imagine that a different conclusion would have been reached in the *Elder, Dempster* case if the shippers had delivered the goods, not directly to the ship, but into the possession of agents of the charterers who had, in their turn, loaded the goods on board; because in such circumstances, by parity of reasoning, the shippers may be held to have impliedly consented that the sub-bailment to the shipowners should be on terms which included the exemption from liability for bad stowage.

. . . On this approach, a person who voluntarily takes another person's goods into his custody holds them as bailee of that person (the owner); and he can only invoke, for example, terms of a sub-bailment under which he received the goods from an intermediate bailee as qualifying or otherwise affecting his responsibility to the owner if the owner consented to them. It is the latter approach which, as their Lordships have explained, has been adopted by English law and, with English law, the law of Hong Kong.

Their Lordships wish to add that this conclusion, which flows from the decisions in *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 and the *Gilchrist Watt* case [1970] 1 WLR 1262, produces a result which in their opinion is both principled and just. They incline to the opinion that a sub-bailee can only be said for these purposes to have voluntarily taken into his possession the goods of another if he has sufficient notice that a person other than the bailee is interested in the goods so that it can properly be said that (in addition to his duties to the bailee) he has, by taking the goods into his custody, assumed towards that other person the responsibility for the goods which is characteristic of a bailee. This they believe to be the underlying principle. Moreover, their Lordships do not consider this principle to impose obligations on the sub-bailee which are onerous or unfair, once it is recognised that he can invoke against the owner terms of the sub-bailment which the owner has actually (expressly or impliedly) or even ostensibly authorised. In the last resort the sub-bailee may, if necessary and appropriate, be able to invoke against the bailee the principle of warranty of authority . . .

The Mahkutai [1996] AC 650, PC

Facts

See p 134, above.

Held

Lord Goff of Chieveley:

Application of the principle of bailment on terms in the present case

In the light of the principle stated by Lord Sumner in the *Elder Dempster* case [1924] AC 522 at 564, as interpreted by Fullagar J in the *Darling Island* case 95 CLR 43 at 78, the next question for consideration is whether the shipowners can establish that they received the goods into their possession on the terms of the bill of lading, including the exclusive jurisdiction clause (cl 19), ie whether the shipowners' obligations as bailees were effectively subjected to the clause as a term upon which the shipowners implicitly received the goods into their possession (see *The Pioneer Container* [1994] 2 AC 324 at 340 *per* Lord Goff of Chieveley). This was the ground upon which Bokhary JA ([1994] 1 HKLR 212 at 229–230) expressed the opinion, in his dissenting judgment, that the shipowners were entitled to succeed.

Their Lordships feel able to deal with this point very briefly, because they consider that in the present case there is an insuperable objection to the argument of the shipowners. This is that the bill of lading under which the goods were shipped on board contained a *Himalaya* clause under which the shipowners as sub-contractors were expressed to be entitled to the benefit of certain terms in the bill of lading but, as their Lordships have held, those terms did not include the exclusive jurisdiction clause. In these circumstances their Lordships find it impossible to hold that, by receiving the goods into their possession pursuant to the bill of lading, the shipowners' obligations as bailees were effectively subjected to the exclusive jurisdiction clause as a term upon which they implicitly received the goods into their possession. Any such implication must, in their opinion, be rejected as inconsistent with the express terms of the bill of lading.

Notes

1 Possession is an elusive idea. It is not always easy to decide who, if anyone, is in possession of particular goods at a given moment or to identify the special terms, if any, on which they hold those goods. In *Lotus Cars Ltd v Southampton Cargo Handling* plc [2000] 2 Lloyd's Rep 532, CA, a Lotus car intended for export on *Rigoletto* was stolen from an insecure compound at Southampton docks operated by ABP. It was common ground that Lotus were entitled to a received for shipment bill of lading on the shipowner's standard form, which included a *Himalaya* clause. The car was delivered to SCH, stevedores acting for the owners of *Rigoletto,* on the stevedores' standard conditions of business and parked in the compound. Despite the agreement that *Rigoletto* had received the car it was held that: (1) SCH had taken possession of the vehicle for storage, as opposed to simply handling during loading or discharge, and were in possession on their standard business terms; (2) the *Himalaya* clause was inconsistent with SCH's own terms, on which SCH had chosen to rely, and so was inapplicable; (3) (Chadwick LJ dissenting) possession of the car was transferred from SCH to ABP when it was parked in the compound and ABP thus owed Lotus a duty of care as bailees or sub-bailees or alternatively were liable in negligence. Comment: the question whether a person has taken possession of goods is a mixed question of fact and law. Control of a compound or an area used for storage does not necessarily demonstrate possession of everything in it. Here the Court of Appeal attached importance to a list of factors that tend to indicate possession, including a clause in ABP's terms which acknowledged that ABP might take possession of stored goods.

2 *Bailment and contract often go hand in hand.* This handy epigram comes from *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] 3 All ER 108, CA,

a road transport case, where it was said that principles of the law of bailment have always overlapped with those of the law of contract so that where a bailee has the consent, and thus the authority, of the bailor to enter into a sub-bailment on particular terms and does so, and where those terms purport to govern the relationship not merely between the sub-bailee and the bailee, but between the sub-bailee and the bailor, all the elements of a collateral contract binding the sub-bailee and the bailor will be present, for there will be privity, via the agency of the bailee, and no difficulty in identifying consideration, at least if the terms are capable of resulting in benefit to each of the parties.

3 See further Bell, A, 'Sub-bailment on terms' (1995) LMCLQ 177; Wilson, J, 'A flexible contract of carriage' (1996) LMCLQ 187; Baughen, S, 'Bailment's continuing role in cargo claims' (1999) LMCLQ 393.

4 *BRANDT* CONTRACTS

If the Carriage of Goods by Sea Act 1992 does not operate to transfer to the holder of a bill of lading the rights under the contract, it may nevertheless be possible in some circumstances to imply a contract between carrier and the receiver to give and receive delivery on the terms of the bill of lading. In some cases decided before 1992 courts seem to have been prepared to find contracts of this type – *Brandt* contracts – without a strong factual basis, almost treating these agreements as arising by operation of law. The Court of Appeal rejected this approach in the next case.

The Aramis [1989] 1 Lloyd's Rep 213, CA

Facts

The *Aramis* was trip chartered for a voyage from South America to Europe. The ship loaded a cargo of linseed expellers at Necochea in Argentina. Two parcels were to be delivered from this bulk at Rotterdam. One parcel was the subject of bill of lading 5 (204 tons), the other of bill of lading 6 (255 tons). On discharge at Rotterdam, it became clear that there was a considerable shortage of cargo, possibly because of over delivery at an earlier port of call. No delivery at all was made under bill of lading 5. Only 11.55 tons was delivered on presentation of bill of lading 6. Despite the fact that separate bills of lading had been issued, the goods in question were said to have formed part of a single undivided bulk cargo. On this basis, no property in the goods had passed to the plaintiff purchasers, who were not therefore entitled to sue the shipowners on the bill of lading contract under s 1 of the Bills of Lading Act 1855. The plaintiffs alleged that, applying *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575, CA, an implied contract had arisen, even though the shipowners had no lien over the cargo and were bound to deliver to any holder of these bills of lading claiming delivery. Freight had been pre-paid; no payments were due to the carrier on discharge. The Court of Appeal held that mere presentation of a bill of lading coupled with delivery is not sufficient material on which to find an implied contract.

Held

Bingham LJ: . . . Like most important legal decisions, that in *Brandt's* case did not lack ancestors and has not lacked progeny. We were referred to a number of cases before *Brandt* and since . . .

These cases may be said to decide no more than that whether a contract is to be implied is a question of fact and that a contract will only be implied where it is necessary to do so. But the

cases certainly show that there is evidence from which a contract may be inferred where a shipowner who has a lien on cargo for unpaid freight or demurrage or other charges makes or agrees to make delivery of the cargo to the holder of a bill of lading who presents it and seeks or obtains delivery and pays outstanding dues or agrees to pay them or is to be taken to agree to pay them. The parties may also . . . show an intention to adopt and perform the bill of lading contract in other ways. There does not, however, appear to have been a case in which a contract has been implied from the mere facts (a) that an endorsee, entitled as holder of the bill of lading to demand delivery, does so, and (b) that the shipowner, bound by contract with his shipper (and perhaps his charterer) to deliver goods to any party presenting the bill of lading, duly makes such delivery. Whether on such facts (without more) a contract may be implied must be considered in the light of ordinary contractual principles.

Most contracts are, of course, made expressly, whether orally or in writing. But here, on the evidence, nothing was said, nothing was written. So regard must be paid to the conduct of the parties alone. The questions to be answered are, I think, twofold: (1) whether the conduct of the bill of lading holder in presenting the bill of lading to the ship's agent would be reasonably understood by the agents (or the shipowner) as an offer to enter into a contract on the bill of lading terms; (2) whether the conduct of the ship's agent in accepting the bill or the conduct of the master in agreeing to give delivery or in giving delivery would be reasonably understood by the bill of lading holder as an acceptance of his offer.

I do not think it is enough for the party seeking the implication of a contract to obtain 'it might' as an answer to these questions, for it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied upon is no more consistent with an intention to contract than with an intention not to contract. It must, surely, be necessary to identify conduct referable to the contract contended for or, at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract.

If this approach is correct, I think it is impossible to imply a contract on the bare facts of this case. Nothing that the shipowners or the bill of lading holders did need have been different had their intention been not to make a contract on the bill of lading terms. Their business relationship was entirely efficacious without the implication of any contract between them. Although the bill of lading holders had no title to any part of the undivided bulk cargo they had a perfectly good right to demand delivery and the shipowners had no right to refuse or to impose conditions . . .

I fully recognise the good sense and the commercial convenience underlying the learned judge's decision. Unless the parties understood s 1 of the 1855 Act (which is not necessarily so) they probably thought that their rights and duties were governed by the bill of lading anyway. It would be perfectly reasonable in a general sense to treat the parties' rights and duties as so governed. Once an intention to contract is found no problem on consideration arises, since there would be ample consideration in the bundle of rights and duties which the parties would respectively obtain and accept. Had the boot been on the other foot it seems very likely that the shipowners would have sought to assert the bill of lading contract. But I do not think these matters entitle one to cast principle aside and simply opt for a commercially convenient solution . . .

Notes

The decision in *The Aramis* has been criticised: Treitel, G, 'Bills of lading and implied contracts' (1989) LMCLQ 612 and Davenport, B, 'Problems in the Bill of Lading Act' (1989) 105 LQR 174. But it was cited without disapproval in the House of Lords in *The Berge Sisar* [2001] UKHL 17; [2002] 2 AC 205 and in the Court of Appeal in *The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395, CA and *The Gudermes* [1993] 1 Lloyd's Rep 311, CA, where it said that it was not enough to show that the parties had done something more than, or something different from, what they were already bound to do under

obligations owed to others. What they do must be consistent only with there being a new contract implied, and inconsistent with there being no such contract. And in any event, terms could not be implied which one party had refused to accept.

5 RULE IN *DUNLOP v LAMBERT*

If for some reason a buyer of cargo carried by sea is not able to make a claim for damages against the carrier, can the shipper or charterer sue on the receiver's behalf? The general rule in English law is that a party to a contract who suffers no loss or damage as a result of a breach can recover no more than nominal damages. The rule in *Dunlop v Lambert* (1839) 6 CP & Fin 600 creates an exception to the general rule. But *The Albazero,* below, restricted the rule to a very narrow range, which has been narrowed even further by the enactment of the Carriage of Goods by Sea Act 1992.

Owners of cargo lately laden on board ship or vessel Albacruz v Ship or vessel Albazero (Owners), The Albazero [1977] AC 774

Facts

The *Albacruz* was time chartered under a five year time charter. Crude oil was loaded at La Salina, Venezuela, for carriage to Antwerp. A bill of lading, which named the charterter as consignee, was endorsed to another company in the charterer's group. In the course of the voyage the *Albacruz* and her cargo became a total loss owing to breaches by the shipowners of the charterparty. The charterer brought an action against the shipowners for breach of the time charter. The cargo owners were not parties to the action; they had lost their right to claim under the bill of lading owing to the expiry of the one year limitation period fixed by the Hague Rules. The charterer claimed that the measure of the damages which they were entitled to recover was the arrived value of the goods lost, notwithstanding that at the time the goods were lost the charterer had no longer any property in the goods and had suffered no loss themselves by reason of their non-delivery at their destination.

Held

> **Lord Diplock:** . . . *Dunlop v Lambert* (1839) 6 Cl & Fin 600 was a Scots case . . . The argument before this House took place some 15 months before judgment was delivered. The only speech was that of Lord Cottenham LC and its reasoning is baffling. The pursuer had shipped a puncheon of whisky for carriage by sea in the defender's ship from Leith to Newcastle under a bill of lading issued by the defender in which the pursuer was named as shipper and Robson, the buyer of the whisky from the pursuer, was named as consignee. The goods were lost by what appears to have been a general average sacrifice and the pursuer had in fact made good the loss to his buyer.
>
> Nine-tenths of Lord Cottenham LC's speech appears to be directed to the question whether the pursuer as consignor and seller had contracted with the shipowner on his own behalf or as agent for his buyer who was named as consignee, and to relate this to the terms of the contract of sale between the consignor and consignee as respects the passing of property in the goods and the passing of risk. So far this was what by 1839 had become the classic approach to the question whether the consignor or consignee was entitled to sue on the contract of carriage. The same approach is also reflected in the order of the House directing that . . . it ought to have been left to the jury to determine, first, whether the goods had been delivered to the carrier on the risk of the consignor or of the consignee and, secondly, whether there was a special contract between the consignor and the consignee which might have enabled the pursuers to recover in the action.
>
> There is, however, a penultimate paragraph in the speech immediately preceding the direction as to the order to be made. This appears to bear little relation to any of the reasoning that goes before

or to the direction that comes after unless 'consignee' in the second part of the direction is a mistake for 'carrier'. It reads as follows

> These authorities, therefore, establish in my mind the propositions which are necessary to be adopted, in order to overrule this direction of the Lord President. I am of opinion, that although, generally speaking, where there is a delivery to a carrier to deliver to a consignee, he is the proper person to bring the action against the carrier should the goods be lost; yet that if the consignor made a special contract with the carrier, and the carrier agreed to take the goods from him, and to deliver them to any particular person at any particular place, the special contract supersedes the necessity of showing the ownership in the goods; and that, by the authority of the cases of *Davis v James* (1770) 5 Burr 2680 and *Joseph v Knox* (1813) 3 Camp 320, the consignor, the person making the contract with the carrier, may maintain the action, though the goods may be the goods of the consignee.

My Lords, there might have been room for argument for some years after *Dunlop v Lambert* as to what principle of law it did lay down and whether it was really a decision of this House that privity of contract sufficed not only to entitle the consignee to bring suit against the carrier (which would be trite law today) but also to enable him to recover substantial damages whether or not he had himself sustained them. It has however been uniformly treated ever since by textbook writers of the highest authority, Abbott, Maude and Pollock, Blackburn and (implicitly) by Scrutton in each of its successive editions, as authority for the broad proposition that the consignor may recover substantial damages against the shipowner if there is privity of contract between him and the carrier for the carriage of goods; although, if the goods are not his property or at his risk, he will be accountable to the true owner for the proceeds of his judgment.

. . . It has been urged on your Lordships on behalf of the shipowners that if *Dunlop v Lambert* really is authority for the rule that it has for so long been understood to have laid down, it constitutes an anomalous exception to the general rule of English law that a party to a contract apart from nominal damages, can only recover for its breach such actual loss as he has himself sustained; and that . . . your Lordships should now declare that it is no longer the law.

My Lords . . . the Bills of Lading Act 1855 and the subsequent development of the doctrine laid down in *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* have reduced the scope and utility of the rule in *Dunlop v Lambert* where goods are carried under a bill of lading. But the rule extends to all forms of carriage, including carriage by sea itself where no bill of lading has been issued, and there may still be occasional cases in which the rule would provide a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it. For my part, I am not persuaded that your Lordships ought to go out of your way to jettison the rule.

On the other hand, I do not think your Lordships should extend it beyond what is justified by its rationale so far as this can be discerned . . .

The only way in which I find it possible to rationalise the rule in *Dunlop v Lambert* so that it may fit into the pattern of the English law is to treat it as an application of the principle, accepted also in relation to policies of insurance on goods, that in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into.

With the passing of the Bills of Lading Act 1855 the rationale of *Dunlop v Lambert* could no longer apply in cases where the only contract of carriage into which the shipowner had entered was that contained in a bill of lading, and the property in the goods passed to the consignee or endorsee named in the bill of lading by reason of the consignment or indorsement. On that happening the

> right of suit against the shipowner in respect of obligations arising under the contract of carriage passes to him from the consignor . . .
>
> The rationale of the rule is in my view also incapable of justifying its extension to contracts for carriage of goods which contemplate that the carrier will also enter into separate contracts of carriage with whoever may become the owner of goods carried pursuant to the original contract.
>
> A charterparty which provides for the issue of bills of lading covering the carriage of particular goods shipped on the chartered vessel is such a contract . . . The complications, anomalies and injustices that might arise from the co-existence in different parties of rights of suit to recover, under separate contracts of carriage which impose different obligations on the parties to them, a loss which a party to one of those contracts alone has sustained, supply compelling reasons why the rule in *Dunlop v Lambert* should not be extended to cases where there are two contracts with the carrier covering the same carriage and under one of them there is privity of contract between the person who actually sustains the loss and the carrier by whose breach of that contract it was caused . . .

Notes

1 Lord Diplock here points out that for some years after *Dunlop v Lambert* was decided, the proper interpretation of that case was open to dispute. In the House of Lords, in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] AC 530, Lord Clyde and Lord Jauncey demonstrate that the rule in *Dunlop v Lambert*, as it eventually emerged, was based on a misunderstanding of the original decision. Nevertheless, the rule, as interpreted in *The Albazero*, was treated in *Panatown* as too well established to be challenged.

2 The function of the rule is to prevent a carrier avoiding liability when the consignee has no cause of action. It is, therefore, fatal to the application of *The Albazero* that the person who has the property and risk in the cargo also has a direct remedy against the carrier.

3 In *Panatown*, the rule in *Dunlop v Lambert* was said to be a rule of law (which can be excluded by agreement) but not a result that can be created by contract.

4 See further Coote, B, '*Dunlop v Lambert:* the search for a rationale' (1998) 13 JCL 91.

5 A majority in *Panatown* recognised that in the case of some contracts, an innocent party who suffers no personal financial loss – as where A employs B to repair property belonging to C, a relative – may nevertheless recover the loss of the value of performance of the contract, provided that C has no direct cause of action.

CHAPTER 10

HAGUE-VISBY RULES

Before 1800 it was unusual for English bills of lading to include extensive exclusion clauses. Practice changed dramatically in the first half of the 19th century and in due course provoked a reaction on the part of cargo interests. Carriers claimed that freedom of contract was the right approach and robustly exercised that freedom. Shippers responded that the only freedom of contract they enjoyed was the freedom either to ship on terms dictated by the sea carrier or the freedom not to ship at all. Consignees, endorsees and their bankers usually had even less opportunity than shippers to influence the terms of bills of lading by negotiation. In England, these considerations led to the promotion of model bills of lading and to unsuccessful demands for legislation. In other jurisdictions, cargo interests were powerful enough to obtain legislation to adjust the balance in their favour. This was done in the United States in the Harter Act in 1893 and later in Australia (Sea Carriage of Goods Act 1904), Canada (Water Carriage of Goods Act 1910) and in New Zealand (Shipping and Seaman Act 1903).

A number of attempts were made to secure a uniform international approach.

> After considerable discussion among the representatives of leading shipowners, underwriters, shippers and bankers of the big maritime nations, a set of rules was finally drafted by the Maritime Law Committee of the International Law Association at a meeting held at The Hague in 1921 … [They] came to be known as the Hague Rules, but … were not immediately adopted … The Rules were amended at the London Conference of CMI in 1922. A draft convention drawn up at that conference was amended at Brussels in 1923, and in due course an international Convention was ultimately signed there by the most important trading nations on 25 August 1924. Each State was expected to give the Hague Rules statutory force with regard to all outward bills of lading … [UNCTAD (United Nations Conference on Trade and Development), 'Bills of Lading', 1971, para 62].

In Great Britain, the draft Convention of 1923 was given statutory effect by the Carriage of Goods by Sea Act 1924. Subsequently, the draft of 1923 was signed at Brussels on 25 August 1924, although only after further amendments, which were not incorporated in the 1924 Act.

The Hague Rules:

> radically changed the legal status of sea carriers under bills of lading. According to the previous law, shipowners were generally common carriers, or were liable to the obligations of common carriers, but they were entitled to the utmost freedom to restrict and limit their liabilities, which they did by elaborate and mostly illegible exceptions and conditions. Under the Act and the Rules, which cannot be varied in favour of the carrier by any bill of lading, their liabilities are precisely determined, and so also are their rights and immunities … [Wright J, *Gosse Millerd v Canadian Govt Merchant Marine Ltd* [1927] 2 KB 432, KBD, p 434].

In 1963 the CMI adopted (at Visby on the Swedish island of Gotland) the text of a draft document intended to make limited amendments to the 1924 Convention. This draft was considered at the 12th session of the Brussels Diplomatic Conference on Maritime Law in 1967 and 1968. The result was the Protocol signed on 23 February 1968. In the United Kingdom, the Carriage of Goods by Sea Act 1971 was passed to give effect to that Protocol. The Act was brought into force on 23 June 1977. It repealed the 1924 Act and re-enacted the Hague Rules in their amended Hague-Visby form.

The Hague Rules (and their successor the Hague-Visby Rules) form an internationally recognised code adjusting the rights and duties existing between shipowners and those shipping goods under bills of lading. As Sir John Donaldson MR said in *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd* [1985] QB 350, 368, 'the rules create an intricate blend of responsibilities and liabilities, rights and immunities, limitations on the amount of damages recoverable, time bars, evidential provisions, indemnities and liberties, all in relation to the carriage of goods under bills of lading' [Saville LJ, *The Nicholas H* [1994] 1 WLR 1071, p 1080].

Although the 1968 Protocol made important changes, it did not radically alter the compromise between the interests of carriers and cargo owners which had been reached in 1924. The case for a more fundamental revision of the Hague Rules was argued in *Bills of Lading*, a report by the secretariat of UNCTAD, published by the United Nations in 1971. The movement for reform, which began with the UNCTAD report, led to the UN Conference on the Carriage of Goods by Sea at Hamburg in 1978 and the adoption of a new convention, the Hamburg Rules. Those Rules, however, attracted little support in the United Kingdom. More recent proposals for a convention to widen and supercede the Hague, Hague-Visby and Hamburg Rules are contained in the CMI (Comité Maritime International)/UNCITRAL (United Nations Commission on International Trade Law) *Preliminary Draft Instrument on the Carriage of Goods by Sea* (available with commentary at www.uncitral.org).

1 CARRIAGE OF GOODS BY SEA ACT 1971

An Act to amend the law with respect to the carriage of goods by sea (8 April 1971; in force 23 June 1977; printed as amended).

1 Application of Hague Rules as amended

(1) In this Act, 'the Rules' means the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on 25 August 1924, as amended by the Protocol signed at Brussels on 23 February 1968, and by the Protocol signed at Brussels on 21 December 1979.

(2) The provisions of the Rules, as set out in the Schedule to this Act, shall have the force of law.

(3) Without prejudice to subsection (2) above, the said provisions shall have effect (and have the force of law) in relation to and in connection with the carriage of goods by sea in ships where the port of shipment is a port in the United Kingdom, whether or not the carriage is between ports in two different States within the meaning of Article X of the Rules.

(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.

(5) [*Repealed by the Merchant Shipping Act 1981, s 5(3) and schedule.*]

(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,

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.

(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 1(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.

1A Conversion of special drawing rights into sterling

[*Section added by the Merchant Shipping Act 1995, s 314(2), Sched 13, para 45(3). In force 1 January 1996.*]

(1) For the purposes of Article IV of the Rules the value on a particular day of one special drawing right shall be treated as equal to such a sum in sterling as the International Monetary Fund have fixed as being the equivalent of one special drawing right:

(a) for that day; or

(b) if no sum has been so fixed for that day, for the last day before that day for which a sum has been so fixed.

(2) A certificate given by or on behalf of the Treasury stating:

(a) that a particular sum in sterling has been fixed as aforesaid for a particular day; or

(b) that no sum has been so fixed for a particular day and that a particular sum in sterling has been so fixed for a day which is the last day for which a sum has been so fixed before the particular day,

shall be conclusive evidence of those matters for the purposes of subsection (1) above; and a document purporting to be such a certificate shall in any proceedings be received in evidence and, unless the contrary is proved, be deemed to be such a certificate.

(3) . . . [*Fees for certificates.*]

2 Contracting States, etc

(1) If Her Majesty by Order in Council certifies to the following effect, that is to say, that for the purposes of the Rules:

(a) a State specified in the Order is a Contracting State, or is a Contracting State in respect of any place or territory so specified; or

(b) any place or territory specified in the Order forms part of a State so specified (whether a contracting State or not),

the Order shall, except so far as it has been superseded by a subsequent Order, be conclusive evidence of the matters so certified.

(2) An Order in Council under this section may be varied or revoked by a subsequent Order in Council.

3 Absolute warranty of seaworthiness not to be implied in contracts to which Rules apply

There shall not be implied in any contract for the carriage of goods by sea to which the Rules apply by virtue of this Act any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

4 Application of Act to British possessions, etc

. . .

5 Extension of application of Rules to carriage from ports in British possessions, etc

. . .

6 Supplemental

(1) This Act may be cited as the Carriage of Goods by Sea Act 1971.

(2) It is hereby declared that this Act extends to Northern Ireland.

(3) The following enactments shall be repealed, that is:

(a) the Carriage of Goods by Sea Act 1924,

(b) section 12(4)(a) of the Nuclear Installations Act 1965,

and without prejudice to section 17(2) of the Interpretation Act 1978, the reference to the said Act of 1924 in section 1(1)(i)(ii) of the Hovercraft Act 1968 shall include a reference to this Act.

(4) It is hereby declared that for the purposes of Article VIII of the Rules section 186 of the Merchant Shipping Act 1995 (which entirely exempts shipowners and others in certain circumstances for loss of, or damage to, goods) is a provision relating to limitation of liability [*Subsection added by s 314(2), Sched 13, para 45(4) of the Merchant Shipping Act 1995. In force 1 January 1996.*]

(5) . . . [*Commencement.*]

SCHEDULE

THE HAGUE RULES

as amended by the Brussels Protocol 1968

ARTICLE I

In these Rules the following words are employed, with the meanings set out below:

(a) 'Carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.

(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.

(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.

(d) 'Ship' means any vessel used for the carriage of goods by sea.

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

ARTICLE II

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.

ARTICLE III

1 The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

(a) Make the ship seaworthy.

(b) Properly man, equip and supply the ship.

(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2 Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

3 After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods.

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

4 Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3(a), (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.

5 The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6 Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection.

Subject to paragraph 6 *bis* the carrier and the ship shall in any event 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. This period may, however, be extended if the parties so agree after the cause of action has arisen.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

6 *bis* An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.

7 After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands, be a 'shipped' bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the 'shipped' bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the

name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article III, shall for the purpose of this article be deemed to constitute a 'shipped' bill of lading.

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. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

ARTICLE IV

1 Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

2 Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

(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.

(c) Perils, dangers and accidents of the sea or other navigable waters.

(d) Act of God.

(e) Act of war.

(f) Act of public enemies.

(g) Arrest or restraint of princes, rulers or people, or seizure under legal process.

(h) Quarantine restrictions.

(i) Act or omission of the shipper or owner of the goods, his agent or representative.

(j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.

(k) Riots and civil commotions.

(l) Saving or attempting to save life or property at sea.

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.

(n) Insufficiency of packing.

(o) Insufficiency or inadequacy of marks.

(p) Latent defects not discoverable by due diligence.

(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.

3 The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

4 Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

5 (a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding [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.

(b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.

The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

(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 or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.

[(d) The unit of account mentioned in this Article is the special drawing right as defined by the International Monetary Fund. The amounts mentioned in subparagraph (a) of this paragraph shall be converted into national currency on the basis of the value of that currency on a date to be determined by the law of the court seized of the case.] [*Words in square brackets substituted by s 2(3), (4) of the Merchant Shipping Act 1981, and by s 314(2), Sched 13, para 45(5) of the Merchant Shipping Act 1995; para 45(6) states that Art IV, para 5(d) 'shall continue to have effect as if the date there mentioned were the date of the judgment in question'.*]

(e) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

(f) The declaration mentioned in subparagraph (a) of this paragraph, if embodied in the bill of lading, shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

(g) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in subparagraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that subparagraph.

(h) Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

6 Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

ARTICLE IV *bis*

1 The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.

2 If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules.

3 The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in these Rules.

4 Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

ARTICLE V

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under these Rules, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper. 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. Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

ARTICLE VI

Notwithstanding the provisions of the preceding articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect.

Provided that this article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

ARTICLE VII

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea.

ARTICLE VIII

The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

ARTICLE IX

These Rules shall not affect the provisions of any international Convention or national law governing liability for nuclear damage.

ARTICLE X

The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:

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

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

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

whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

(The last two paragraphs of this Article are not reproduced. They require contracting States to apply the Rules to bills of lading mentioned in the Article and authorise them to apply the Rules to other bills of lading.)

(Articles 11 to 16 of the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on 25 August 1924 are not reproduced. They deal with the coming into force of the Convention, procedure for ratification, accession and denunciation, and the right to call for a fresh conference to consider amendments to the Rules contained in the Convention.)

2 ARTICLE I

The Hague-Visby Rules only apply to certain types of contract. Article II is the principal operative provision; it applies the rights and duties set out in the Rules to the carrier under 'every contract of carriage of goods by sea'. But Art I defines these words narrowly, so that only contracts 'covered by a bill of lading or any similar document of title' attract the operation of the convention. Article X provides further limitations: the carriage must be between ports in two different States and either the bill of lading must be issued in a contracting State, or the carriage must be from a port in a contracting State, or the contract contained in or evidenced by the bill of lading must provide that the Rules or the legislation of any State giving effect to them are to govern the contract.

The Carriage of Goods by Sea Act 1971 gives the Rules the force of law in the United Kingdom: s 1(2). The Rules are extended to UK coastal shipping by s 1(3).

2.1 Carrier

Article I, para (a) defines 'carrier' as including the owner or the charterer who enters into a contract of carriage with a shipper. This definition directs attention to the contracting rather than the performing carrier, as Robert Goff J indicates in the following extract.

***Freedom General Shipping SA v Tokal Shipping Co Ltd, The Khian Zephyr* [1982] 1 Lloyd's Rep 73**

Held

Robert Goff J: … the function of art I(a), in providing that the word 'carrier' includes the owner or charterer who enters into a contract of carriage with a shipper, is to legislate for the fact that you may get a case … where the bills of lading are charterers' bills; and where there are

charterers' bills, of course, the charterer is in a contractual relationship with the cargo owner and is responsible under the bills of lading to the cargo owners …

2.2 Contract of carriage

These words are said by Art I, para (b) to apply only to contracts of carriage covered by a bill of lading or any similar document of title. The word 'covered' is interpreted broadly. A contract can be 'covered' by a bill of lading even though no bill is ever actually issued.

***Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402**

Facts

The plaintiffs sold machinery, including a fire tender, to the Government of India. While the tender was being lifted on to the vessel by the ship's tackle, and before it was across the rail it was, through the fault of the ship, dropped and damaged. The plaintiffs sued in tort to recover £966, which was the cost of repairing the tender. The defendants admitted liability but claimed to limit the amount recoverable under Art 4 r 5 of the Hague Rules to £200. A bill of lading had been prepared to cover the whole shipment and was later issued, but with the fire tender deleted from it. It was not disputed that the contract of carriage was actually created before loading began.

Held

Devlin J: The … contention on behalf of the plaintiffs is that the rules are incorporated in the contract of carriage only if a bill of lading is issued. The basis for this is in the definition of Article I(b) of 'contract of carriage'; I have already quoted it, and it 'applies only to contracts of carriage covered by a bill of lading'. The use of the word 'covered' recognises the fact that the contract of carriage is always concluded before the bill of lading, which evidences its terms, is actually issued. When parties enter into a contract of carriage in the expectation that a bill of lading will be issued to cover it, they enter into it upon those terms which they know or expect the bill of lading to contain. Those terms must be in force from the inception of the contract; if it were otherwise the bill of lading would not evidence the contract but would be a variation of it. Moreover, it would be absurd to suppose that the parties intend the terms of the contract to be changed when the bill of lading is issued: for the issue of the bill of lading does not necessarily mark any stage in the development of the contract; often it is not issued till after the ship has sailed, and if there is pressure of office work on the ship's agent it may be delayed several days. In my judgment, whenever a contract of carriage is concluded, and it is contemplated that a bill of lading will, in due course, be issued in respect of it, that contract is from its creation 'covered' by a bill of lading, and is therefore from its inception a contract of carriage within the meaning of the rules and to which the rules apply. . .

Notes

1 Devlin J concluded that the Hague Rules applied to the contract and that the defendants were entitled to limit their liability to £200.

2 The word 'covered' in Art I, para (a) is clarified so far as UK law is concerned by s 1(4) of the 1971 Act which provides that the contract must expressly or by implication provide for the issue of a bill of lading or similar document of title.

3 The judgment in this case noted that the bill of lading to be issued was to contain the terms on which the parties had agreed. In the next case, it did not.

2.3 Contract not in bill of lading

A contract can still be covered by a bill of lading even though the bill does not contain the terms of the contract.

Parsons Corp v CV Scheepvaartonderneming, The Happy Ranger
[2002] EWCA Civ 694; [2002] 2 Lloyd's Rep 357

Facts

The defendant owners of the heavy-lift vessel the *Happy Ranger* contracted to carry three reactors from Porto Marghera in Italy to Al Jubail in Saudi Arabia. One of the reactors was damaged by the carrier while being loaded. The contract between the parties consisted of three documents: a printed front page which was signed, a rider consisting of six pages and an attached specimen form of bill of lading. The rider clauses contained provisions (for example, for laytime) that would ordinarily be found in a voyage charter but not in a liner bill of lading. The shipowners argued that the contract was not subject to the Hague-Visby Rules because the bill of lading did not contain the terms of the contract or alternatively because the contract was a voyage charter.

Held

Tuckey LJ: [Paragraph 24] It does not seem to me that the Rules are concerned with whether the bill of lading contains terms which have been previously agreed or not. It is the fact that it is issued or that its issue is contemplated which matters. As it was put in one of the cases, 'the bill of lading is the bedrock on which the mandatory code is founded'. If a bill of lading is or is to be issued the contract is 'covered' by it or 'provides for its issue' within the definitions of art I(b) and s 1(4) of the 1971 Act … As to Mr Teare's [counsel] alternative submission I do not think it is possible to characterize the contract in this case as a voyage charter-party. It was obviously a carefully drawn document and although it does contain terms which are to be found in voyage charter-parties, it emphatically calls itself a contract of carriage and that is what I think it is. The fact that the goods to be carried were a part cargo supports this conclusion, although I accept that this factor is not conclusive …

2.4 Straight bill of lading

Despite longstanding doubts, it has recently been held that a straight bill of lading is a bill of lading for the purposes of the Rules.

JI MacWilliam Co Inc v Mediterranean Shipping Co SA, The Rafaela S
[2003] EWCA Civ 556; [2003] 2 Lloyd's Rep 113

Facts

Printing machinery was shipped to MacWilliam at Boston, USA from Felixstowe in England and was damaged on the way. No bill of lading was in fact issued but the parties accepted that the carriage was to be treated as governed by a straight bill of lading in the same form as that used for an earlier voyage. That bill of lading in three identical original parts was based on a printed form with a box layout and could be completed either as an order bill or as a straight bill. The attestation clause provided that: 'One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order.'

Held

Rix LJ: 134 The first question is whether a straight bill of lading, but otherwise in the form of any classic bill of lading, is a bill of lading within the meaning of the Rules … It is common ground that the point is open. It is open today. It was open and uncertain immediately before the agreement of the Hague Rules.

135 In my judgment, a straight bill of lading, for all that it is non-negotiable, should be viewed as a bill of lading within the meaning of the Rules. I say that for the following reasons.

136 First, the Hague Rules are predominately concerned with the content of a contract of carriage in circumstances where such a contract as found in a bill of lading may come to affect a third party into whose hands such a bill is transferred. It seems to me to be plain as a matter of common-sense but also on a review of the material cited in this judgment, that in this connection a named consignee under a straight bill of lading, unless he is the same person as the shipper, is as much a third party as a named consignee under a classic bill. Therefore I would view such a named consignee under a straight bill as *prima facie* within the concern of the Rules.

137 Secondly, while it is I suppose true that a straight bill of lading can be used in circumstances where there is no intention of transferring it to the consignee, the authorities considered demonstrate that in practice it is used, just like a classic bill, as a document against which payment is required and the transfer of which thus marks the intended transfer of property. Therefore, as Professor Tetley says [*Marine Cargo Claims*, 3rd edn, 1998, Montreal: BLAIS], its nature is that, although it cannot be transferred more than once, for it is not negotiable, it can be transferred by delivery (just like a classic bill) to the named consignee. In these circumstances, the shipper and his bankers and insurers need the same protection as the shipper under a classic bill; and the consignee himself and his insurers in turn need to have rights against the carrier under the contract of carriage. I can see no reason why straight bills of lading have not always been within the 1855 Act. Those needs are in any event recognised under the 1992 Act.

138 Thirdly, whatever may be the position as a matter of principle and in the absence of express agreement, the practice appears to be that a straight bill of lading, unlike a mere sea waybill, is written on the form of an otherwise classic bill and requires production of the bill on delivery, and therefore transfer to a consignee to enable him to obtain delivery. (In this respect the position of a straight bill under the Pomerene Act appears to be different, but even so the US Harter Act, one of the forerunners of the Hague Rules, would seem to cover straight as well as negotiable bills.)

139 Fourthly, suppose the question is asked, in the context of the Hague Rules, in these, terms: What of the straight bill? Is this a 'bill of lading' or, being non-negotiable, something else, more akin to a non-negotiable receipt? Then, as it seems to me, the straight bill of lading is in principle, function, and form much closer to a classic negotiable bill, than to a non-negotiable receipt, which, to judge from article VI of the Rules, was viewed as something far more exotic.

140 Fifthly, the *travaux preparatoires* of the Hague Rules, despite lacking unequivocal cogency, to my mind are not only consistent with the view I would prefer, but go far to support it.

141 Sixthly, I am unimpressed by the argument derived from the terms of the 1971 and 1992 Acts. They may reflect a developing English view about how to categorise bills of lading and non-negotiable receipts and sea waybills, but, as the learned authors of *Benjamin* and *Carver* point out, they are ultimately dealing with different purposes. In any event, I do not see how they can control the meaning of the Hague Rules, which are not only much earlier, but also of international and not merely domestic scope.

142 The next question is as to the effect of the attestation clause in the bill of lading in the present case. Is it applicable only to the use of the bill in its negotiable form, or does it survive to control its use as a straight bill? In my judgment, for the reasons stated in para 106 above and in *Gaskell* [*Bills of Lading: Law & Contracts*, 2nd edn, 2002, London: Lloyd's of London] the attestation clause is to be construed as applicable in either event. If it had been intended that it should not apply when the bill was used in a non-negotiable form, then it could very easily have said so. Against the background of the common forms of sea waybills, it is truly remarkable that it does not say so.

143 The third question is, then, whether such a straight bill of lading, which has to be produced to obtain delivery, is a document of title? In my judgment it is. I consider that the authorities and text-books discussed above support that view. Whatever the history of the phrase in English common or statutory law may be, I see no reason why a document which has to be produced to obtain possession of the goods should not be regarded, in an international convention, as a document of title. It is so regarded by the courts of France, Holland and Singapore.

144 Is it a 'similar' document of title? If I am right to consider that negotiability is not a necessary requirement of a 'bill of lading' within the meaning of the Rules, then plainly it is. But I also think that the good sense of regarding a straight bill whose production is required for delivery of the goods as a document of title in turn supports the answer to the prior question of whether a straight bill is a 'bill of lading'.

145 The final question is whether a straight bill of lading is in principle a document of title, even in the absence of an express provision requiring its production to obtain delivery? It would seem that *Peer Voss v APL Co Pte Ltd* [2002] 2 Lloyd's Rep 707, Singapore Court of Appeal, concluded that it was (at any rate if it is issued in traditional form in three originals). That was also the view of the Law Commission. It is unnecessary to decide the point, but in my judgment it is. It seems to me to be undesirable to have a different rule for different kinds of bills of lading – which I think was the view of Butt J in *The Stettin* as well. It is true, as *Benjamin* states, that in the case of a negotiable bill the carrier needs to have the bill produced in order to be able to police the question of who is entitled to delivery. Yet an analogous problem arises with a straight bill. A shipper needs the carrier to assist him in policing his security in the retention of the bill. He is entitled to redirect the consignment on notice to the carrier, and, although notice is required, a rule of production of the bill is the only safe way, for the carrier as well as the shipper, to police such new instructions. In any event, if proof of identity is necessary, as in practice it is, what is wrong with the bill itself as a leading form of proof? That is of course an inconvenient rule where the carriage is very short, as in cross-Channel shipments, and that is why sea waybills are used in such trades. But it is clear that straight bills are used in intercontinental carriage and therefore the inconvenience argument fades.

146 I am not unhappy to come to these conclusions. It seems to me that the use of these hybrid forms of bill of lading is an unfortunate development and has spawned litigation in recent years in an area which for the previous century or so has not caused any real difficulty. Carriers should not use bill of lading forms if what they want to invite shippers to do is to enter into sea waybill type contracts. It may be true that ultimately it is up to shippers to ensure that the boxes in these hybrid forms are filled up in the way that best suits themselves; but in practice I suspect that serendipity often prevails. In any event, these forms invite error and litigation, which is best avoided by a simple rule.

2.5 No right to a bill of lading

The primary statutory application of the 1971 Act is excluded if the shipper is not entitled under the contract of carriage to demand a bill of lading at or after shipment.

***Browner International Ltd v Monarch Shipping Co Ltd, The European Enterprise* [1989] 2 Lloyd's Rep 185**

Facts

The defendants operated a roll-on roll-off ferry between Dover and Calais and, in common with all other English operators in that trade, would not issue a bill of lading for goods taken on board, but offered only non-negotiable receipts. While entering port during heavy weather, goods overturned and were damaged. The defendants claimed to be entitled to limit their liability under the conditions of carriage to a sum which was less than the amount stated in Art IV r 5.

Held

Steyn J: 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 contract prevails . . .

Note
Article X and s 1(6)(b) make specific provision for the application of the Rules by agreement.

2.6 A bill of lading, etc, is necessary but not sufficient to engage the Rules

***Compania Portorafti Commerciale SA v Ultramar Panama Inc, The Captain Gregos* [1990] 1 Lloyd's Rep 310, CA**

Facts

The *Captain Gregos* was chartered for the carriage of a cargo of crude oil from Egypt to Rotterdam. The bills of lading incorporated the Hague-Visby Rules. More than one year after discharge of the cargo, the cargo owners alleged that the ship had made short delivery and that part of the cargo had been deliberately misappropriated. The shipowners commenced proceedings for a declaration that this claim was time-barred under Art III r 6. The cargo owners argued that they were not parties to the bills of lading and that they were not therefore bound by the Rules.

Held

Bingham LJ: The shipowners' argument was in essence very brief. They could rely on the time bar in Article III, rule 6 because the rules have the force of law and apply to any bill covered by Article X, as these bills admittedly were. Article IV *bis* rule 1 expressly provides that the rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort. It would frustrate the purpose of an international convention if its application were to depend on questions of privity to which (as we know) different legal systems may yield different answers. The issue of a bill of lading to which the rules apply is a necessary but also a sufficient condition of the right of shipowner or cargo owner to rely on the rules, even though neither is a party to the bill. Reliance was placed in particular on views expressed by Mr Diamond QC in his article on 'The Hague-Visby Rules' (1978) 2 *LMCLQ* 225 at 248–49 and on *Gillespie Bros v Roy Bowles Ltd* [1973] QB 400 at p 412 where Lord Denning MR cited Article IV *bis* rule 1 to show how a non-party could become bound.

The cargo owners' response was even briefer. The effect of the Act is to give statutory force to a mandatory contractual regime. The language of the Act and the rules shows that they were intended to regulate the rights and duties of the parties to the bill of lading contract, not non-parties. That was what Mr Mustill QC thought in 1972 ('Carriage of Goods by Sea Act 1971', *Arkiv for Sjorett* at p 710). The issue of a bill of lading was a necessary, but not in itself a sufficient, condition of the application of the rules.

We are again (no doubt unavoidably) obliged to resolve this issue without the help which the decisions or opinions of foreign judges or jurists might have given us. I have not for my part found it an easy question. I am particularly concerned at the risk that idiosyncratic legal rules on privity might yield different results in different countries. But on balance I prefer the cargo owners' argument for three main reasons:

(1) As section 1(4) of the Act and Articles I(b) and X of the rules in particular make clear, the bill of lading is the bedrock on which this mandatory code is founded. A bill of lading is a contractual document with certain commercially well known consequences when endorsed and transferred. It is not clear to me why the code should treat the existence of a bill of lading as a matter of such central and overriding importance if the code is to apply with equal force as between those who are not parties to the contract which the bill contains or evidences.

(2) Much of the language in the Act and the rules suggests that the code is intended to govern the relations between the parties to the bill of lading contract. Section 1(4) speaks of applying the rules to a contract. Article I(a) defines the carrier as including the party who enters into a

contract of carriage with a shipper. Article I(b) speaks of regulating relations between a carrier and a holder of a bill or similar document of title. Most significantly of all, Article II defines the application of the rules 'under every contract of carriage'. Articles V and VI are concerned with agreements between contracting parties. Article X applies the rules to the bill of lading, not the carriage. If it had been intended to regulate relations between non-parties to the bill of lading contract, it is hard to think the language would not have been both different and simpler.

(3) Whatever the law in other jurisdictions, the general principle that only a party to a contract may sue on it is well established here. If the draftsmen of the 1924 or 1971 Acts had intended the respective rules to infringe that principle or appreciated that that was their effect, I think they would have sought to make that clear in the Acts. It would be strange if so fundamental a principle were to be so inconspicuously abrogated.

In reaching this conclusion I recognise the unattractiveness to carriers of exposure to claims by non-parties to bills not subject to limits in time or amount. But the notion that bill of lading terms may be held to regulate relations between those who were not parties to the bills was, as I understand, specifically disavowed by Lord Donaldson MR and the House of Lords in *The Aliakmon* [1985] QB 350 at p 368; [1986] AC 785 at p 818.

2.7 Deck cargo

The definition of 'goods' in Art I, para (c) is expressed to include 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.

Deck cargo only falls outside the Rules if the contract allows the carrier to carry on deck, the cargo is in fact carried on deck and the bill of lading contains on its face a statement that the cargo is so carried.

Svenska Traktor Aktiebolaget v Maritime Agencies (Southampton) Ltd
[1953] 2 QB 295

Held

Pilcher J: The policy of the Carriage of Goods by Sea Act 1924, was to regulate the relationship between the shipowner and the owner of goods along well known lines. In excluding from the definition of 'goods', the carriage of which was subject to the Act, cargo carried on deck and stated to be so carried, the intention of the Act was, in my view, to leave the shipowner free to carry deck cargo on his own conditions, and unaffected by the obligations imposed on him by the Act in any case in which he would, apart from the Act, have been entitled to carry such cargo on deck, provided that the cargo in question was in fact carried on deck and that the bill of lading covering it contained on its face a statement that the particular cargo was being so carried. Such a statement on the face of the bill of lading would serve as a notification and a warning to consignees and indorsees of the bill of lading to whom the property in the goods passed under the terms of s 1 of the Bill of Lading Act 1855, that the goods which they were to take were being shipped as deck cargo. They would thus have full knowledge of the facts when accepting the documents and would know that the carriage of the goods on deck was not subject to the Act. If, on the other hand, there was no specific agreement between the parties as to the carriage on deck, and no statement on the face of the bill of lading that goods carried on deck had in fact been so carried, the consignees or indorsees of the bill of lading would be entitled to assume that the goods were goods the carriage of which could only be performed by the shipowner subject to the obligations imposed on him by the Act. A mere general liberty to carry goods on deck is not in my view a statement in the contract of carriage that the goods are in fact being carried on deck. To hold otherwise would in my view do violence to the ordinary meaning of the words of Article I(c) . . .

Note

See also 'Article IV Rule 4', below. The 1855 Act was repealed and replaced by the Carriage of Goods by Sea Act 1992.

3 ARTICLE II

> 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.

A problem of interpretation is considered in the cases reproduced in this section. Article II uses the words 'carriage of goods', which are defined in Art I, para (e) as covering the period from the time when the goods are loaded on to the time when they are discharged from the ship. The two articles do not sit happily together: the activities listed in Art II may straddle the moments in time fixed by Art I. The three extracts in this section deal with the relationship between these provisions.

Pyrene Co Ltd v Scindia Navigation Co Ltd [1954] 2 QB 402

Facts

See above. It was argued that as the fire tender had not passed across the ship's rail when it was dropped, it had never been loaded on the ship so that the accident occurred before the time specified in Art I, para (e).

Held

> **Devlin J:** … In my judgment this argument is fallacious, the cause of the fallacy perhaps lying in the supposition 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. I say 'part of a contract' because a single contract may cover both inland and sea transport; and in that case the only part of it that falls within the rules is that which, to use the words in the definition of 'contract of carriage' in Article I(b), 'relates to the carriage of goods by sea'. 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'.
>
> Article II is the crucial article which for this purpose has to be construed. It is this article that gives the carrier all his rights and immunities, including the right to limit his liability. He is entitled to do that 'in relation to the loading' and 'under every contract of carriage'….
>
> … In my judgment, no special significance need be given to the phrase 'loaded on'. It is not intended to specify a precise moment of time. Of course, if the operation of the rules began and ended with a period of time a precise specification would be necessary. But they do not. It is legitimate in England to look at section 1 of the Act, which applies the rules not to a period of time but 'in relation to and in connection with the carriage of goods by sea'. The rules themselves show the same thing. The obligations in Article III, r 1, for example, to use due diligence to make the ship seaworthy and man and equip her properly are independent of time. The operation of the rules is determined by the limits of the contract of carriage by sea and not by any limits of time. The function of Article I(e) is, I think, only to assist in the definition of contract of carriage. As I have already pointed out, there is excluded from that definition any part of a larger contract which relates, for example, to inland transport. It is natural to divide such a contract into periods, a period of inland transport, followed perhaps by a period of sea transport and then again by a

period of inland transport. Discharging from rail at the port of loading may fall into the first period; loading on to the ship into the second. The reference to 'when the goods are loaded on' in Article I(e) is not, I think, intended to do more than identify the first operation in the series which constitutes the carriage of goods by sea; as 'when they are discharged' denotes the last. The use of the rather loose word 'cover', I think, supports this view.

… It is no doubt possible to read Article I(e) literally as defining the period as being from the completion of loading till the completion of discharging. But the literal interpretation would be absurd. Why exclude loading from the period and include discharging? How give effect to the frequent references to loading in other rules? How reconcile it with Article VII which allows freedom of contract 'prior to the loading on and subsequent to the discharge from'? Manifestly both operations must be included. That brings me back to the view that Article I(e) is naming the first and last of a series of operations which include in between loading and discharging, 'handling, stowage, carriage, custody and care'. This is, in fact, the list of operations to which Article II is by its own terms applied. In short, nothing is to be gained by looking to the terms of Article I(e) for an interpretation of Article II …

Compania Portorafti Commerciale SA v Ultramar Panama Inc, The Captain Gregos [1990] 1 Lloyd's Rep 310, CA

Facts

See above. Cargo owners argued that the time bar under Art III r 4 could only be invoked in suits relating to events occurring between loading and discharge and not in relation to later events such as misdelivery of cargo.

Held

Bingham LJ: …The contract of carriage here was of an entirely normal kind. The cargo owners counterclaim as parties to the bill of lading (which I shall at this stage assume them to have been) against the shipowners as carriers. It is a paradigm situation.

The definition in Article I(e) does, I accept, assign a temporal term to the 'carriage of goods' under the rules, supporting an argument that the rules do not apply to events occurring before loading or after discharge. (See also Article VII.) I read Article II as defining the scope of the operations to which the responsibilities, rights and immunities in the rules apply. Apart from the obligation of seaworthiness imposed by Article III rule 1 (not in issue here), the carrier's central obligation is (per Article III rule 2) properly and carefully to load, handle, stow, carry, keep, care for and discharge the goods carried.

It seems to me that the acts of which the cargo owners complain are the most obvious imaginable breaches of Article III rule 2. A bailee does not properly and carefully carry, keep and care for goods if he consumes them in his ship's boilers or delivers them to an unauthorised recipient during the voyage. A bailee does not properly and carefully discharge goods if, whether negligently or intentionally, he fails to discharge them and so converts them to his own use. If the cargo owners were to establish the fact they allege, and had brought suit within the year, I cannot see how a claim based on breach of the rules could fail …

Mayhew Foods Ltd v Overseas Containers Ltd [1984] 1 Lloyd's Rep 317

Facts

OCL agreed to carry a refrigerated container of chicken and turkey from Mayhew's premises to Jeddah, Saudi Arabia. The contract contemplated that the container would be carried on *Benalder* from Southampton direct to Jeddah. But the contract gave the carrier a wide power to choose the route and method of transport and after collection the container was in fact taken to Shoreham, loaded on *Voline* and carried to Le Havre

where it was discharged. The container was then stored for six days before being loaded on *Benalder* and carried to Jeddah, where permission to discharge was refused because the meat had decayed. The temperature control on the container, instead of being set at –18ºC, as it should have been, had been set at +2ºC to +4ºC. OCL accepted that they had failed to carry, keep and care for the same properly and carefully.

Held

Bingham J: OCL's second submission took as its starting point the fact already noted that the Act and the rules only apply:

> . . . in relation to and in connection with the carriage of goods by sea in ships . . .

It was accordingly argued that even if the statutory provisions governed carriage from Shoreham to Le Havre, they did not apply while the goods were lying ashore at Le Havre any more than they applied before the goods were loaded at Shoreham or after they were discharged at Jeddah. In short, it was said that the interval of storage at Le Havre was not carriage by sea and so not covered by the rules . . . The answer to this problem is again to be found in the principle that the rights and liabilities under the rules attach to a contract. They do not apply to carriage or storage before the port of shipment or after the port of discharge, because that would be inland and not sea carriage. But between those ports the contract was, despite the wide language of cl 21, for carriage by sea. If, during that carriage, OCL chose to avail themselves of their contractual right to discharge, store and tranship, those were, in my judgment, operations 'in relation to and in connection with the carriage of goods by sea in ships', to use the language of the Act, or were 'within the contractual carriage', to use the language of cl 21(2) of the bill of lading conditions. It would, I think, be surprising if OCL could, by carrying the goods to Le Havre and there storing the goods before transhipment, rid themselves of liabilities to which they would have been subject had they, as contemplated, shipped the goods at Southampton and carried them direct to Jeddah, the more so since Mayhew had no knowledge of any voyage to Le Havre. My conclusion is that the rules, having applied on shipment at Shoreham, remained continuously in force until discharge at Jeddah …

4 ARTICLE III RULE 1: SEAWORTHINESS

The 1971 Act and the Rules alter the position at common law. Section 3 of the Act provides that an absolute warranty of seaworthiness is not to be implied in contracts to which the Rules apply. In its place, Art III provides a duty to exercise due diligence 'before and at the beginning of the voyage'. Unlike the common law duty, which can be excluded by agreement, the obligation under the Rules to exercise due diligence has been held to be 'inescapable', an idea that has been explored in recent cases. By Art IV r 1 the carrier is made liable only for loss or damage caused by want of care; the burden of proving due diligence is placed on the carrier.

The meaning of 'before and at the beginning of the voyage' was settled by the decision in *Maxine Footwear*, a case which also established that if the obligation in Art III r 1 is not fulfilled and the non-fulfilment causes damage to cargo, the immunities in Art IV r 2 cannot be relied on.

4.1 An overriding obligation

Maxine Footwear Co Ltd v Canadian Govt Merchant Marine Ltd
[1959] AC 589, PC

Facts

The appellants were shippers and consignees of cargo loaded on the *Maurienne* at Halifax NS for carriage to Kingston, Jamaica. The contract was subject to the Hague

Rules as enacted by the Canadian Water Carriage of Goods Act 1936. Shortly before the vessel was due to sail an attempt was made to thaw a frozen drainpipe with an acetylene torch. A fire was started in the cork insulation around the pipe. The fire eventually forced the master to scuttle the ship.

Held

Lord Somervell of Harrow: . . . Before proceeding to consider the arguments it is convenient to state certain conclusions which appear plain to their Lordships. From the time when the ship caught on fire she was unseaworthy. This unseaworthiness caused the damage to and loss of the appellants' goods. The negligence of the respondents' servants which caused the fire was a failure to exercise due diligence.

Logically, the first submission on behalf of the respondents was that in cases of fire Article III never comes into operation even though the fire makes the ship unseaworthy. All fires and all damage from fire on this argument fall to be dealt with under Article IV, r 2(b). If this were right there was at any rate a very strong case for saying that there was no fault or privity of the carrier within that rule, and the respondents would succeed.

In their Lordships' opinion the point fails. Article III, r 1, is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage the immunities of Article IV cannot be relied on. This is the natural construction apart from the opening words of Article III, r 2. The fact that that rule is made subject to the provisions of Article IV and r 1 is not so conditioned makes the point clear beyond argument.

The further submissions by the respondents were based, as they had to be, on the construction of Article III, r 1. It was submitted that under that article the obligation is only to exercise due diligence to make the ship seaworthy at two moments of time, the beginning of the loading and the beginning of the voyage.

It is difficult to believe that this construction of the word 'before' could have been argued but for the fact that this doctrine of stages had been laid down in relation to the absolute warranty of seaworthiness in English law.

It is worth, therefore, bearing in mind words used by Lord Macmillan with reference to the English Carriage of Goods by Sea Act 1924, which embodied the Hague Rules, as does the present Act:

> It is important to remember that the Act of 1924 was the outcome of an International Conference, and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation (*Stag Line Ltd v Foscolo, Mango & Co* [1932] AC 328, 350).

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 . . .

It becomes therefore unnecessary to consider whether the Supreme Court were justified in holding that the appellants' goods were not stowed until after the commencement of the fire.

It is also unnecessary to consider the earlier cases as to 'stages' under the common law. The doctrine of stages had its anomalies and some important matters were never elucidated by authority. When the warranty was absolute 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.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be allowed.

Notes

1 Lack of due diligence is negligence: *The Amstelslot* [1963] 2 Lloyd's Rep 223, *per* Lord Devlin, p 225. The exercise of due diligence is equivalent to the exercise of reasonable skill and care: *The Eurasian Dream* [2002] EWHC 118; [2002] 1 Lloyd's Rep 719.

2 Unseaworthiness and the carrier's right to limit liability. The carrier's duty to ensure seaworthiness is overriding in that a breach of the duty, if it causes loss or damage, prevents the carrier relying on the defences in Art IV r 2 and on the right to indemnity contained in Art IV r 6. However, a carrier is entitled to limit financial liability under Art IV r 5 notwithstanding a failure to exercise due diligence to make the ship seaworthy. The words in r 5: '"in any event" mean what they say. They are unlimited in scope': *The Happy Ranger, per* Tuckey LJ.

4.2 An inescapable obligation

The obligation under the Rules to exercise due diligence has been held to be 'inescapable' in the sense that the carrier is liable for lack of due diligence on the part of anyone involved in keeping or making the vessel seaworthy. The authorities for this interpretation were reviewed in *The Muncaster Castle.*

Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd, The Muncaster Castle [1961] AC 807

Facts

Cases of canned ox tongue were shipped on board the *Muncaster Castle* for carriage from Sydney to London under a bill of lading which was subject to the Hague Rules as enacted by the Australian Sea Carriage of Goods Act 1924. When the goods were discharged, most of the cases were found damaged by sea water which had entered the hold through storm valves. Shortly before starting the voyage, the storm valve inspection covers had been removed during a survey of the vessel. The covers had not been properly refitted by the independent firm of ship repairers who had been instructed in connection with the survey. The cargo owners alleged that the carriers had not exercised due diligence to make the ship seaworthy.

Held

Viscount Simonds: My Lords, the question, then, is whether the respondents discharged this burden, and it is conceded that they did unless they are to be held responsible for the negligence of the fitter employed by Alexander Stephen & Sons Ltd. This is the single issue in the case . . . Its solution depends on the meaning of the words occurring in article III, rule 1, and repeated in article IV, rule 1, 'due diligence to make the ship seaworthy'. To ascertain their meaning it is, in my opinion, necessary to pay particular regard to their history, origin and context . . . The Hague Rules, as is well known, were the result of the Conferences on Maritime Law held at Brussels in 1922 and 1923. Their aim was broadly to standardise within certain limits the rights of every holder of a bill of lading against the shipowner, prescribing an irreducible minimum for the responsibilities and

liabilities to be undertaken by the latter. To guide them the framers of the rules had amongst other precedents the American Harter Act of 1893, the Australian Sea Carriage of Goods Act 1904, the Canadian Water Carriage of Goods Act 1910, and, though they had no British Act as a model, they had decisions of the English courts in which the language of the Harter Act had fallen to be construed by virtue of its provisions being embodied in bills of lading. In all these Acts the relevant words, 'exercise due diligence to make the ship seaworthy', are to be found. It was in these circumstances that these words were adopted in the Hague Rules.

My Lords, the question how far their meaning should be governed by previous decisions in the courts of America or this country has been more than once discussed in this House. Notwithstanding some apparent qualification of the proposition which is to be found in the speeches of Lords Atkin and Macmillan in *Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328, I think I am at liberty to adopt emphatically what was said by Lords Sumner and Hailsham in *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd* [1929] AC 223. The former of them said:

> By forbearing to define 'management of the ship' . . . the legislature has, in my opinion, shown a clear intention to continue and enforce the old clause as it was previously understood and regularly construed by the courts.

The latter said:

> I am unable to find any reason for supposing that the words as used by the legislature in the Act of 1924 leave any different meaning to that which has been judicially assigned to them when used in contracts for the carriage of goods by sea before that date; and I think that the decisions which have already been given are sufficient to determine the meaning to be put upon them in the statute now under discussion.

Mutatis mutandis these statements I apply to the words we have to construe . . .

First I would refer to *G E Dobell & Co v Steamship Rossmore Co Ltd* [1895] 2 QB 408, a case often referred to in the courts of this country and of the United States and never, so far as I am aware, dissented from. In that case the ship was unseaworthy owing to the negligence of the ship's carpenter. Into the bill of lading the words of the Harter Act were introduced, 'which', said Lord Esher MR 'I decline to construe as an Act, but which we must construe simply as words occurring in this bill of lading'. Then he proceeds:

> In section 3 of the Act so incorporated the exception which is to relieve the ship owner is made to depend on the condition that the owner of the ship . . . shall exercise due diligence to make the vessel in all respects seaworthy. If he does not do that the exceptions in his favour do not take effect. It is contended that the meaning of the clause is that if the owner personally did all that he could do to make the ship seaworthy when she left America, then, although she was not seaworthy, by the fault of some agent or servant, the owner is not liable.

And the learned Master of the Rolls, after rejecting this contention, went on:

> It is obvious to my mind . . . that the words of section 3 which limit the owner's liability if he shall exercise due diligence to make the ship in all respects seaworthy, must mean that it is to be done by the owner by himself or the agents whom he employs to see to the seaworthiness of the ship before she starts out of that port.

So also Kay LJ:

> It seems to me to be plain on the face of this contract that what was intended was that the owner should, if not with his own eyes, at any rate by the eyes of proper competent agents, ensure that the ship was in a seaworthy condition before she left port, and that it is not enough to say that he appointed a proper and competent agent.

I have cited from these judgments at some length because they determine decisively the meaning attached by the courts of this country to the relevant words. It is true that the negligence was that of a servant of the shipowner, but the reasoning and the language of the judgments embrace any agent employed by him. These are wise words.

I turn now to a case decided two years later in the District Court, SD New York, *The Colima* (1897) 82 Fed Rep 665 and I quote at some length from the judgment of Judge Brown. In that case the vessel was unseaworthy owing to negligent loading by the stevedores which was done under the supervision and direction of the master and first officer of the ship. The learned judge said:

> This section [that is, section 3 of the Harter Act] has been in several cases adjudged to require due diligence, not merely in the personal acts of the owner, but also on the part of the agents he may employ, or to whom he may have committed the work of fitting the vessel for sea. The Act requires in other words, due diligence in the work itself . . .
>
> On any other construction, owners would escape all responsibility for the seaworthiness of their ships by merely employing agents of good repute, whether any diligence and care to make their vessels seaworthy were in fact exercised or not. On reason and sound policy no such intent in the statute can be supposed. The context and the pre-existing law indicate that the intent of the Act is to relieve the shipowner from his previous warranty of absolute seaworthiness in fact, and to substitute for that warranty a warranty only of diligence, to make the ship seaworthy. This difference is of great importance, as it avoids responsibility for latent and undiscoverable defects. But the warranty of diligence remains: and this requires the application of the usual rule, that the acts and negligences of the agent are deemed those of the principal.

. . . My Lords, I have without reluctance ventured on this long quotation because I can find no words more apt to express my own view as to the meaning of words taken from the Harter Act and embodied in the Hague Rules. To one thing in particular I call attention . . . Here I may quote words of MacKinnon LJ in *Smith, Hogg & Co Ltd v Black Sea and Baltic General Insurance Co Ltd* [1939] 2 All ER 855:

> The limitation and qualification of the implied warranty of seaworthiness by cutting down the duty of the shipowner to the obligation to use 'due diligence . . . to make the ship seaworthy' is a limitation or qualification more apparent than real, because the exercise of due diligence involves not merely that the shipowner personally shall exercise due diligence, but that all his servants and agents shall exercise due diligence. That is pointed out in a note in *Scrutton on Charterparties* (14th edn, 1939, London: Sweet & Maxwell, p 110) which says that this variation will not be 'of much practical value in face of the dilemma that must constantly arise on the facts. In most cases if the vessel is unseaworthy due diligence cannot have been used by the owner, his servants, or agents; if due diligence has been used the vessel in fact will be seaworthy. The circumstances in which the dilemma does not arise (eg a defect causing unseaworthiness, but of so latent a nature that due diligence could not have discovered it) are not likely to occur often'.

In the same case on appeal to this House, Lord Wright said [1940] AC 997, 1001:

> The unseaworthiness, constituted as it was by loading an excessive deck cargo, was obviously only consistent with want of due diligence on the part of the shipowner to make her seaworthy. Hence the qualified exception of unseaworthiness does not protect the shipowner. In effect such an exception can only excuse against latent defects. The overloading was the result of overt acts.

. . . I come, then, to *W Angliss & Co (Australia) Proprietary Ltd v P & O Steam Navigation Co* [1927] 2 KB 456 which is said to be the first case in which the Hague Rules were discussed in an English court . . . It is important to note what was the point of decision. It was whether, when the carrier has contracted for the building of a ship, he is liable for lack of due diligence on the part of the shipbuilders or their workmen if he has engaged builders of repute and has adopted all reasonable precautions, such as requiring the builders to satisfy one of the recognised classification societies and engaged skilled naval architects who advise him and skilled inspectors who supervise the work with due diligence. The learned judge, Wright J, as he then was, held that in such circumstances the carrier was not liable. I see no reason to question the correctness of this decision, and need say no more about it, for it does not in the present appeal fall to be reviewed. Of greater significance is

that, except in a single passage where the learned judge was dealing with the employment of an inspector to supervise the work, no mention is made of the employment of agents to repair a ship. That passage is as follows: 'Again, the need of repairing a ship may cast on the carrier a special duty to see, as far as reasonably possible, by special advisers for whom he is personally responsible, that the repairs adequately make good the defects.'

It is not possible to extract from this somewhat speculative *dictum* that the learned judge thought that the carrier would not in any case, with or without inspection, be liable for negligence on the part of those to whom (in the words of Brown J in *The Colima*) 'he committed the work of fitting the vessel for sea'. It was not a matter for his decision and he did not, in my opinion, purport to decide it. But it is upon this authority that the whole fabric of the respondents' case appears to rest. It is a reasonable construction of the words, which once again I quote, 'to exercise due diligence to make the ship seaworthy' to say that in the case of a ship built for the carrier, or newly come into his hands by purchase, the carrier fulfils his obligation if he takes the precautions which the learned judge suggests. Until the ship is his he can have no further responsibility. I am aware of no case either in the United States under the Harter Act or this country when its words fell to be construed in which the contrary has been suggested. But it is far otherwise where the shipowner puts his ship in the hands of third parties for repair. To such a case the words that I have cited from *The Rossmore* and *The Colima* are precisely applicable. An attempt was made to draw a distinction between negligence shown by the shipowner's servants, his agents and independent contractors. But this could but fail. For no sensible reason could be found for such a distinction . . .

The plea that the shipowner is not liable for the negligence of an independent contractor failing as a general proposition, as it was bound to fail, it was then urged that it was a question of fact in each case, and that upon the facts of the present case the respondents were not liable for the negligence of the fitter employed by the ship repairers. It was for this reason that I stated the facts fully at the beginning of this opinion. Having done so, I must say at once that I find it impossible to distinguish between one independent contractor and another, or between one kind of repair and another. I have no love for the argumentative question 'Where is the line to be drawn?' but it would be an impossible task for the court to examine the facts of each case and determine whether the negligence of the independent contractor should be imputed to the shipowner. I do not know what criterion or criteria should be used, nor were any suggested. Take the case of repair. Is there to be one result if the necessary repair is slight, another if it is extensive? Is it relevant that the shipowner might have done the work by his own servants but preferred to have it done by a reputable shipyard? These and many other questions that will occur to your Lordships show that no other solution is possible than to say that the shipowner's obligation of due diligence demands due diligence in the work of repair by whomsoever it may be done.

. . . I will end by categorically repelling the second and third formal reasons in the respondents' case. They did not on the facts of the case by entrusting the vessel to reputable ship repairers perform their duty to exercise due diligence. They were vicariously liable for negligence of a servant of an independent contractor, namely, the fitter of Alexander Stephen & Sons Ltd . . .

Lord Keith of Avonholm: My Lords, I agree. I would only add a few words . . .

The obligation is a statutory obligation imposed in defined contracts between the carrier and the shipper. There is nothing novel in a statutory obligation being held to be incapable of delegation so as to free the person bound of liability for breach of the obligation, and the reasons for this become, I think, more compelling where the obligation is made part of a contract between parties. We are not faced with a question in the realm of tort, or negligence. The obligation is a statutory contractual obligation. The novelty, if there is one, is that the statutory obligation is expressed in terms of an obligation to exercise due diligence, etc. There is nothing, in my opinion, extravagant in saying that this is an inescapable personal obligation. The carrier cannot claim to have shed his obligation to exercise due diligence to make his ship seaworthy by selecting a firm of competent ship repairers to make his ship seaworthy. Their failure to use due diligence to do so is his failure.

> The question, as I see it, is not one of vicarious responsibility at all. It is a question of statutory obligation. Perform it as you please. The performance is the carrier's performance . . .

(Lord Merriman, Lord Radcliffe and Lord Hodson also delivered reasoned judgments in favour of allowing the appeal.)

Note

An inescapable and unlimited personal obligation? The approach adopted in *The Muncaster Castle* makes the carrier liable under the Rules for lack of due diligence by anyone involved in keeping or making the vessel seaworthy. In *The Kamsar Voyager* [2002] 2 Lloyd's Rep 57 this was held to include the suppliers of equipment or spare parts. In this case an engine failed at sea. A spare piston was fitted. One dimension of the spare made it incompatible with the engine and when the engine was run, a major breakdown occurred. The shipowners could not be criticised for ordering and carrying a spare made by the reputable builders of the engine, for failing to notice the small difference in dimensions of the spare, or for fitting it when the failure occurred. But the shipowners could not prove that the engine builders had exercised due diligence in supplying the spare piston and the ship was held to be unseaworthy at the start of the voyage. So understood, the obligation is extensive as well as inescapable. But is it unlimited? In the next case, it was argued that the carrier was responsible not only for those involved in keeping or making a ship seaworthy, but also for the acts or defaults of all those who ship cargo.

4.3 Liability of carrier for acts of shippers

Northern Shipping Co v Deutsche Seereederei GmbH, The Kapitan Sakharov [2000] 2 Lloyd's Rep 255, CA

Facts

C shipped tank containers of the flammable liquid isopentane on NSC's vessel *Kapitan Sakharov*. The containers were improperly stowed under-deck in a hold without mechanical ventilation, which was held to be an obvious danger and a contravention of the International Convention for Health and Safety of Life at Sea (SOLAS), the International Maritime Dangerous Goods Code (IMDG) and MOPOG (Russian version of IMDG) and to render the ship unseaworthy. D unwittingly shipped other dangerous cargo, which exploded and caused a fire. The fire ignited the isopentane, resulting in the sinking of the vessel. Two seamen died. The vessel would not have been lost if the isopentane had been stowed on deck. It was held that the vessel was unseaworthy in respect of both shipments. The unseaworthiness in respect of D's container was not caused by lack of due diligence by the shipowner: a carrier's duty of due diligence did not extend to verification of the contents of a sealed container packed by the shipper, in the absence of notice of the need to do so. But the unseaworthiness in respect of C's cargo was on the facts caused by lack of due diligence and was a cause of the sinking. Claims were made against the carrier by other shippers, the dependants of the deceased seamen and by Iranian authorities for pollution damage. D was held liable for the shipowner's loss from the initial explosion but was not obliged to indemnify the carrier against claims arising from the isopentane fire and sinking.

Held

> **Auld LJ:** . . .
>
> *Due diligence*
>
> NSC was required under art III, r 1, of the Hague Rules to exercise due diligence to make the vessel seaworthy. The Judge correctly took as the test whether it had shown that it, its servants,

agents or independent contractors, had exercised all reasonable skill and care to ensure that the vessel was seaworthy at the commencement of its voyage, namely, reasonably fit to encounter the ordinary incidents of the voyage. He also correctly stated the test to be objective, namely to be measured by the standards of a reasonable shipowner, taking into account international standards and the particular circumstances of the problem in hand.

The Judge held that NSC was in breach of art III, r 1, of the Hague Rules in failing to exercise due diligence to make the ship seaworthy in respect of the stowage of the isopentane below deck. . .

Compliance or otherwise with codes like MOPOG is not necessarily determinative of the issue of due diligence. Depending on the facts of the case, a reasonable misconstruction or misunderstanding of such an instrument may not amount to want of due diligence. Here, though the Judge found that there had been a genuine misunderstanding of the document, it was coupled with what, on the evidence before him, he was entitled to find was plainly unreasonable conduct in stowing isopentane below deck. It was an obvious risk . . .

NSC's entitlement to an indemnity from D – art IV, r 6

. . . Art III, r 1, of the Hague Rules requires a carrier before and at the beginning of a voyage to exercise due diligence to make the ship seaworthy. Article IV, r 6, of the rules renders the shipper of inflammable, explosive or otherwise dangerous goods, who gives no notice of their nature and dangerous character, liable to the carrier 'for all damages and expenses directly or indirectly arising out of or resulting from . . . [their] shipment'. The shipper is so liable irrespective of its knowledge of the dangerous nature of the goods; see *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] 1 Lloyd's Rep 337; [1998] AC 605. But what if another effective cause of the loss is the carrier's want of due diligence in providing an unseaworthy ship?

The Judge held that, as NSC's want of due diligence in failing to render the vessel seaworthy was an effective, albeit not the only, cause of its loss of the ship and most of the cargo, it could not recover damages for, or an indemnity in respect of, that loss against D under art IV, r 6, or at common law . . .

In my view, the Judge was correct for the reasons he gave. The essential question was whether NSC's lack of due diligence in the stowage of the isopentane – breach of contract – causing unseaworthiness in the vessel was an effective cause of the fire in hold 3 and her loss. The Judge held that it was and that, therefore, NSC was not entitled to rely on art IV, r 6, to seek an indemnity against D in respect of loss caused by that breach. It is immaterial that there was another cause or as to which of them was the dominant cause or their respective timings. The principle is the same as that applicable to a breach of art III, r 1, resulting in damage to or loss of cargo where the shipowner pleads an excepted peril under art IV, r 2, where it is for the shipowner to establish that the whole or a specific part of the damage or loss was caused by the excepted peril. See eg *The Torenia* [1983] 2 Lloyd's Rep 210, per Mr Justice Hobhouse at 219. As the House of Lords held in the pre-Hague Rules' case of *Smith Hogg & Co Ltd v Black Sea & Baltic General Insurance Co Ltd* (1940) 67 LIL Rep 253; [1940] AC 997, the obligation to furnish a seaworthy ship is the 'fundamental obligation' or, now, as Lord Somervell in *Maxine Footwear Co Ltd v Canadian Merchant Marine Ltd* [1959] 2 Lloyd's Rep 105 at p 113; [1959] AC 589 at pp 602–603, and Lord Justice Hirst in *The Fiona*, at p 519, put it, art III, r 1, is the 'overriding' obligation.

As to Mr Macdonald's [counsel] submission that the general rule does not apply where the co-operating causes are concurrent, as causes they are almost never truly concurrent though they may be in their consequences. The unseaworthiness, where it is a co-operating cause of loss, will in all or most cases precede other co-operating causes, since it must exist at the commencement of the voyage . . .

NSC's 'non-delegable' duty of due diligence in respect of D's undeclared and dangerous cargo

. . . Mr Milligan [counsel] submitted that the Judge should have found that NSC had not exercised due diligence in relation to D's undeclared dangerous cargo since it had a non-delegable duty to

exercise such due diligence in all the stages of progress of the cargo to shipment. He argued that it was not enough for NSC to show that it could not itself have reasonably known what was in the offending container; it had to establish that due diligence was exercised by all concerned in the manufacture, packing, transport and storage of the cargo before shipment. He said that NSC was thus liable to C, even if not on notice of the undeclared and dangerous cargo, for the acts of D or of some other third party previously concerned with the cargo or D's container, and that it had a corresponding right of indemnity against D as contemplated by art IV, r 2, of the Hague Rules.

The sole authority upon which Mr Milligan relied for that ambitious proposition was *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] 1 Lloyd's Rep 57; [1961] AC 807 . . .:

The Judge, on my reading of his judgment, clearly found it beyond argument that the vessel was unseaworthy because of the dangerous and undeclared cargo on deck. On the evidence before him and on the authorities to which I have referred, I consider that he was right to do so.

As to the separate question of due diligence . . . Lord Keith, in *Riverstone Meat*, at p 87; p 871, described the duty as 'an inescapable personal obligation'. However, it is plain from context of the case – disrepair of a ship – and of his reasoning in the passage from his speech I have set out, that he did not extend it to a responsibility for the conduct of manufacturers or exporters, or of shippers in their stuffing of containers and description of their contents; see also *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd*, *per* Lord Somervell at p 113; p 602. In my view, there is no warrant in the facts of those cases or the *rationes* of them for extending a carrier's duty of due diligence as to the structure and stowage of its ship to a physical verification of the declared contents of containers or other packaging in which cargo is shipped, unless put on notice to do so. As Mr Macdonald [counsel] observed, in the case of shipper-packed containers – the norm nowadays – the containers are, in any event, closed with a customs seal and not capable of internal examination by the carrier or his agents . . .

Mr Milligan [argued] . . . that where the issue is one of due diligence in providing a seaworthy ship, as distinct from one of the careful handling of cargo, the carrier has an absolute duty rendering it responsible for the misconduct of shippers and others over whom it has no control and whether or not it is on notice of such misconduct.

The difficulty in that submission, as he acknowledged, involves an open ended extension of *Riverstone Meat*, itself an unseaworthiness case, the *ratio* of which was that a carrier cannot absolve itself from its personal duty of due diligence by delegating its responsibility as a carrier to an independent contractor. The shipper's and the carrier's respective orbits of responsibility are normally quite distinct and neither is agent of the other outside its own orbit; cf, *per* Lord Radcliffe in *Riverstone Meat*, at p 82; p 863. Those responsible for the manufacture, stuffing and shipping of containers are plainly not carrying out any part of the carrier's function for which he should be held responsible. I can find nothing in the Hague Rules or at common law to make a carrier responsible for the unseaworthiness of its vessel resulting from a shipper's misconduct of which it, the carrier, has not been put on notice. Nor can I see any reason in principle or logic why a carrier should be exposed to such an infinite liability in time, place and people. It is not liable for latent defects in a vessel before it acquired it; see *Riverstone Meat*, *per* Lord Radcliffe at p 85; p 867 and cf *W Angliss & Co (Australia) Pty v Peninsular & Oriental Steam Navigation Co* (1927) 28 LIL Rep 202; [1927] 2 KB 456. So why, as a matter of unseaworthiness, should it be liable for latent defects in cargo shipped on it?

On the facts found by the Judge – a shipper-packed and sealed container containing undeclared dangerous cargo – he was clearly justified in finding that NSC could not, with the exercise of reasonable skill and care have detected the presence of that cargo. Accordingly, I am of the view that he was justified in holding that NSC had exercised due diligence in this respect . . .

Note

The decision in *The Kapitan Sakharov* followed an earlier case, *The Fiona,* where an explosion occurred while the vessel was preparing to discharge a cargo of fuel oil. The

explosion was caused by the ignition of gasses derived partly (and unknown to the carrier) from the cargo and partly from the remains of a previous cargo which the owners had failed to wash from the ship's ducts and lines. Both the parties were therefore at fault. The shipowners claimed an indemnity under Art IV r 6, from the shippers of the cargo. The claim failed. It was held that a carrier was not entitled to invoke the indemnity under Art IV r 6 if he was in breach of his obligation under Art III r 1 to exercise due diligence to make the vessel seaworthy and that was a total or partial cause of the loss: *Mediterranean Freight Services Ltd v BP Oil International Ltd, The Fiona* [1994] 2 Lloyd's Rep 506, CA.

4.4 Seaworthiness: 'the voyage'

At common law, the carrier's duty to provide a seaworthy ship is not continuous but arises only at particular points of time. It was argued in the next case that the duty under the Rules was no different.

***Island Tug and Barge v Makedonia, The Makedonia* [1962] P 190**

Facts

The plaintiffs shipped timber on board the vessel for carriage from various British Columbian ports to ports in the United Kingdom. The bills of lading incorporated the Canadian Water Carriage of Goods Act 1936. The *Makedonia* broke down in mid-ocean and had to take salvage assistance. The plaintiffs brought proceedings to recover the shares of the salvage award which they had had to pay.

Held

Hewson J: Before proceeding to the consideration of whether the breakdown was caused by actionable fault on the part of the defendants, I propose to decide first what 'voyage' under Article III(1) of the Hague Rules means. There has been much argument about it. Mr Brandon [counsel] submitted that the Hague Rules substituted for the absolute warranty of seaworthiness at each bunkering stage at common law a qualified obligation upon the owners to exercise due diligence to make her seaworthy at each bunkering port. If she was unseaworthy on leaving any bunkering port through defective bunkers being shipped there or through loading good fuel oil into tanks already containing sea water, thereby contaminating the fuel and making it unburnable, the owners are responsible for the lack of diligence on the part of the engineers at the beginning of that stage and they cannot, therefore, rely on the exceptions in Article IV (2) of those Rules.

There is no decision on what is meant or implied by 'voyage' in Article III(1) of the Hague Rules . . . In *Northumbrian Shipping Co Ltd v E Timm & Son Ltd* [1939] AC 397 Lord Wright said:

> . . . the warranty of seaworthiness is subdivided in respect of bunkers. Instead of a single obligation to make the vessel seaworthy in this respect, which must be satisfied once for all at the commencement of the voyage, there is substituted a recurring obligation at each bunkering port at which the owners or those who act for the owners decide she shall bunker, thereby fixing the particular stage of the voyage.

In the *Northumbrian Shipping Co* case, s 6 of the Canadian Water Carriage of Goods Act 1910, applied. This section provided that if the shipowner exercised due diligence to make the ship in all respects seaworthy and properly manned, he should not be responsible for any loss resulting from faults or errors in the navigation of the ship. The House of Lords held that that qualified obligation, referred to by Mr Brandon, applied to the owners at each bunkering stage, that is, the owners were bound to exercise due diligence regarding bunkers at each stage.

Has the different wording of the Hague Rules or the rules of the Canadian Act of 1936 altered the position? Mr Brandon argued that the importation of the words 'before and at the beginning of the

> voyage' has added nothing, and that the words are simply declaratory of the law as it was at the time or up to the time the Rules were formulated. In my view, the position in this country before the Carriage of Goods by Sea Act 1924, was clear without any further words. Mr Brandon argued that 'seaworthy at the beginning of the voyage' had already been defined by a long line of cases, and therefore the qualified obligations to use due diligence of seaworthiness at each stage should be read into the words.
>
> . . . I see no obligation to read into the word 'voyage' a doctrine of stages, but a necessity to define the word itself. The word does not appear in the Canadian Act of 1910. 'Voyage' in this context means what it has always meant; the contractual voyage from the port of loading to the port of discharge as declared in the appropriate bill of lading. The rule says 'voyage' without any qualification such as 'any declared stage thereof'. In my view, the obligation on the shipowner was to exercise due diligence before and at the beginning of sailing from the loading port, to have the vessel adequately bunkered for the first stage to San Pedro, and to arrange for adequate bunkers of a proper kind at San Pedro and other selected intermediate ports on the voyage so that the contractual voyage might be performed. Provided he did that, in my view, he fulfilled his obligation in that respect.
>
> I find that the shipowner exercised due diligence to ensure sufficient and proper bunkers at each stage of the voyage . . .

Notes

Unseaworthiness: burden of proof. In *Ministry of Food v Reardon-Smith Line* [1951] 2 Lloyd's Rep 265, McNair J said that the burden of proving that loss was caused by unseaworthiness lies on the claimant and that it is not until that burden has been discharged that any question of any burden of proof on the carrier under Art IV r 1 can arise. This decision was followed and applied in *The Hellenic Dolphin* [1978] 2 Lloyd's Rep 336, which was followed in *The Theodegmon* [1990] 1 Lloyd's Rep 52. If the claimant proves that the vessel was unseaworthy and that the unseaworthiness caused the loss or damage, the burden passes to the defendants to prove that they and those for whom they are responsible exercised due diligence in the relevant respects: *The Toledo* [1995] 1 Lloyd's Rep 40, p 50; *The Eurasian Dream* [2002] EWHC 118, para 123; [2002] 1 Lloyd's Rep 719.

5 ARTICLE III RULE 2

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

The extracts reprinted in this section deal with the meaning of the phase 'shall properly and carefully', which gives rise to two questions. Does 'shall' oblige the carrier to undertake – or at least accept liability for – all the activities listed in the rule? Does 'properly' add anything to 'carefully'?

Pyrene Co Ltd v Scindia Navigation Co Ltd [1954] 2 QB 402

Facts

See p 166, above.

Held

> **Devlin J:** The phrase 'shall properly and carefully load' may mean that the carrier shall load and that he shall do it properly and carefully: or that he shall do whatever 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. Their object as it is put, I think correctly, in *Carver's*

Carriage of Goods by Sea, 9th ed, 1952, page 186, is to define not the scope of the contract service but the terms on which that service is to be performed. The extent to which the carrier has to undertake the loading of the vessel may depend not only upon different systems of law but upon the custom and practice of the port and the nature of the cargo. It is difficult to believe that the rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the rules should not leave the parties free to determine by their own contract the part which each has to play. On this view the whole contract of carriage is subject to the rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide.

Note

This statement was approved by the Court of Appeal in *The Coral* [1993] 1 Lloyd's Rep 1 and by a majority of the House of Lords in *Renton v Palmyra* [1957] AC 149, where it was held that 'shall carry' means no more than 'shall undertake the carrying obligation defined in the contract'; and see note to Art III r 8, below. *Pyrene* and *Renton v Palmyra* were followed by the Court of Appeal in *Jindal Iron and Steel Co Ltd v Islamic Solidarity Co Jordan Inc* [2003] EWCA Civ 144 where the shipper agreed with the shipowner that the shipper would load a cargo of steel coils and be responsible for any damage in loading and that the receiver would discharge the cargo and be responsible. The cargo was damaged either during loading or discharge. The Court of Appeal held that Art III r 2 did not compel the shipowner to take responsibility for loading or discharge: 'it simply compels the shipowner to load and unload properly if he undertakes those functions' (*per* Waller LJ, para 47).

Albacora SRL v Wescott & Laurance Line [1966] 2 Lloyd's Rep 53, HL

Facts

The owners of *Maltasian* carried a consignment of wet salted fish from Glasgow to Genoa. Both parties were aware that the vessel's holds were not refrigerated but neither knew that the cargo could not be carried safely at the relevant time of year. The fish deteriorated. The cargo owners argued that the shipowners were in breach of Art III r 2.

Held

Lord Reid: … The argument is that in this Article 'properly' means in the appropriate manner looking to the actual nature of the consignment, and that it is irrelevant that the shipowner and ship's officers neither knew nor could have discovered that special treatment was necessary. The obligation under the Article is to carry goods properly and if that is not done there is a breach of contract. So it is argued that in the present case it is proved that the only proper way to carry this consignment on this voyage was in a refrigerated hold, and there the obligation of the respondents was to do that, even if the appellants' agents who were parties to the contract were aware that there was no refrigeration in this ship.

This construction of the word 'properly' leads to such an unreasonable result that I would not adopt it if the word can properly be construed in any other sense. The appellants argue that, because the article uses the word 'properly' as well as 'carefully', the word 'properly' must mean something more than carefully. Tautology is not unknown even in international conventions, but I think that 'properly' in this context has a meaning slightly different from 'carefully'. I agree with Viscount Kilmuir LC, that here 'properly' means in accordance with a sound system (*GH Renton & Co Ltd v Palmyra Trading Corporation of Panama* [1957] AC 149, at p 166) and that may mean rather more than carrying the goods carefully. But the question remains by what criteria it is to be judged whether the system was sound.

In my opinion, the obligation is to adopt a system which is sound in light of all the knowledge which the carrier has or ought to have about the nature of the goods. And if that is right, then the respondents did adopt a sound system. They had no reason to suppose that the goods required any different treatment from that which the goods in fact received. That is sufficient to dispose of the appellants' case on breach of contract . . .

Lord Pearce: . . . The word 'properly' presumably adds something to the word 'carefully'. In *GH Renton & Co Ltd v Palmyra Trading Corporation of Panama* [1957] AC 149, this House construed it as meaning 'upon a sound system'. A sound system does not mean a system suited to all the weaknesses and idiosyncrasies of a particular cargo, but a sound system under all the circumstances in relation to the general practice of carriage of goods by sea. It is tantamount, I think, to efficiency . . .

Lord Pearson: . . . Article III, r 2, is expressly made subject to the provisions of Article IV. The scheme is, therefore, that there is a *prima facie* obligation under Article III, r 2, which may be displaced or modified by some provision of Article IV. Article IV contains many and various provisions, which may have different effects on the *prima facie* obligation arising under Article III, r 2. The convenient first step is to ascertain what is the *prima facie* obligation under Article III, r 2.

It is not an obligation to achieve the desired result, ie the arrival of the goods in an undamaged condition at their destination. It is an obligation to carry out certain operations properly and carefully. The fact that goods, acknowledged in the bill of lading to have been received on board in apparent good order and condition, arrived at the destination in a damaged condition does not in itself constitute a breach of the obligation, though it may well be in many cases sufficient to raise an inference of a breach of the obligation. The cargo owner is not expected to know what happened on the voyage, and, if he shows that the goods arrived in a damaged condition and there is no evidence from the shipowner showing that the goods were duly cared for on the voyage, the court may well infer that the goods were not properly cared for on the voyage.

In *Gosse Millerd v Canadian Government Merchant Marine Ltd* [1927] 2 KB 432, at p 434, Wright J said:

> The words 'properly discharge' in Article III, r 2, mean, I think, 'deliver from the ship's tackle in the same apparent order and condition as on shipment', unless the carrier can excuse himself under Article IV . . .

In my view, that is not the right construction of Article III, r 2. Rightly construed, that rule only provides that the operations referred to, including the operation of discharging the goods, shall be carried out properly and carefully. That this is the right construction appears from the judgment of Mr Justice Devlin in *Pyrene Company Ltd v Scindia Navigation Company Ltd* [1954] 2 QB 402 and from the speeches in the House of Lords in *GH Renton & Co Ltd v Palmyra Trading Corporation of Panama* [1957] AC 149.

. . . The word 'properly' adds something to 'carefully', if 'carefully' has a narrow meaning of merely taking care. The element of skill or sound system is required in addition to taking care. In my opinion, there was no breach of the *prima facie* obligation under Article III, r 2 . . .

(Lord Guest and Lord Upjohn agreed with Lord Reid.)

6 ARTICLE III RULE 6: TIME LIMIT ON SUITS

Subject to para 6 *bis* the carrier and the ship shall in any event 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. This period may, however, be extended if the parties so agree after the cause of action has arisen.

Transworld Oil (USA) Inc v Minos Compania Naviera SA, The Leni **[1992] 2 Lloyd's Rep 486**

Held

Judge Diamond QC: There were a number of objectives which Article III, r 6 sought to achieve; first, to speed up the settlement of claims and to provide carriers with some protection against stale and therefore unverifiable claims; second, to achieve international uniformity in relation to prescription periods; third, to prevent carriers from relying on 'notice-of-claim' provisions as an absolute bar to proceedings or from inserting clauses in their bills of lading requiring proceedings to be issued within short periods of less than one year.

Compania Portorafti Commerciale SA v Ultramar Panama Inc, The Captain Gregos **[1990] 1 Lloyd's Rep 310, CA**

Facts

See p 164, above. Cargo owners alleged that part of a cargo of crude oil had been deliberately misappropriated by the carrier and argued that the time bar could not be invoked in response to such a claim.

Held

Bingham LJ: … Article III, r 6 provides that the carrier and the ship shall: '. . . *in any event* be discharged from *all liability whatsoever in respect of the goods* (my emphasis) unless suit is brought within the year.' I do not see how any draftsman could use more emphatic language . . . I would hold that 'all liability whatsoever in respect of the goods' means exactly what it says. The inference that the one-year time bar was intended to apply to all claims arising out of the carriage (or miscarriage) of goods by sea under bills subject to the Hague-Visby Rules is in my judgment strengthened by the consideration that Article III, r 6 is, like any time bar, intended to achieve finality and, in this case, enable the shipowner to clear his books (*The Aries* [1977] 1 Lloyd's Rep 334 at p 336) . . .

There is an obvious attraction in the argument that a party should not be able to rely on a one-year time bar to defeat a claim based on his own dishonesty. It is, however, to be remembered that claims such as these are made not infrequently (although how often they are established I do not know). I would moreover be slow to suppose that the experienced shipping interests represented at the conferences which led to these rules were not alert to the possibility of almost any form of skulduggery. But I think the rules themselves provide the solution. If damage to the goods is caused by wilful or reckless misconduct the shipowner loses the benefit of the financial limitation (Article IV, r 5(e)). If a servant or agent of the carrier damages the goods by wilful or reckless misconduct he cannot rely on the provisions of Article IV (Article IV *bis*, r 4), although still perhaps able to rely on the time bar (see the commentary in *Scrutton* at p 459). There is, however, no provision which deprives the shipowner of his right to rely on the time bar, even where he has been guilty of wilful or reckless misconduct. I cannot regard the omission as other than deliberate. This approach gains some small support from the Court of Appeal decision in *The Antares* [1978] 1 Lloyd's Rep 424.

I would be more reluctant to accept the shipowners' argument if I thought it would lead to injustice. A limitation provision can lead to injustice if a party's cause of action may be barred before he knows he has it. But that should not, as it seems to me, happen here. A cargo owner should know whether he has received short delivery at or about the time of delivery. With a cargo of crude oil such as this he will quickly be able to consider, and if necessary investigate, whether the shortage is reasonably explicable by evaporation, wastage, clingage, unpumpable residue etc. He can investigate what quantity was loaded. If he finds an unjustifiable shortage during carriage he is in a position to sue, and it is not crucial how or why the shortage occurred. He should be ready to sue well within the year, as the rules intend. The only reason why the cargo owners seek to found on the shipowners' alleged misconduct rather than on the breaches of the rules is, as I infer, that for whatever reason they let the year pass without bringing suit. That is in my view precisely the result the rules were intended to preclude.

For these reasons I differ from the judge and conclude that he was wrong to make the declaration he did on the ground he did. In reaching my conclusion I am not greatly influenced by the *travaux preparatoires*, which seem to me to have been concentrating on a different problem namely delivery to a party who does not present the bills, but I hold the view, if it be relevant, that the *travaux* certainly do disclose the legislative intention which the judge found. I am pleased to find that my conclusions broadly reflect those of Mr Brian Davenport QC in the *Law Quarterly Review* (vol 105, p 521, October, 1989) . . .

Notes

1 *Time bar: terminus a quo*. Where goods are not loaded, time begins to run from the moment the goods ought to have been delivered, assuming the loading obligation had been fulfilled: *The Ot Sonja* [1993] 2 Lloyd's Rep 435, CA.

2 *Time bar: 'suit'*. The commencement of an arbitration is a 'suit' within the meaning of Art III r 6: *The Merak* [1965] P 223, CA.

3 *Time bar: 'brought'*. This means brought by a competent plaintiff (*Compania Columbiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101) in a competent court (*The Nordglimpt* [1988] QB 183) and brought to enforce a relevant claim (*The Leni* [1992] 2 Lloyd's Rep 48).

4 *Time bar: effect*. In *The Aries* [1977] 1 Lloyd's Rep 334, the House of Lords held that the effect of Art III r 6 of the Hague Rules is to extinguish the claim, not merely to bar the remedy while leaving the claim against the carrier in existence. Nevertheless, the time bar does not prevent a carrier's negligence being relied on as a defence to a claim by the carrier to be indemnified under Art IV r 6: *The Fiona* (above). And see *Goulandris v Goldman* [1958] 1 QB 74 in Chapter 17, below.

7 ARTICLE III RULE 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. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

The Hollandia [1983] 1 AC 565

Facts

The respondents shipped machinery on the appellants' vessel *Haico Holwerda* at Leith for carriage to Bonaire in the Netherlands Antilles. A through bill of lading, providing for transhipment at Amsterdam, was issued. The cargo was damaged during the course of discharge at Bonaire as a result of the negligence of the servants of the carrying vessel which for the ocean leg of the voyage was a ship under the Norwegian flag, the *Morviken*, of which the carriers were charterers. The shippers commenced an action *in rem* in the High Court against the *Hollandia*, a sister ship of the *Haico Holwerda*. The carriers sought to stay proceedings on the grounds that the bill of lading included a choice of forum clause which provided for the exclusive jurisdiction of the Court of Amsterdam. The bill of lading also provided that the proper law of the contract should be the law of the Netherlands and stated 'The maximum liability per package is DFL 1,250' (para 1, condition 2). It was common ground that if the dispute

was tried by a Dutch court, that court would apply Dutch law and the Hague Rules limit of liability which would limit recovery to £250, but that if an English court tried it, the Hague-Visby limit would be £11,000.

Held

Lord Diplock: My Lords, the provisions in section 1 of the Act . . . appear to me to be free from any ambiguity perceptible to even the most ingenious of legal minds. The Hague-Visby Rules, or rather all those of them that are included in the Schedule, are to have the force of law in the United Kingdom: they are to be treated as if they were part of directly enacted statute law. But since they form part of an international convention which must come under the consideration of foreign as well as English courts, it is, as Lord Macmillan said of the Hague Rules themselves in *Stag Line Ltd v Foscolo, Mango and Co Ltd* [1932] AC 328, 350:

> desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation.

They should be given a purposive rather than a narrow literalistic construction, particularly wherever the adoption of a literalistic construction would enable the stated purpose of the international convention, *viz*, the unification of domestic laws of the contracting states relating to bills of lading, to be evaded by the use of colourable devices that, not being expressly referred to in the Rules, are not specifically prohibited.

The bill of lading issued to the shippers by the carriers upon the shipment of the goods at the Scottish port of Leith was one to which the Hague-Visby Rules were expressly made applicable by Article X; it fell within both paragraph (a) and paragraph (b); it was issued in a contracting state, the United Kingdom, and it covered a contract for carriage from a port in a contracting state. For good measure, it also fell directly within s 1(3) of the Act of 1971 itself.

The first paragraph of condition 2 of the bill of lading, prescribing as it does for a per package maximum limit of liability on the part of the carriers for loss or damage arising from negligence or breach of contract instead of the higher per kilogram maximum applicable under the Hague-Visby Rules, is *ex facie* a clause in a contract of carriage which purports to lessen the liability of the carriers for such loss or damage otherwise than is provided in the Hague-Visby Rules. As such it is therefore rendered null and void and of no effect under Article III, paragraph 8. So much indeed was conceded by counsel for the carriers, subject to a possible argument to the contrary which was briefly mentioned but not elaborated upon. I shall have to revert to this argument later, but can do so with equal brevity . . .

[The carriers argued for a stay on the grounds that a choice of forum clause] is to be classified as a clause which only prescribes the procedure by which disputes arising under the contract of carriage are to be resolved. It does not *ex facie* deal with liability at all and so does not fall within the description 'Any clause, covenant, or agreement in a contract of carriage . . . lessening . . . liability', so as to bring it within Article III, paragraph 8; even though the consequence of giving effect to the clause will be to lessen, otherwise than is provided in the Hague-Visby Rules, the liability of the carrier for loss or damage to or in connection with the goods arising from negligence, fault or failure in the duties and obligations provided in the Rules.

My Lords, like all three members of the Court of Appeal, I have no hesitation in rejecting this narrow construction of Article III, paragraph 8, which looks solely to the form of the clause in the contract of carriage and wholly ignores its substance. The only sensible meaning to be given to the description of provisions in contracts of carriage which are rendered 'null and void and of no effect' by this rule is one which would embrace every provision in a contract of carriage which, if it were applied, would have the effect of lessening the carrier's liability otherwise than as provided in the Rules. To ascribe to it the narrow meaning for which counsel contended would leave it open to any shipowner to evade the provisions of Article III, paragraph 8 by the simple device of inserting in his bills of lading issued in, or for carriage from a port in, any contracting state a clause in

standard form providing as the exclusive forum for resolution of disputes what might aptly be described as a court of convenience, *viz*, one situated in a country which did not apply the Hague-Visby Rules or, for that matter, a country whose law recognised an unfettered right in a shipowner by the terms of the bill of lading to relieve himself from all liability for loss or damage to the goods caused by his own negligence, fault or breach of contract.

My Lords, unlike the first paragraph of condition 2 a choice of forum clause, such as that appearing in the third paragraph, does not *ex facie* offend against Article III, paragraph 8. It is a provision of the contract of carriage that is subject to a condition subsequent; it comes into operation only upon the occurrence of a future event that may or may not occur, *viz*, the coming into existence of a dispute between the parties as to their respective legal rights and duties under the contract which they are unable to settle by agreement. There may be some disputes that would bring the choice of forum clause into operation but which would not be concerned at all with negligence fault or failure by the carrier or the ship in the duties and obligations provided by article III; a claim for unpaid freight is an obvious example. So a choice of forum clause which selects as the exclusive forum for the resolution of disputes a court which will not apply the Hague-Visby Rules, even after such clause has come into operation, does not necessarily always have the effect of lessening the liability of the carrier in a way that attracts the application of Article III, paragraph 8.

My Lords, it is, in my view, most consistent with the achievement of the purpose of the Act of 1971 that the time at which to ascertain whether a choice of forum clause will have an effect that is proscribed by Article III, paragraph 8 should be when the condition subsequent is fulfilled and the carrier seeks to bring the clause into operation and to rely upon it. If the dispute is about duties and obligations of the carrier or ship that are referred to in that rule and it is established as a fact (either by evidence or as in the instant case by the common agreement of the parties) that the foreign court chosen as the exclusive forum would apply a domestic substantive law which would result in limiting the carrier's liability to a sum lower than that to which he would be entitled if Article IV, paragraph 5 of the Hague-Visby Rules applied, then an English court is in my view commanded by the Act of 1971 to treat the choice of forum clause as of no effect.

The rule itself speaks of a proscribed provision in a contract of carriage as a 'clause, covenant, or agreement in a contract of carriage' and describes the effect of the rule on the offending provision as being to render it 'null and void and of no effect'. These pleonastic expressions occurring in an international convention (of which the similarly pleonastic version in the French language is of equal authenticity) are not to be construed as technical terms of legal art. It may well be that if they were to be so construed the most apt to be applied to a choice of forum clause when brought into operation by the occurrence of a particular dispute would be the expression 'of no effect', but it is no misuse of ordinary language to describe the clause in its application to the particular dispute as being *pro tanto* 'null' or 'void' or both . . .

As foreshadowed at an earlier point in this speech I must return in a brief postscript to an argument based on certain passages in an article by a distinguished commentator, Dr FA Mann, 'Statutes and the Conflict of Laws' which appeared in (1972–73) 46 BYIL 117, and which, it is suggested, supports the view that even a choice of substantive law, which excludes the application of the Hague-Visby Rules, is not prohibited by the Act of 1971 notwithstanding that the bill of lading is issued in and is for carriage from a port in, the United Kingdom. The passages to which our attention was directed by counsel for the carriers I find myself (apparently in respectable academic company) unable to accept. They draw no distinction between the Act of 1924 and the Act of 1971 despite the contrast between the legislative techniques adopted in the two Acts, and the express inclusion in the Hague-Visby Rules of Article X (absent from the Hague Rules), expressly applying the Hague-Visby Rules to every bill of lading falling within the description contained in the article, which article is given the force of law in the United Kingdom by section 1(2) of the Act of 1971. The Act of 1971 deliberately abandoned what may conveniently be termed the 'clause paramount' technique employed in section 3 of the Act of 1924, the Newfoundland counterpart of which provided the occasion for wide-ranging *dicta* in the opinion of the Privy Council delivered by Lord Wright in *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277.

> Although the actual decision in that case would have been the same if the relevant Newfoundland statute had been in the terms of the Act of 1971, those *dicta* have no application to the construction of the latter Act and this has rendered it no longer necessary to embark upon what I have always found to be an unrewarding task of trying to ascertain precisely what those *dicta* meant. I would dismiss this appeal.

Note

Liberty clauses. The holders of bills of lading argued that a clause which permitted discharge at a substitute port, including the port of loading, in the event of a strike, was a clause which purported to relieve the carrier from loss arising from failure in the duty 'properly to carry … and discharge the goods carried' (Art III r 2) and so was rendered null and void by Art III r 8. The House of Lords rejected this claim on the grounds that:

(a) Art III r 2 did not require goods to be transported from one place to another if the contract said they need not be moved in a certain event;

(b) the obligation to 'discharge properly' meant 'in accordance with a sound system' and not at a particular place (*per* Viscount Kilmuir LC);

(c) the clause did not purport to extend the power to deviate permitted by the Rules, but rather defined the contractual voyage to be performed in certain circumstances: *GH Renton & Co Ltd v Palmyra Trading Corporation of Panama*. (For the facts and the decision of the House of Lords in this case on the construction of the liberty clause, see Chapter 5, above.)

8 ARTICLE IV RULE 2

8.1 Article IV r 2(a): fault in the navigation or management of the ship

These words contain two surprises. The idea that the Rules should excuse carriers from the consequences of the negligence of their employees at sea looks odd; odder still when it is remembered that the Rules also create a virtually inescapable duty to be careful in making the ship ready for sea. The words contain a second surprise for anyone unfamiliar with the general approach adopted in English courts to the interpretation of exclusion clauses in bills of lading.

Gosse Millerd Ltd v Canadian Govt Merchant Marine Ltd [1929] AC 22

Facts

The appellants shipped boxes of tinplates on the respondents' ship *Canadian Highlander* at Swansea for carriage to Vancouver. On arrival it was found that the cargo had been damaged by fresh water. The trial judge found that rain entered the hold at a port of call when the hatch cover was removed during discharge of other cargo and during a period in dry dock when there was carelessness in moving and replacing tarpaulins which were supposed to cover the hatch when repair and maintenance work was being done to the vessel.

Held

> **Lord Hailsham LC:** My Lords, this is an action brought by the appellants against the respondents, claiming damages for injury done to their tinplates on a voyage from Swansea to Vancouver in a ship belonging to the respondents and known as the *Canadian Highlander*.

At the trial there was a great conflict as to the cause of the damage to the tinplates; but on the hearing before the Court of Appeal and at your Lordships' bar, both sides accepted the findings of fact of the learned trial judge . . .

The appellants relied on rule 2 of Article III of the rules . . . but the respondents relied upon rule 2 (a) of Article IV; this rule provides that:

> Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from – (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.

. . . The argument at the bar turned mainly upon the meaning to be placed upon the expression 'management of the ship' in that rule. The words in question first appear in an English statute in the Act now being considered; but nevertheless they have a long judicial history in this country. The same words are to be found in the well known Harter Act of the United States, and as a consequence they have often been incorporated in bills of lading which have been the subject of judicial consideration in the courts in this country. 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 to that which has been judicially assigned to them when used in contracts for the carriage of goods by sea before that date; and I think that the decisions which have already been given are sufficient to determine the meaning to be put upon them in the statute now under discussion.

In the year 1893, in the case of *The Ferro* [1893] P 38, certain oranges had been damaged by the negligent stowage of the stevedore. It was held by the Divisional Court that the negligent stowage of the cargo was not neglect or default in the management of the ship. Gorell Barnes J says:

> I think it is desirable also to express the view which I hold about the question turning on the construction of the words 'management of the ship', I am not satisfied that they go much, if at all, beyond the word 'navigation'.

Sir Francis Jeune says:

> It would be an improper use of language to include all stowage in such a term [ie 'mismanagement of the ship']. It is not difficult to understand why the word 'management' was introduced, because, inasmuch as navigation is defined as something affecting the safe sailing of the ship . . . it is easy to see that there might be things which it would be impossible to guard against connected with the ship itself, and the management of the ship, which would not fall under navigation. Removal of the hatches for the sake of ventilation, for example, might be management of the ship, but would have nothing to do with the navigation.

In the case of *The Glenochil* [1896] P 10, the same two learned judges, sitting as a Divisional Court, held that the words did protect the shipowner for damage done by pumping water into the ballast tank in order to stiffen the ship without ascertaining that a pipe had become broken, and thereby let the water into the cargo. Gorell Barnes J says:

> There will be found a strong and marked contrast in the provisions which deal with the care of the cargo and those which deal with the management of the ship herself; and I think that where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words 'management of the said vessel'.

Sir Francis Jeune says:

> It seems to me clear that the word 'management' goes somewhat beyond – perhaps not much beyond – navigation, but far enough to take in this very class of acts which do not affect the sailing or movement of the vessel, but do affect the vessel herself.

And referring to his own judgment in *The Ferro*, he says:

> It may be that the illustration I gave in that case, as to the removal of the hatches for the sake of ventilation, was not a very happy one; but the distinction I intended to draw then, and

> intend to draw now, is one between want of care of cargo and want of care of the vessel indirectly affecting the cargo.

The principles enunciated in this case have repeatedly been cited since with approval in this country and in America . . .

In the case of *Hourani v Harrison* (1927) 32 Com Cas 305 the Court of Appeal had to consider the meaning to be attached to the words of Article IV, rule 2, in a case in which loss was caused by the pilfering of the stevedore's men whilst the ship was being discharged. The court held that this did not fall within the expression 'management of the ship'; but both Bankes LJ and Atkin LJ (as he then was) discussed the meaning to be placed on the expression. Bankes LJ reviews the authorities both in this country and in the United States; he points out that the principle laid down in *The Glenochil* has been accepted in the Supreme Court of the United States as being correct, and he adopts and applies that principle to the case which he is then considering. The learned judge expresses the distinction as being between:

> damage resulting from some act relating to the ship herself and only incidentally damaging the cargo, and an act dealing, as is sometimes said in some of the authorities, solely with the goods and not directly or indirectly with the ship herself.

Atkin LJ says:

> that there is a clear distinction drawn between goods and ship; and when they talk of the word 'ship', they mean the management of the ship, and they do not mean the general carrying on of the business of transporting goods by sea.

My Lords, in my judgment, the principle laid down in *The Glenochil* and accepted by the Supreme Court of the United States in cases arising under the American Harter Act, and affirmed and applied by the Court of Appeal in the *Hourani* case under the present English statute, is the correct one to apply. Necessarily, there may be cases on the borderline, depending upon their own particular facts; but if the principle is clearly borne in mind of distinguishing between want of care of cargo and want of care of vessel indirectly affecting the cargo, as Sir Francis Jeune puts it, there ought not to be very great difficulty in arriving at a proper conclusion . . .

My Lords, it appears to me plain that if the test which I have extracted from the earlier cases is the correct one, it follows that the appellants are entitled to recover in the present case. It is clear that the tinplates were not safely and properly cared for or carried; and it is for the respondents then to prove that they are protected from liability by the provisions of Article IV, and that the damage was occasioned through the neglect or default of their servants in the management of the ship. In my judgment they have not even shown that the persons who were negligent were their servants; but even if it can be assumed that the negligence in dealing with the tarpaulins was by members of the crew, such negligence was not negligence in the management of the ship, and therefore is not negligence with regard to which Article IV, rule 2(a), affords any protection . . .

Viscount Sumner: . . . Now the tarpaulins were used to protect the cargo. They were put over the hatch, as they always are, to keep water out of cargo holds. They should have been so arranged, when the hatch boards were taken off, as to prevent water from getting to the cargo. It was not a question of letting light into the 'tween decks. They were lit by electricity. There is no evidence that an amount of water entered that would have done any harm to an empty hold or to the ship as a ship. Water, sufficient when soaked into the wood of the boxes to rust the tinplates in the course of a voyage through the tropics, might well have been harmless if it merely ran into the bilges. There is neither fact nor finding to the contrary. I think it quite plain that the particular use of the tarpaulin, which was neglected, was a precaution solely in the interest of the cargo. While the ship's work was going on these special precautions were required as cargo operations. They were no part of the operations of shifting the liner of the tail shaft or scraping the 'tween decks . . .

8.2 Article IV r 2(q): any other cause

***Leesh River Tea v British India Steam Navigation* [1967] 2 QB 250, CA**

Facts

The plaintiffs shipped tea on *Chyebassa* for carriage from Calcutta to London, Hull and Amsterdam via Port Sudan. While the vessel was at Port Sudan it discharged other cargo and loaded cotton seed. The work was carried out by stevedores who were the agents of the shipowners. In the course of discharge or loading, one or more of the stevedores stole a brass cover plate from one of the ship's storm valves. As a result, when the vessel left port, water entered the hold and damaged the tea.

Held

> **Sellers LJ:** . . . The shipowners established that the theft was without their actual fault or privity and they have to establish also that it was without the fault or neglect of their agents or servants. *RF Brown & Co Ltd v T & J Harrison* (1927) 43 TLR 633 held that 'and' has to be substituted for 'or'. . . . If a complete stranger had entered the hold unobserved and removed the plate, sub-clause (q) would, I think, apply if the shipowner could prove that it was a stranger who removed the cover and reasonable care had been taken to prevent strangers getting aboard the ship and due diligence generally had been exercised. In the present case the act of the thief ought, I think, to be regarded as the act of a stranger.

Notes

1 *Excepted perils: burden of proof.* The burden of proof of an excepted peril under Art IV r 2, falls on the carrier 'by virtue of the common law principle that he who seeks to rely upon an exception in his contract must bring himself within it': *The Antigoni* [1991] 1 Lloyd's Rep 209, CA, p 212, *per* Staughton LJ.

2 *Excepted peril and concurrent cause: burden of proof.* 'Where the facts disclose that the loss was caused by the concurrent causative effects of an excepted and a non-excepted peril, the carrier remains liable. He only escapes liability to the extent he can prove that the loss or damage was caused by the excepted peril alone': *The Torenia* [1983] 2 Lloyd's Rep 211, *per* Hobhouse J.

9 ARTICLE IV RULE 4

> Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

The meaning of 'reasonable' in this rule was considered by the House of Lords in *Stag Line.* Lord Atkin's approach enjoys wide support today.

***Stag Line Ltd v Foscolo, Mango & Co* [1932] AC 328**

Held

> **Lord Buckmaster**: My Lords, the appellants are the owners of the steamship *Ixia* . . . The vessel was chartered to carry a cargo of coal . . . and to proceed from Swansea, where the coal was to be loaded with all possible despatch, to Constantinople . . . The usual and customary route for the voyage was from Swansea, south of Lundy, from thence in a straight line to a point about five miles off Pendeen, on the north coast of Cornwall, and then with a slight alteration to the east to Finisterre and so on.
>
> The ship had been fitted with a heating apparatus designed to make use of the heat which might otherwise be wasted as steam and so to diminish the bill for fuel. This apparatus had not been

working satisfactorily, and the owners therefore arranged to send representatives of the engineers to make a test when the vessel started on her next voyage. Two engineers accordingly joined the boat, the intention being that they should leave the ship with the pilot somewhere off Lundy.

The firemen on board the ship were not in possession of their full energies when the boat started at 1.45 in the morning on [30] June 1929, owing to excessive drinking before they joined the ship. The result was that a proper head of steam necessary for making the test was not got up in time to enable the test to be made before the pilot was discharged. Accordingly they proceeded on the voyage until the ship was off St Ives, when the ship was turned about five miles out of its course to enter the St Ives Harbour in order that the engineers might be landed. After landing them, the ship did not go straight back to the recognised route that she ought to have pursued, but hugged too closely the dangerous coast of Cornwall, and ran on a rock called the Vyneck Rock, with the result that the vessel and cargo were totally lost though, fortunately, there was no loss of life. The accident took place at about 3.20 pm, there was a moderate wind from ENE, the weather was cloudy, but visibility was moderately good up to six miles.

The respondents sought to recover damages for loss of their cargo upon the ground that there had been an unlawful deviation from the contracted course. The appellants . . . said (that) by the Carriage of Goods by Sea Act 1924, the rules in the Schedule must be regarded as incorporated in the contract and, by those rules, they were entitled to make the deviation which led to the disaster . . .

The appellants' argument upon the statute is, firstly, that the accident was a peril of the sea; and, secondly, that the deviation in question was a reasonable deviation and consequently was not an infringement of the contract of carriage . . . the first point can, I think, be disregarded. It involves the view that perils and accidents of the sea are not qualified by the provisions as to deviation, and that such perils exempted the shipowner from responsibility for damage if they arise from or in the course of deviation, whether such deviation be reasonable or not. In my opinion clause 4 must be given its full effect without rendering it to a large extent unnecessary by such an interpretation, for it would follow from the arguments that a peril encountered by deviation, wholly unreasonable and wholly unauthorised, would be one for which the shipowner would be exempted from loss. In other words, the reasonable deviation would then only apply to questions of demurrage whatever the deviation might be.

The real difficulty in this case, and it is one by which I have been much oppressed, is whether in the circumstances the deviation was reasonable. It hardly needed the great authority of Lord Herschell in *Hick v Raymond* [1893] AC 22 to decide that in construing such a word it must be construed in relation to all the circumstances, for it is obvious that what may be reasonable under certain conditions may be wholly unreasonable when the conditions are changed. Every condition and every circumstance must be regarded, and it must be reasonable, too, in relation to both parties to the contract and not merely to one . . . I do not think elaborate definitions, whether contained in dictionaries or judgments, are of much use in determining the value of a word in common use which means no more in this context than a deviation which where every circumstance has been duly weighed commends itself to the common sense and sound understanding of sensible men . . .

Lord Atkin: . . . The position in law seems to be that the plaintiffs are *prima facie* entitled to say that the goods were not carried safely: the defendants are then *prima facie* entitled to rely on the exception of loss by perils of the sea: and the plaintiffs are *prima facie* entitled in reply to rely upon a deviation. For unless authorised by the charterparty or the Act the departure to St Ives from the direct course to Constantinople was admittedly a deviation. I pause here to say that I find no substance in the contention faintly made by the defendants that an unauthorised deviation would not displace the statutory exceptions contained in the Carriage of Goods by Sea Act. I am satisfied that the general principles of English law are still applicable to the carriage of goods by sea except as modified by the Act: and I can find nothing in the Act which makes its statutory exceptions apply to a voyage which is not the voyage the subject of 'the contract of carriage of goods by sea' to which the Act applies. It remains therefore for the shipowners to show that the suggested deviation was authorised by the contract including the terms incorporated by the Act . . .

(Article IV, r 4 provides that) 'Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom'. In approaching the construction of these rules it appears to me important to bear in mind that one has to give the words as used their plain meaning, and not to colour one's interpretation by considering whether a meaning otherwise plain should be avoided if it alters the previous law. If the Act merely purported to codify the law, this caution would be well founded. I will repeat the well known words of Lord Herschell in the *Bank of England v Vagliano Brothers* [1891] AC 107. Dealing with the Bills of Exchange Act as a code he says:

> I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view . . . The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was.

He then proceeds to say that of course it would be legitimate to refer to the previous law where the provision of the code was of doubtful import, or where words had previously acquired a technical meaning or been used in a sense other than their ordinary one. But if this is the canon of construction in regard to a codifying Act, still more does it apply to an Act like the present which is not intended to codify the English law, but is the result (as expressed in the Act) of an international conference intended to unify certain rules relating to bills of lading. It will be remembered that the Act only applies to contracts of carriage of goods outwards from ports of the United Kingdom: and the rules will often have to be interpreted in the courts of the foreign consignees. For the purpose of uniformity it is, therefore, important that the courts should apply themselves to the consideration only of the words used without any predilection for the former law, always preserving the right to say that words used in the English language which have already in the particular context received judicial interpretation may be presumed to be used in the sense already judicially imputed to them.

Having regard to the method of construction suggested above, I cannot think that it is correct to conclude, as Scrutton LJ does, that r 4 was not intended to extend the permissible limits of deviation as stated in *The Teutonia* (1872) LR 4 PC 171, 179. This would have the effect of confining reasonable deviation to deviation to avoid some imminent peril. Nor do I see any justification for confining reasonable deviation to a deviation in the joint interest of cargo owner and ship, as MacKinnon J appears to hold, or even to such a deviation as would be contemplated reasonably by both cargo owner and shipowner, as has been suggested by Wright J in *Foreman and Ellams Ltd v Federal Steam Navigation Co* [1928] 2 KB 424, 431, approved by Slesser LJ in the present case. A deviation may, and often will, be caused by fortuitous circumstances never contemplated by the original parties to the contract; and may be reasonable, though it is made solely in the interests of the ship or solely in the interests of the cargo, or indeed in the direct interest of neither: as for instance where the presence of a passenger or of a member of the ship or crew was urgently required after the voyage had begun on a matter of national importance; or where some person on board was a fugitive from justice, and there were urgent reasons for his immediate appearance. The true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned, but without obligation to consider the interests of any one as conclusive . . . The decision has to be that of the master or occasionally of the shipowner; and I conceive that a cargo owner might well be deemed not to be unreasonable if he attached much more weight to his own interests than a prudent master having regard to all the circumstances might think it wise to do.

> Applying then this test, was this deviation reasonable? I do not discuss the facts except to say that I see no ground for suggesting that the deviation was due to some default of the shipowner in respect of the firemen. In the absence of evidence directed to that issue it does not seem right to impute blame to the owners in that respect … I think that Greer LJ is plainly right in applying the test of reasonableness to the deviation as a whole. It could not, however, be laid down that as soon as the place was reached to which deviation was justified, there was an obligation to join the original course as directly as possible. A justified deviation to a port of refuge might involve thereafter a shorter and more direct route to the port of destination compared with a route which took the shortest cut to the original course. On the other hand, though the port of refuge was justifiably reached, the subsequent voyage might be so conducted as to amount to an unreasonable deviation. Taking all the facts into account I am pressed with the evidence which the learned judge accepted, that after St Ives the coasting course directed by the master was not the correct course which would ordinarily be set in those circumstances. It is obvious that the small extra risk to ship and cargo caused by deviation to St Ives, was vastly increased by the subsequent course. It seems to me not a mere error of navigation but a failure to pursue the true course from St Ives to Constantinople which in itself made the deviation cease to be reasonable. For these reasons I agree that this appeal should be dismissed.

Note

Deck cargo and deviation. In *Kenya Railways v Antares, The Antares* [1986] 2 Lloyd's Rep 626; [1987] 1 Lloyd's Rep 424, machinery was shipped at Antwerp for carriage to Mombasa under two bills of lading which were subject to the Hague or Hague-Visby Rules and which also contained arbitration clauses. On discharge at Mombasa it was found that part of the machinery had been loaded on deck and had been seriously damaged in the course of the voyage. The bills of lading were on the form of the Mediterranean Shipping Company (MSC) but each contained a demise clause. MSC had chartered the vessel from the defendant owners. The plaintiffs made a claim against MSC by letter and informed MSC that they had appointed an arbitrator under the arbitration clause in the bills of lading. One year and two days after the final discharge of the cargo, MSC's solicitors informed the plaintiffs' solicitors that MSC were not the owners of the vessel. The plaintiffs then attempted to claim against the owners, who asserted that the claim was time-barred. The plaintiffs sought a declaration that the owners were in fundamental breach of contract by stowing the goods on deck and that this precluded the owners from relying on the one year time bar in Art III r 6 of the Hague-Visby Rules.

Steyn J held that the question was one of construction of Art III r 6 and that the word 'whatsoever' in the rules made it clear that the time limit applied to cases of wrongful stowage of cargo on deck. His Lordship also said that it would be wrong to approach this question of construction by supposing that the Hague-Visby Rules were intended to codify or reflect pre-existing English law. He concluded that the rule made no distinction between fundamental and non-fundamental breach of contract or between breaches which do and breaches which do not amount to deviations: [1986] 2 Lloyd's Rep 626, p 633.

The Court of Appeal agreed that the time limit in Art III r 6 applied to claims arising from unauthorised carriage on deck, although the question whether the time limit also applied to 'a deviation strictly so called' was not determined. In delivering the leading judgment, Lloyd LJ (Glidewell and O'Connor LJJ concurring) noted that it was 'sometimes said that the so-called "deviation cases" may have survived the abolition (in *Suisse Atlantique* [1967] 1 AC 361) of the doctrine of fundamental breach' and that the plaintiffs argued that improper loading on deck should be treated in the same way as a geographical deviation. After referring to *Photo Production v Securicor*

[1980] AC 827 (see Chapter 5, above) his Lordship said that: 'Whatever may be the position with regard to deviation cases strictly so called (I would myself favour the view that they should now be assimilated into the ordinary law of contract), I can see no reason for regarding the unauthorised loading of deck cargo as a special case.'

The effect of unauthorised stowage on deck8 was considered again by the Court of Appeal in *Daewoo Heavy Industries Ltd v Klipiver Shipping, The Kapitan Petko Voivoda* [2003] EWCA Civ 451; [2003] 2 Lloyd's Rep 1, where charterers contracted to carry 34 new excavators from Korea to Turkey on bill of lading terms which provided for under-deck carriage and incorporated the Hague Rules. All the excavators were initially stowed under-deck, but in breach of contract at an intermediate port, 26 were restowed on deck without consent. Eight of the excavators were subsequently lost overboard in heavy weather, the others were damaged by rust or water. The Court of Appeal held that the words 'in any event' in Art IV r 5 of the Hague Rules meant 'in every case', so that the charterers were entitled to limit liability.

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CHAPTER 11

THE VESSEL

1 IDENTITY OF THE SHIP

Most charters are tied to a single specific vessel. The shipowner must make available to the charterer the vessel on which the parties have agreed and which is the subject of the charter. Unless the parties agree that the shipowner shall have a right to provide a substitute, the charterer cannot be required to accept any other vessel. If a specific vessel is chartered but is lost without fault before the time for performance arrives, the contract will be frustrated: *The Super Servant Two* [1990] 1 Lloyd's Rep 9, CA. But what is meant by saying that the agreed vessel must be tendered or delivered? If the vessel is described in detail in the charter, must she comply strictly with every item of the description? The point was argued in *The Diana Prosperity.*

Reardon Smith Line Ltd v Hansen-Tangen, The Diana Prosperity
[1976] 1 WLR 989

Facts

Hansen-Tangen sub-chartered to Reardon Smith a ship to be built, which was described in the charterparty as 'called yard No 354 at Osaka Zosen' (Osaka Shipbuilding). The Osaka yard had a No 354 on their books, but she was too large for them to build, so construction was sub-contracted to another Japanese yard, Oshima, some 300 miles away. The vessel was number 004 in Oshima's books. Osaka were part-owners of Oshima. Osaka supervised the building and helped in the construction by seconding staff to Oshima.

Held

> **Lord Wilberforce:** My Lords, these appeals arise out of a charterparty and a subcharterparty both relating to a medium-sized newbuilding tanker to be constructed in Japan. By the time the tanker was ready for delivery the market had collapsed, owing to the oil crisis of 1974, so that the charterers' interest was to escape from their contracts by rejecting the vessel. The ground on which they hoped to do so was that the vessel tendered did not correspond with the contractual description. Both charterparties were on the well known form Shelltime 3. The result of the appeal depends primarily on the view taken of the sub-charterparty between the appellants in the first appeal (Reardon Smith) and the respondents in that appeal (Hansen-Tangen) . . .
>
> . . . the whole case, as regards the first appeal, turns, in my opinion, on the long italicised passage in the subcharter set out above which, for convenience of reference I repeat:
>
> > the good Japanese flag (subject to Clause 41) Newbuilding motor tank vessel called Yard No 354 at Osaka Zosen.
>
> I shall refer to this as the 'box' since it appears enclosed in a typed box on the document …
>
> The appellants sought, necessarily, to give to the 'box' and the corresponding provision in the intermediate charter contractual effect. They argued that these words formed part of the 'description' of the future goods contracted to be provided, that, by analogy with contracts for the sale of goods, any departure from the description entitled the other party to reject, that there were departures in that the vessel was not built by Osaka and was not Hull No 354. I shall attempt to deal with each of these contentions.
>
> In the first place, I am not prepared to accept that authorities as to 'description' in sale of goods cases are to be extended, or applied, to such a contract as we have here . . . The general law of

contract has developed along much more rational lines (eg *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26), in attending to the nature and gravity of a breach or departure rather than in accepting rigid categories which do or do not automatically give a right to rescind, and if the choice were between extending cases under the Sale of Goods Act 1893 into other fields, or allowing more modern doctrine to infect those cases, my preference would be clear. The importance of this line of argument is that Mocatta J and Lord Denning MR used it in the present case so as to reject the appellants' argument on 'description' and I agree with them. But in case it does not appeal to this House, I am also satisfied that the appellants fail to bring the present case within the strictest rules as to 'description'.

In my opinion, the fatal defect in their argument consists in their use of the words 'identity' or 'identification' to bridge two meanings. It is one thing to say of given words that their purpose is to state (identify) an essential part of the description of the goods. It is another to say that they provide one party with a specific indication (identification) of the goods so that he can find them and if he wishes subdispose of them. The appellants wish to say of words which 'identify' the goods in the second sense, that they describe them in the first. I have already given reasons why I can only read the words in the second sense.

The difference is vital. If the words are read in the first sense, then, unless I am right in the legal argument above, each element in them has to be given contractual force. The vessel must, as a matter of contract, and as an essential term, be built by Osaka and must bear their yard number 354; if not, the description is not complied with and the vessel tendered is not that contracted for. If in the second sense, the only question is whether the words provide a means of identifying the vessel. If they fairly do this, they have fulfilled their function. It follows that if the second sense is correct, the words used can be construed much more liberally than they would have to be construed if they were providing essential elements of the description.

The two significant elements (whether in the 'box', or in the intermediate charter) are (i) the yard number 354, (ii) the expression 'built by Osaka Shipbuilding Co Ltd'. (These words do not appear in the 'box' but I will assume, very much in the appellants' favour, that the 'box' has the same meaning as if the word 'built' were used.) The appellants at one time placed great stress on the yard number provision. They contended that by using it the 'owners' assumed an obligation that the vessel should bear a number which would indicate that it would be constructed in the yard, where that number was appropriate, in sequence after vessels bearing earlier yard numbers (350–53). But this argument broke down in face of the fact, certainly known to Sanko which used and introduced the number into the charterparties, that the sequence through 354 was the sequence used at Osaka's yard at Osaka, which yard could not construct the vessel. Thus the use of the yard number for the contracted vessel must have had some other purpose than indicating construction at a particular yard. This turns the argument against the appellants for it shows the words to be 'labelling' words rather than words creating an obligation.

So the question becomes simply whether, as a matter of fact, it can fairly be said that – as a means of identification – the vessel was 'Yard No 354 at Osaka Zosen' or 'built by Osaka Shipping Co Ltd and known as Hull No 354, until named'. To answer this, regard may be had to the actual arrangements for building the vessel and numbering it before named. My Lords, I have no doubt, for the reasons given by the Court of Appeal, that an affirmative answer must be given. I shall not set out the evidence which clearly makes this good. The fact is that the vessel always was Osaka Hull No 354 – though also Oshima No 004 – and equally it can fairly be said to have been 'built' by Osaka as the company which planned, organised and directed the building and contractually engaged with Sculptor to build it, though also it could be said to have been built by Oshima. For the purpose of the identificatory clause, the words used are quite sufficient to cover the facts. No other vessel could be referred to: the reference fits the vessel in question.

There are other facts not to be overlooked. (1) So long as the charterers could identify the nominated vessel they had not the slightest interest in whatever contracting or subcontracting arrangements were made in the course of the building, a fact which no doubt explains the

> looseness of the language used in the 'box'. (2) In making the arrangements they did for building the vessel, Osaka acted in a perfectly straightforward and open manner. They cannot be said to be substituting one vessel for another; they have not provided any ground on which the charterers can claim that their bargain has not been fulfilled. The contracts all down the chain were closely and appropriately knitted into what Osaka did. (3) If the market had risen instead of falling, it would have been quite impossible for Osaka or Sculptor, or Sanko, to refuse to tender the vessel in accordance with the charters on the ground that it did not correspond with that contracted for. No more on a falling market is there, in my opinion, any ground on which the charterers can reject the vessel. In the end I find this a simple and clear case . . .

Note

Classification of contract terms. In *The Diana Prosperity*, above, Lord Wilberforce refers to the classification adopted in *Hongkong Fir Shipping*, which was summarised in *Bunge Corp v Tradax Export SA* [1981] 1 WLR 711, by Lord Scarman:

> A condition is a term, the failure to perform which entitles the other party to treat the contract as at an end. A warranty is a term, breach of which sounds in damages but does not terminate, or entitle the other party to terminate, the contract. An innominate or intermediate term is one, the effect of non-performance of which the parties expressly or (as is more usual) impliedly agree will depend upon the nature and the consequences of the breach … (in which case the court has to decide) whether the breach that has arisen is such as the parties would have said, had they been asked at the time they made their contract: 'it goes without saying that, if that happens, the contract is at an end.'

2 PARTICULAR ITEMS OF DESCRIPTION

Modern charterparties usually describe the ship that is the subject of the agreement, making statements, for example, about the vessel's name, class, capacity and location. It is common for a charterparty also to identify the vessel's builder, country of registration, tonnage and present activities. Forms used in some trades go on to deal with the vessel's technical specifications in great detail. Statements of all these types are normally terms of the contract. The cases reproduced in this section deal with the meaning of common descriptive statements in charterparties. They also deal with the way in which particular obligations should be classified. However, some of the cases were decided before *Hongkong Fir Shipping* added innominate/intermediate terms to the standard classification of contractual obligations. Are the older cases still good law, given that a more sophisticated classification is now available? Some of the older decisions were, in any event, made in circumstances that were very different to those prevailing today. If circumstances have changed, it is reasonable to ask if rules should change too. On the other hand, it is also reasonable to ask if further intervention by the courts is really necessary. Charters are negotiated by professionals: if the rule laid down by a well known case is undesirable, the parties are free to adopt a different solution by making their own wishes clear.

2.1 Flag

A statement of the national character of a ship might in some circumstances – during a war, for example – be treated as a term, breach of which would give the charterer the right to decline to take the vessel: *Behn v Burness* (1863) 3 B & S 751. In the absence of an express statement as to nationality, an obligation not to change the flag of a chartered vessel to the detriment of the charterer may be implied.

M Isaacs & Sons Ltd v William McAllum & Co Ltd [1921] 3 KB 377

Facts

Charterers alleged that a sale of the ship and consequent registration in a different national register was a breach of contract.

Held

Rowlatt J: The plaintiffs contend that the defendants committed a breach of the charterparty by selling the steamship during the currency of the charterparty. I do not think that the mere fact that the defendants sold the ship during the currency of the charterparty amounted to a breach of the charterparty, especially as the contract of sale contained a clause reserving to the defendants the right to perform personally the obligations of the charterparty.

The plaintiffs, however, say further, that the defendants have committed a breach of the charterparty by selling the steamship during the charterparty to a foreign subject, and so causing a change in her flag. It is not here necessary to inquire whether that action of the defendants would have entitled the plaintiffs to avoid the charterparty. The plaintiffs did not seek to avoid the charterparty. They kept the steamship and continued to avail themselves of her services during the period of the charterparty which has now expired. The charterparty has been performed in the sense that during its currency the steamship has made the various voyages required by the plaintiffs in accordance with the charterparty.

The complaint of the plaintiffs is that there has been a breach of the charterparty, because the services which have been rendered to them by the steamship have been rendered by a ship not of the British flag but of the Greek flag, and that they have thereby suffered damage.

The case has naturally given rise to some discussion as to the terms which are to be implied in a contract of this kind. It is clear that the fact that in this charterparty the steamship was described by an English name, the *City of Hamburg*, did not imply any warranty that it was, or would continue to be, a British ship: see *Clapham v Cologan* (1813) 3 Camp 382, and no claim could be made by the plaintiffs on that ground.

It is said, however, by counsel for the plaintiffs, and it seems to me that they are right in saying so, that where persons enter into a contract for services to be rendered by one of them to the other by means of a specific chattel, there is an implied term in the contract by which the person supplying the chattel undertakes that it shall not be altered so as materially to prejudice the services which are to be rendered by it; and that if it is so altered there is a breach of that term. If a person enters into a contract for the use of a specific thing he does not get what he contracts for if the thing is so altered as to render him services substantially less valuable than, or different from, those contracted for . . .

I therefore think that the question here is whether the defendants by selling the steamship to a Greek subject and so causing her flag to be changed from the British to the Greek flag made such an alteration in her as has materially affected the services which she was to render to the plaintiff under the charterparty. The plaintiffs contend that the defendants by so doing gave them the services of a ship different from and less valuable than that for which they had contracted; and the defendants deny this. Many changes can, no doubt, be made in a chartered ship which do not materially affect her position under the charterparty – such, for example, as altering her colour, or her masts. I have here to consider whether a change in the ship's flag is such a change as materially to affect the ship as the subject matter of the charterparty. I think I must deal with the question generally and without drawing any distinction between different nationalities. I do not think that I can treat the question of a change of flag from the British to the French flag, for example, as distinct for this purpose from a change from the British to the Chinese flag or to the flag of some undeveloped power. That distinction is relevant to the question of damages, but not to the question of breach. I have to face the plain question whether a change in the flag of the chartered ship is a breach of the charterparty as being a material change in the nature of the subject matter. It seems to me that it is. I do not think it could possibly be held that it makes no difference under

what flag a ship sails. The law of the flag is of direct importance as affecting the status of the ship. It is also of importance in its collateral effects, as, for instance, in determining the nationality and therefore to some extent the discipline and morals of the crew and in many other respects. It seems to me that in any particular case of this kind there can be no question that the change of flag is a breach of the charterparty, and that the only question is what damages, if any, have resulted from the change of flag. I must therefore hold that it was a breach of this charterparty to change the flag of the steamer during the charterparty.

As to damages, these must depend upon the circumstances of the particular case. I cannot conceive that the transfer of a ship from the flag of a civilised power to that of a wholly uncivilised power would not give rise to damages. Greece, however, is a civilised power and a maritime nation of good standing, and I do not think that the damages in this case can possibly be heavy . . .

2.2 Class

A statement that a vessel is of a particular class has been said to be a condition of a charterparty: *Routh v Macmillan* (1863) 2 H & C 750; *The Apollonius* [1978] 1 Lloyd's Rep 53; *The Seaflower* [2001] 1 Lloyd's Rep 341, CA; and *French v Newgass*, below. But such a statement has been construed as meaning only that at the time of the charter the vessel actually was so classed, not that the classification was correct or that she would continue to be so classed during the charter or that the owners would omit no act necessary to keep her in class.

***French v Newgass* (1878) 3 CPD 163, CA**

Facts

The *William Jackson,* chartered for a voyage from New Orleans to Liverpool, was described in the charter as 'A 1 1/2 Record of American and Foreign Shipping Book. London, 4 Sept, 1786 …'. At the time the vessel was so classified. After the ship's arrival in New Orleans, the classification was cancelled by the American and Foreign Shipping Association and the charterer refused to load.

Held

Brett LJ (Bramwell and Cotton LJJ delivered judgments to the same effect): . . . The question is one solely of construction, and whatever hardship there may be, we have only to construe the written instrument, which in its terms is elliptical. The document states 'A 1 1/2 Record of American and Foreign Shipping Book'. Now, the ordinary meaning of that language is that it refers to the ship, and that she is, at the time of entering into the charterparty, registered as A 1 1/2. The document further speaks of the ship newly classed as above; that relates to what has been done in the book of the American and Foreign Shipping. I am of opinion that the words amount, not only to a warranty, but to a condition, as to the vessel's classification at the time the charterparty was made, and that they must be construed in their grammatical and natural sense; they cannot be added to. No doubt the meaning of words may be extended by custom, if consistent with the written instrument, but here the words are plain, and no addition can be made to them; construing them according to their grammatical meaning, it is a statement as to the actual registration of the vessel. The only argument that can be urged on behalf of the defendant is the argument which was urged in *Hurst v Usborne* (1856) 18 CBNS 144 unsuccessfully, that it is a continuing warranty, and therefore it must be taken to be a statement that the vessel would continue to be of the same class that she was at the time the charterparty was made. Mr Herschell [counsel] proposes to add to the statement; he says that the words are to be construed, not merely that she is newly classed, but that she will continue to be of the same class as she was at the time the charterparty was made; but that construction would refer to the future, whereas the words of the charterparty only refer to the present. If the words suggested were added by implication, the shipowner, no doubt, would have failed to offer a proper ship, but that construction adds to the meaning, and if adopted,

the shipowner would have warranted, not only the description of the vessel at the time of the charterparty, but he would have made himself liable for the acts of the authorities at New Orleans, over whom he had no control. It is quite clear that we ought to adhere to the words of the charterparty, and give to them their ordinary meaning. The charterparty contains, as a fact, a statement that the ship is A 1 1/2 Record of American and Foreign Shipping at the time the charterparty was made.

Notes

1 The statement of class was here held to relate to the vessel at the time the charter was made. Other descriptive statements dealt with in this chapter have been interpreted as applying to the vessel at the date of delivery: see *The Apollonius* [1978] 1 Lloyd's Rep 53, below.

2 In *The Seaflower* [2001] 1 Lloyd's Rep 341, the Court of Appeal held that a clause requiring shipowners to obtain the approval of a tanker by a named major oil company within 60 days of the commencement of the charter period was a condition of the contract on breach of which the charterers were entitled to terminate. It was pointed out that while there are similarities between a promise relating to class and to approval by oil majors, the obligations are not identical.

2.3 Cargo capacity

Cargo capacity is normally of great importance to a charterer. If a chartered vessel cannot load all the cargo the charterer wishes to ship, he may be in breach of a contract to sell the goods, miss an intended market or incur extra warehouse or transport expenses on shore as well as the expenses of procuring substitute tonnage. A statement in a charterparty of a vessel's deadweight tonnage (the maximum weight the vessel can lift) or of cubic capacity will usually be treated as a term of the contract. Statements of capacity are often qualified by the word 'about'. Deadweight capacity is sometimes stated generally, although it is often more precisely defined as being measured in certain circumstances (for example, on summer salt water) and as being inclusive or exclusive of bunkers, fresh water or stores. Stowage factors of particular cargoes are detailed in Cufley, CFH, *Ocean Freights*, 1972, London: Staples; reprinted 1983, London: Granada. The two cases in this section establish that it is a question of construction whether a statement in a charterparty of deadweight capacity is to be read as referring to the vessel's abstract lifting capacity (this is the primary meaning) or her capacity to lift a particular type of cargo.

Mackill v Wright Bros & Co Ltd (1888) 14 App Cas 106

Facts

The *Lauderdale* was chartered to load a general cargo, including a railway locomotive and machinery, at Glasgow for carriage to Karachi. The owners guaranteed that the vessel would carry 2,000 tons deadweight of cargo, including a stated number of pieces of machinery of a given size and type. It was agreed that if the vessel did not carry the guaranteed weight of cargo, there would be a *pro rata* reduction in the lump sum freight.

Held

Lord Macnaghten: My Lords, the question turns upon the true construction of a charterparty in some respects peculiar. It is a charter for the hire of a vessel for a lump sum from Glasgow to Kurrachee. It has a note in the margin as to the description of part of the proposed cargo, and it

contains this guarantee, 'Owners guarantee that the vessel shall carry not less than 2,000 tons dead weight of cargo'. In effect, the charterers say to the owners, 'We want a vessel to carry to Kurrachee a general cargo, including parcels of machinery; we give you the dimensions and number of the largest pieces; will your vessel carry 2,000 tons dead weight?' The owners say 'It will'. That is, I think, something more than a mere guarantee of carrying capacity. It is a guarantee of the vessel's carrying capacity with reference to the contemplated voyage and the description of the cargo proposed to be shipped, so far as that description was made known to the owners . . .

. . . it seems to me that the fair result of the evidence is, that in regard to the machinery which was tendered for shipment and shipped, the cargo was not such a cargo as was contemplated by the charterparty. It contained more large pieces; it was more bulky in comparison to its weight, and it was more awkward for stowage than the terms of the charterparty would naturally have led the owners to expect.

These being the material facts of the case, the clause in the charterparty on which the question turns remains to be considered. The charterparty has this provision: 'Should the vessel not carry the guaranteed dead weight, as above, any expense incurred from this cause to be borne by the owners, and a *pro rata* deduction per ton to be made from the first payment of freight.'

What is the meaning of this provision? What is the event contemplated? Is it the case of the vessel (1) not actually carrying 2,000 tons dead weight from any cause whatever; or (2) not carrying that weight from any cause not attributable to the charterers?

I think it would be unreasonable to read the provision as allowing abatement in the freight in every case of short weight. Such a construction would place the shipowners at the mercy of the charterers. They might fill the whole space at their disposal, and yet the cargo might be much under the contemplated weight, and so the shipowners would lose their full freight without any fault on their part.

I think that the provision was intended to have effect in the event of the vessel not carrying the specified weight, assuming the cargo tendered to be such a cargo as was contemplated by the charterparty, that is, an ordinary general cargo with a fair and reasonable proportion of machinery corresponding as to the largest pieces with the numbers, dimensions, and weights specified in the margin of the charterparty. In other words (to put it most favourably for the charterers), the provision was to come into effect in the event of the vessel not carrying 2,000 tons dead weight from any cause not attributable to the charterers.

I think that the loss of cargo space and the short weight of the cargo carried on the *Lauderdale* were attributable to the charterers. It was their doing . . .

Neither the appellants nor the respondents were, I think, conspicuously reasonable. But the respondents were the more unreasonable of the two, and, what is more to the purpose, I think they took a wrong view of the construction of the charterparty, and of their own position. I therefore agree that the appeal ought to be allowed.

(Lord Halsbury LC and Lord Watson also delivered reasoned judgments.)

W Millar & Co Ltd v Owners of SS Freden [1918] 1 KB 611, CA

Facts

The ship was chartered to carry a full and complete cargo of maize in bags from Durban to the UK. The owners guaranteed the ship's deadweight capacity to be 3,200 tons and freight was to be paid on this quantity. She was full when 3,081 tons had been loaded.

Held

Swinfen Eady LJ: … There is no dispute that the vessel was of a deadweight capacity of 3,200 tons – in other words, that she would take on board a cargo to that extent without sinking the ship below her proper loadline. With regard to the particular cargo of maize she was only able to

take on board 3,081 tons 560 lbs, but that was not because her deadweight capacity was not as guaranteed, or had been in any way misrepresented. It was because the cubic capacity of the space on board was insufficient to allow of the stowage of more than 3,081 tons 560 lbs of maize in bags. On the one hand it is said on behalf of the appellants, reading the guarantee of the capacity of the ship in connection with the cargo, that the shipowners had notice of what the cargo was to be. It was maize in bags, and it is said that the guarantee must be read as if it meant 'We guarantee that the ship on this voyage will be of a capacity to take, and will be able to carry, 3,200 tons of maize in bags'. On the other hand the respondents say 'That is not the language which is used, and that is not what we meant. What we said was, and what we adhere to is, "We guarantee that the ship shall be and is of a deadweight capacity of 3,200 tons, and so it is"'. The guarantee is a measure of the capacity of the ship, the general capacity irrespective of the particular cargo that she was to carry on this voyage.

. . . Reference was made to *Mackill v Wright* (1888) 14 App Cas 106 [above]. The dispute there was whether the cargo that was actually shipped corresponded to that which was intended, having regard to the representations made at the time the contract was entered into. But it will be observed that the language of the contract there was very different from what we have to consider here. There it was 'the owners guarantee that the vessel shall carry not less than 2,000 tons dead weight of cargo'. Now that must have been a guarantee that the vessel should carry that amount on the voyage in question; and then there was a subsequent clause: 'and should the vessel not carry' – that is, should the vessel not carry on this particular voyage – 'the guaranteed dead weight as above, then any expense incurred from this cause to be borne by the owners and a *pro rata* reduction per ton to be made from the first payment of freight'. So that there was language there pointing to a guarantee with regard to the weight of cargo to be carried on that particular voyage, and not to the general carrying capacity of the ship. Here it is the opposite. The only guarantee is with reference to the general carrying capacity of the ship – a certain deadweight capacity.

In my opinion the appeal fails and should be dismissed.

(Bankes LJ and Eve J delivered judgments to the same effect.)

Notes

1 A charterparty provided that the ship should 'load a cargo of creosoted sleepers and timbers' and stated that 'charterer has option of shipping 100/200 tons of general cargo' and that 'owners guarantee ship to carry at least about 90,000 cubic feet or 1,500 tons of dead weight of cargo'. The charterers tendered a cargo of the agreed type which did not exceed 90,000 cubic feet. But because the sleepers were of unequal lengths and many were half-round, the ship could load a cargo of only 64,400 cubic feet, 1,120 tons dead weight. The charterers sought damages. Held: the clause was not a guarantee that the ship would carry 90,000 cubic feet of the cargo specified in the charterparty. It was a guarantee of abstract capacity without reference to the particular cargo: *Carnegie v Conner* (1889) 14 QBD 45.

2 Owners guaranteed to place 5,600 tons deadweight cargo capacity and 300,000 cubic feet of bale space at a charterer's disposal. The agreed lump sum freight was to be reduced *pro rata* if the deadweight or bale space were less than the guaranteed figures. The charterers claimed a *pro rata* reduction in respect of 32 tons of necessary dunnage used to stow their cargo. It was held the guarantee was of the vessel's abstract lifting capacity, not capacity to lift that weight of the particular type of cargo shipped or of an average or reasonable cargo: *Re Thomson and Brocklebank* [1918] 1 KB 655.

3 Owners guaranteed dead weight as 7,100 tons and grain capacity as 8,450 tons, with a specific right to deduct from freight *pro rata* for errors. The stated grain capacity was available and was fully utilised by charterers, but deadweight

capacity was in fact only 6,728 tons. Held: the charterers were entitled to deduct *pro rata*: *SA Ungheresi Di Armamento Marittimo Oriente v Tyser Line* (1902) 8 Com Cas 25.

4 '*About*'. The *Resolven* was chartered to carry '2,000 tons or thereabouts'. It was held that: '. . . words of elasticity are elastic and their extensiveness runs with the subject matter they refer to. I think that in this instance five per cent may be taken as a fair margin': *The Resolven* (1892) 9 TLR 75, *per* Sir F Jeune P. In *Dreyfus v Parnaso, The Dominator* [1960] 1 Lloyd's Rep 117, Sellers LJ said he would 'regard 331 tons deficiency in a cargo of 10,400 tons, a deficiency of just over three per cent, as fulfilling the obligation to ship about 10,400 tons . . . In the absence of any trade evidence on this matter, it is, in my opinion, within a reasonable commercial margin in respect of such cargo'. In *Cargo Ships 'El-Yam' Ltd v Invotra NV* [1958] 1 Lloyd's Rep 39, p 52, Devlin J said that if he had to determine whether a margin of 1.2% was within the phrase 'about 478,000 cubic feet bale capacity' it might have been a point requiring careful consideration, but the point did not in fact arise for decision.

5 A charter of *TFL Prosperity*, a roll-on roll-off vessel designed to carry trailers loaded with containers, provided that the free high of the main deck was 6.10 m. In fact at one critical point, the high was only 6.05 m, so that a trailer double stacked with 40 ft containers could not be loaded on the main deck. The owners were held liable in damages: *Tor Line AB v Alltrans Group* [1984] 1 WLR 50, HL.

3 TIME FOR PERFORMANCE

Charterparties do not all define the time for start of performance in the same way. One option is to agree a specific date on which the vessel is to sail or to be ready to receive cargo. But the uncertainties of maritime trade make prudent shipowners reluctant to fix a specific date unless the vessel is ready to begin at once. An alternative is to state the present position of the vessel and to agree that the ship will sail for the loading port either forthwith or with reasonable despatch. A little more precisely, some standard forms require a statement of present position and an estimate of the date the vessel is expected to be ready to load under the charter.

But if it is commercially unreasonable to expect shipowners to be able to promise performance on a specific date in every case, it is equally unrealistic to expect a charterer to be able to use a vessel whenever it manages to arrive. To avoid arguments about what is realistic or reasonable on the part of a charterer or whether delay by a shipowner has been sufficiently long to enable the charterer to throw up the charter and reject the vessel, it is common for charterparties to specify the earliest date on which the charterer is obliged to commence loading (the lay date) and the latest date on which he is obliged to accept the vessel (the cancellation date). These two dates are sometimes referred to as the lay/can spread. Modern forms in some trades go further and require notification of any changes in the date the vessel is expected ready to load and/or advance notice to be given at specified times before arrival.

3.1 Fixed date obligations

Firm statements in charters that the vessel is in a certain port or sailed on a certain day or is to sail or be ready to receive cargo on or before a certain date are generally important to charterers and so have in the past usually been treated as conditions. The

first case in this section has often been criticised as hard on the shipowner; but in context, the decision made good sense.

Behn v Burness (1863) 3 B & S 751, Court of Exchequer Chamber

Facts

The *Martaban,* described as being 'now in the port of Amsterdam', was chartered to proceed with all possible despatch direct to Newport and load a full cargo of coal for Hong Kong. At the time of the charter, the vessel was unavoidably detained by gales at Niewediep, 62 miles and 12 hours sailing time from Amsterdam. She reached Amsterdam four days later and finally sailed for Newport 28 days after the date of the charter.

Held

Williams J: . . . The question on the present charterparty is confined to the statement of a definite fact – the place of the ship at the date of the contract. Now the place of the ship at the date of the contract, where the ship is in foreign parts and is chartered to come to England, may be the only datum on which the charterer can found his calculations of the time of the ship's arriving at the port of load. A statement is more or less important in proportion as the object of the contract more or less depends upon it. For most charters, considering winds, markets and dependent contracts, the time of a ship's arrival to load is an essential fact, for the interest of the charterer. In the ordinary course of charters in general it would be so: the evidence for the defendant shews it to be actually so in this case. Then, if the statement of the place of the ship is a substantive part of the contract, it seems to us that we ought to hold it to be a condition . . . unless we can find in the contract itself or the surrounding circumstances reason for thinking that the parties did not so intend. If it was a condition and not performed, it follows that the obligation of the charterer dependent thereon, ceased at his option and considerations either of the damage to him or of proximity to performance on the part of the shipowner are irrelevant. So was the decision of *Glaholm v Hays* (2 M & G 257), where the stipulation in a charter of a ship to load at Trieste was that she should sail from England on or before the 4 February, and the non-performance of this condition released the charterer, notwithstanding the reasons alleged in order to justify the non-performance. So, in *Ollive v Booker* (1 Exch 416), the statement in the charter of a ship which was to load at Marseilles was that she was 'now at sea, having sailed three weeks ago', and it was held to be a condition for the reasons above stated . . . We think these cases well decided, and that they govern the present case . . .

Bentsen v Taylor [1893] 2 QB 274, CA

Facts

By a charterparty dated 29 March, the *Folkvang* was described as 'now sailed or about to sail from a pitch pine port to the UK'. She did not in fact sail from Mobile until 23 April.

Held

Bowen LJ: . . . The first question we have to consider is, What is the true effect and meaning of the words in the charterparty, 'now sailed or about to sail to the United Kingdom'?

. . . Of course it is often very difficult to decide as a matter of construction whether a representation which contains a promise, and which can only be explained on the ground that it is in itself a substantive part of the contract, amounts to a condition precedent, or is only a warranty. There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other

party is relieved of his liability. In order to decide this question of construction, one of the first things you would look to is, to what extent the accuracy of the statement – the truth of what is promised – would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out . . .

It was by the application of that train of reasoning that the court in *Behn v Burness* [above] appears to have come to the conclusion, that if a ship, which at the date of a charterparty is in foreign parts, is chartered to come to England, a statement of the place where she is ought *prima facie* to be construed as a condition precedent . . .

Now, if that is true as regards the place of a ship which is in foreign parts and is chartered to come to England, the same train of reasoning ought to apply to the time at which a ship is stated to have sailed, or to be about to sail, from the place at which she has been loading, unless the language be so vague as to lead anyone to suppose that it was not intended to be a condition precedent. I quite agree that the vagueness or ambiguity of the statement is one of the elements which would influence the court very much in deciding whether the parties intended that the statement should be a promise the fulfilment of which was to be a condition precedent.

That drives us to consider, what is the real meaning of these words. Is there anything in them so vague or so ambiguous that they cannot fairly be treated as a statement of a condition precedent? I agree that a condition precedent ought to be clearly expressed. The statement is, that the ship 'has now sailed or is about to sail'. Having regard to what we have heard of the history of the port of Mobile, I have not the slightest doubt that, if that statement does not mean that the ship has actually sailed, it does mean that she is loaded, or may at all events for business purposes be treated as actually loaded; that she has got past the embarrassments and dangers attendant on loading, and that her sailing is the next thing to be looked for. And, with regard to the suggested ambiguity in the phrase 'about to sail', when it is read in conjunction with the other words, it seems to me clear that it does not mean that the ship is to sail within a 'reasonable' or indefinite time, a statement which might lead to endless difficulties and expense, but that, if she has not already sailed, she is about to sail forthwith. If that is so, then applying the reasoning which lies at the root of *Behn v Burness*, I have no hesitation in saying that I believe the phrase to be a condition precedent. It is a representation the accuracy of which is made a condition precedent, though I do not doubt that the fulfilment of a promise may be equally made a condition precedent . . .

(Lord Esher MR and Kay LJ also delivered reasoned judgments.)

3.2 Reasonable despatch

An obligation to proceed with reasonable despatch is also treated strictly in English law. This obligation will be implied unless the parties have expressly or by implication provided otherwise: *The Kriti Rex* [1996] 2 Lloyd's Rep 171, p 191.

McAndrew v Adams (1834) 1 Bing NC 31, Common Pleas

Facts

The defendant agreed that the *Swallow* would go in ballast from Portsmouth to St Michael's in the Azores and carry a cargo of oranges direct to London. Instead of proceeding direct to St Michael's, the defendant sailed first to Oporto carrying troops. Shore batteries prevented a landing; the vessel returned the troops to Portsmouth. The charterparty fixed 1 December as the earliest date on which the charterer was obliged to load; 35 running days were allowed for loading with a further 10 days on demurrage. The charterer was entitled to cancel if the vessel did not arrive at St Michael's by 31 January. The *Swallow* sailed for St Michael's on 6 December; she loaded there and returned to London, arriving on 1 February, by which time the market price of oranges had fallen.

Held

Tindal CJ: . . . And the question here is, whether the defendant sailed within a reasonable time according to the terms of his charterparty. All the authorities concur in stating, that the voyage must be commenced within a reasonable time; and they are all cited and commented upon in *Freeman v Taylor* (1831) 8 Bing 124 and *Mount v Larkins* (1831) 8 Bing 108. If that be the general rule, where there is any delay in a voyage it is incumbent on the party to account for it. In many cases it may be difficult to say what is a reasonable or an unreasonable time for commencing a voyage. It is better, therefore, to refer to the contract itself, and see whether the voyage performed is conformable to that pointed out by the contract.

Now, looking at this contract, I think, with a view to the object of the voyage, its commencement was delayed an unreasonable time. The charterparty was entered into on the 20th of October 1832, and provides, that the *Swallow*:

> being tight, staunch, strong, and in every way fitted for the voyage, shall proceed in ballast to St Michael's.

I do not lay stress on the stipulation for proceeding in ballast, any further than that it seems to refer to a voyage in which the master should not lie by to take in a cargo, which might delay the ship on her voyage. The instrument then goes on:

> shall there receive on board a complete cargo of fruit; and, having been so loaded, shall proceed with the said cargo direct to the port of London.

. . . Now, inasmuch as the parties have stipulated that the lay days shall commence on the 1st of December, it may be inferred that they contemplated the voyage to St Michael's should terminate by that day. If, indeed, by any accident or unforeseen cause, which should excuse the master, the vessel should arrive later, the charterer would have no just cause of action: but the intention at the time was, that the object of the voyage should, if possible, take effect from the 1st of December. That it might have taken effect from that time, is clear; for the voyage usually lasts a fortnight or three weeks, and the vessel sailed for Oporto on the 7th of November.

The instrument then goes on:

> That, in case the vessel should not be arrived at St Michael's, and in readiness to receive her cargo by the 31st of January next, it shall be optional with the agents of the affreighters whether they load or not; and in case they decline loading, the charterparty shall be null and void.

That was to give the charterer the option of repudiating the contract if the vessel should arrive too late for any useful purpose, although if she had been detained by any justifiable cause, he might have no right of action against the owner.

And all the evidence in the cause goes to show that the intention of the parties in entering into this contract was such as I have described: the course of the trade in London, which requires a speedy voyage, and gives advantages to those who are first in the market; and the letter of the 9th of November, in which the plaintiffs say:

> In having taken the *Swallow* to Oporto with passengers, on her way to St Michael's, instead of proceeding direct, we consider you to have deviated from the due performance of the charterparty entered into with us, and we hold you liable for all loss or injury which may arise to the parties interested in consequence of your not proceeding direct.

I think, therefore, that, as the commencement of the voyage was, without any justifiable cause, delayed till the 6th of December, an action lies for the plaintiffs . . .

(The Chief Justice went on to deal with entitlement to damages. Park and Bosanquet JJ delivered judgments to the same effect.)

3.3 Expected ready to load

A statement in a charter of the date that it is expected the vessel will be ready to load (ERTL) will normally be treated as having contractual force, although it will not necessarily be a breach of contract if the ship fails to arrive by an estimated date or time. The leading case on interpretation of clauses of this type is *The Mihalis Angelos*.

***Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164, CA**

Facts

The *Mihalis Angelos* was chartered for a voyage from Haiphong to Hamburg. The charterparty described the vessel as 'now trading and expected ready to load under this charter about 1 July 1965'. Lay days were not to commence before 1 July 1965; charterers had the option to cancel if the vessel was not ready to load by 20 July 1965.

Held

Megaw LJ: . . . It is not disputed that when a charter includes the words 'expected ready to load . . .' a contractual obligation on the part of the shipowner is involved. It is not an obligation that the vessel will be ready to load on the stated date, nor about the stated date, if the date is qualified, as here, by 'about'. The owner is not in breach merely because the vessel arrives much later, or indeed does not arrive at all. The owner is not undertaking that there will be no unexpected delay. But he is undertaking that he honestly and on reasonable grounds believes, at the time of the contract, that the date named is the date when the vessel will be ready to load. Therefore in order to establish a breach of that obligation the charterer has the burden of showing that the owner's contractually expressed expectation was not his honest expectation, or, at the least, that the owner did not have reasonable grounds for it.

In my judgment, such a term in a charterparty ought to be regarded as being a condition of the contract, in the old sense of the word 'condition': that is, that when it has been broken, the other party can, if he wishes, by intimation to the party in breach, elect to be released from performance of his further obligations under the contract; and he can validly do so without having to establish that on the facts of the particular case the breach has produced serious consequences which can be treated as 'going to the root of the contract' or as being 'fundamental' or whatever other metaphor may be thought appropriate for a frustration case. I reach that conclusion for four interrelated reasons.

First, it tends towards certainty in the law. One of the essential elements of law is some measure of uniformity. One of the important elements of the law is predictability. At any rate in commercial law, there are obvious and substantial advantages in having, where possible, a firm and definite rule for a particular class of legal relationship: for example, as here, the legal categorisation of a particular, definable type of contractual clause in common use. It is surely much better, both for shipowners and charterers (and, incidentally, for their advisers), when a contractual obligation of this nature is under consideration, and still more when they are faced with the necessity for an urgent decision as to the effects of a suspected breach of it, to be able to say categorically: 'If a breach is proved, then the charterer can put an end to the contract,' rather than that they should be left to ponder whether or not the courts would be likely, in the particular case, when the evidence has been heard, to decide that in the particular circumstances the breach was or was not such as 'to go to the root of the contract'. Where justice does not require greater flexibility, there is everything to be said for, and nothing against, a degree of rigidity in legal principle.

Second, it would, in my opinion, only be in the rarest case, if ever, that a shipowner could legitimately feel that he had suffered an injustice by reason of the law having given to a charterer the right to put an end to the contract because of the breach by the shipowner of a clause such as this. If a shipowner has chosen to assert contractually, but dishonestly or without reasonable

grounds, that he expects his vessel to be ready to load on such-and-such a date, wherein does the grievance lie?

Third, it is, as Mocatta J held, clearly established by authority binding on this court that where a clause 'expected ready to load' is included in a contract for the sale of goods to be carried by sea, that clause is a condition, in the sense that any breach of it enables the buyer to reject the goods without having to show that the dishonest or unreasonable expectation of the seller has in fact been prejudicial to the buyer . . .

It would, in my judgment, produce an undesirable anomaly in our commercial law if such a clause – 'expected ready to load' – were to be held to have a materially different legal effect where it is contained in a charterparty from that which it has when it is contained in a sale of goods contract . . .

The fourth reason why I think that the clause should be regarded as being a condition when it is found in a charterparty is that that view was the view of Scrutton LJ so expressed in his capacity as the author of *Scrutton on Charterparties* . . .

3.4 Combined effect of reasonable despatch and 'expected ready to load undertakings'

An obligation to proceed with reasonable despatch requires the chartered ship to sail for the loading port within a reasonable time, not to sail or to arrive on a particular day: *McAndrew v Adams*, above. An ERTL obligation requires an honest estimate, made on reasonable grounds; it too does not impose a duty to sail or to arrive on a particular day. But when these obligations are combined (and the duty to use reasonable despatch is implied in every case unless expressly excluded) the result, according to the decision in *The North Anglia* is to produce an absolute duty.

Evera SA Commercial v North Shipping Co Ltd, The North Anglia
[1956] 2 Lloyd's Rep 367

Held

Devlin J: . . . A charterer manifestly wants, if he can get it, a fixed date for the arrival of the ship at the port of loading. He has to make arrangements to bring down the cargo and to have it ready to load when the ship arrives, and he wants to know, as near as he can, what that date is going to be. On the other hand, it is to the interest of the shipowner, if he can have it, to have the date as flexible as possible. Because of the inevitable delays due to bad weather or other circumstances that there might be in the course of a voyage, he can never be sure that he can arrive at a port on a fixed and certain day. Therefore, in order to accommodate these two views as far as possible, it has been the general practice for a long time past to have a clause under which the shipowner, without pledging himself to a fixed day, gives a date in the charterparty of expected readiness, that is, the date when he expects that he will be ready to load. The protection that is afforded to the charterer under that type of clause is this. As was clearly settled in *Samuel Sanday & Co v Keighley, Maxted & Co* (1922) 27 Com Cas 296, he is entitled to have that statement of position, as it is called – the statement of expectation as to when the ship arrives or is likely to arrive – made honestly and made on reasonable grounds.

Thus, the result is that, in a perfectly simple case, where at the time when the charterparty was entered into the ship was free to proceed to the port of loading, her obligation is simply to set out in good time so that under normal circumstances she will arrive at the port of loading at or about the day which she has given as being the one when she expects to be ready to load. If something occurs on the voyage to the port of loading which delays the ship without her fault, then the owners under this type of clause are not liable.

The complication arises if the charterparty is made a little ahead so that it is not anticipated by either party that the ship is likely to sail at once for her port of loading. If she is going to have some intervening period, how can she dispose of it?

It was quite clearly settled in *Monroe Brothers Ltd v Ryan* [1935] 2 KB 28 – and I have in mind the point in Greer LJ's judgment (at p 37) where he deals with this particular matter – that the charterers have no right in such circumstances to expect the ship to keep herself free and unoccupied. If the shipowners wish to charter the ship by means of an intervening charterparty, or otherwise to employ her, they are entitled to do so. But if the new engagement into which she enters prevents her from fulfilling her obligations under the next voyage, they take the risk that they will be liable in damages for that. In other words, they take the risk … of clashing engagements.

But what then happens, the shipowner having entered into the intervening charter, if the intervening charter interferes with the performance of the second voyage. The simplest case, and one that was settled as long ago as 1907, is the case in which the shipowner, having entered into a charterparty, then deliberately enters into an earlier charterparty which he knows is bound to make him late for the following voyage. In those circumstances there is no need, really, to invoke any principle of difficulty. Manifestly in such circumstances the shipowner who has put it out of his power to perform the engagement which he has entered into is liable in damages. That was so decided in *Thomas Nelson & Sons v Dundee East Coast Shipping Co Ltd* [1907] Sess Cas 927.

The next stage, so to speak, is reached when the shipowner enters into a charter which he honestly anticipates, and with reasonable grounds, will be completed in time to fulfil her earlier obligations, and then, through some circumstances for which he is not responsible, he is delayed on the earlier voyage. That situation was considered by the Court of Appeal in this country in the case of *Monroe Brothers Ltd v Ryan*, above, to which I have already referred. There it was held that the shipowner must nevertheless pay damages.

Then the next stage is reached when the shipowner does not enter into an intervening charter, but is in this position, that when he makes his charter with the charterers who are concerned in the case, he is already under charter to another charterer, and, again, making an honest statement of expectation on reasonable grounds, some delay occurs there for which he is not responsible, with the result that he is late with the second charter. That situation was considered in *Louis Dreyfus & Co v Lauro* (1938) 60 LIL Rep 94.

The present case introduces yet another new feature. Here when the shipowner made his engagement with the plaintiffs as charterers on August 6, 1953, he had already made an earlier engagement, so that in that respect the situation was comparable to that in *Louis Dreyfus & Co v Lauro* above, but he not merely disclosed the circumstance of the earlier engagement to the charterer, but he set out his estimate with regard to them in full in the charterparty. The substantial question, therefore, which has arisen in this case is whether those words in the charterparty affect the position in such a way as to enable me to distinguish it from *Monroe Brothers Ltd v Ryan* …

It is clear that there are two obligations into which the shipowner enters. He enters into the obligation of making an honest and reasonable statement about his position. That he discharged that is not questioned here. But he also entered into an obligation, which is expressed in the printed words of the charter … that the ship 'shall with all convenient speed sail and proceed to Fort Churchill'. It is for the breach of that obligation that the ship is being sued in this case, as it was sued in the case of *Monroe Brothers Ltd v Ryan,* above; and the effect of that obligation, it is submitted, combined with the statement of readiness which is made earlier on in the charter, is to impose upon the ship an absolute duty with which … the ship has not complied. I think the best way of framing the duty … is to take it as it was framed by Branson J in *Louis Dreyfus & Co v Lauro* … :

> In view of the combination of the expected date and of the implied term that the ship will use all convenient speed to get to her port of loading, the obligation is, as was well put by Mr

> Mocatta, that she shall start from wherever she may happen to be, at a date when, by proceeding with reasonable dispatch, she will arrive at the port of loading by the expected date.
>
> . . . Under the principle in *Monroe Brothers Ltd v Ryan* the ship is excused if she starts out in good time but something happens on the way to the port of loading. But she is not excused if anything happens before that time which prevents her from starting out upon the expected date …
>
> The question therefore arises: Is there anything in the typed words which demands, or enables, me to alter that construction?
>
> . . . if a shipowner wants to make the beginning of one voyage contingent upon the conclusion of the one before, he must say so in clear terms. There is clearly a number of things that would have to be worked out in order that such an arrangement should be made as would be fair to both sides. It may be that the shipowner had it in mind in this case that that was what he wanted. But, if he did have that in mind, he has not put it into such language as would make it plain to any reasonable charterer that the charterer was being invited to accept the risks of delay under an earlier charterparty in which that charterer was not concerned. To pass those risks on to a person who was not a party to that charter requires, in my judgment, if not express language, at least much clearer language than that which has been adopted in the present case . . .

Notes

1 It is a question of construction whether an exclusion clause in a charterparty applies to events occurring before the loading voyage begins. Exclusion clauses do not normally apply before the vessel has begun 'the chartered service'; but chartered service can begin before loading commences: *Barker v McAndrew* (1868) 18 CBNS 759*; Monroe v Ryan* [1935] 2 KB 28*; The Super Servant Two* [1990] 1 Lloyd's Rep 1, CA, p 6.

2 A statement of estimated time of arrival is treated in the same way as a statement of expected readiness to load: *The Myrtos* [1984] 2 Lloyd's Rep 449.

3 The approach adopted in *The North Anglia* was approved by the Court of Appeal in *The Baleares* [1993] 1 Lloyd's Rep 215 where it was held that a reasonable despatch obligation does not remain inoperative until a chartered vessel completes discharge under a preceding fixture and the charterer is not obliged to wait until the vessel leaves the last discharge point before treating the owners as being in breach.

3.5 Cancellation clauses

A good deal of learning has grown up around these clauses. A shipowner who enters into a charter containing a cancellation clause does not necessarily promise that the ship will arrive by the agreed date. English courts have typically taken the view that a cancelling option depends on non-arrival of the ship, not on a breach of contract by the shipowner.

Marbienes Compania Naviera SA v Ferrostaal AG, The Democritos **[1976] 2 Lloyd's Rep 149, CA**

Facts

The *Democritos* was time chartered on the New York Produce Exchange (NYPE) form with a cancelling date of 20 December 1969. The vessel arrived at Durban on 16 December 1969. Her 'tween deck in No 2 hold was found to be collapsed. Repairs would have taken some days so that she might not have been ready by the cancelling date. The master gave a written guarantee that the vessel could load the cargo and loading began.

Held

Lord Denning MR: ... It is said by the charterers that the owners were under an absolute obligation to deliver the vessel at Durban by the cancelling date, 20 December 1969 – and this is the point – they were bound to deliver her by that date in a fit condition as required by the charter; and that the owners were in breach of that condition because the vessel was not in a fit state then. The 'tween decks were broken. The charterers admit that they may have waived any right to reject the vessel, but nevertheless they claim that they had a right to sue for damages for the vessel being in an unfit condition. The damages would be for loss incurred by her not being able to carry a full cargo, and also by the time occupied later at Seattle in doing the repairs.

Now there is nothing in this charter which binds the owners positively to deliver by 20 December 1969. The only clue to any time of delivery is to be found in the cancelling clause. There is, of course, an implied term that the owners will use reasonable diligence to deliver the ship in a fit condition by 20 December 1969. But that is not an absolute obligation. So long as they have used reasonable diligence, they are not in breach. In this case it is found that reasonable diligence was used, so there is no breach by them of that implied obligation.

Next the cancelling clause. Its effect is that, although there may have been no breach by the owners nevertheless the charterers are, for their own protection, entitled to cancel if the vessel is not delivered in a proper condition by the cancelling date. That is the sole effect.

On this point the Judge referred to the English cases, particularly *Smith v Dart & Son* (1884) 14 QBD 105 at p 110, when AL Smith J said:

> The shipowner does not contract to get there by a certain day, but says: 'If I do not get there you may cancel.'

But we have had the benefit of one or two others. The first is from Scotland, *Nelson & Sons v The Dundee East Coast Shipping Co Ltd* (1907) 44 SLR 661. It was a voyage charter, but Lord M'Laren said this:

> If it can be shown that the shipowners had used their best endeavours and that the delay was due to unavoidable accident or perils of the sea, I should have been of opinion that no damages were due. The contract could be cancelled but damages would not be due, for each party would then be within his rights.

...These authorities show that as long as the owner uses reasonable diligence, he is not in breach, but the charterer is entitled to cancel if the vessel is not delivered by the cancelling date ...

The right to exercise an option to cancel depends on non-arrival. But does a ship 'arrive' if she is unseaworthy?

Cheikh Boutros Selim El-Khoury v Ceylon Shipping Lines Ltd, The Madeleine **[1967] 2 Lloyd's Rep 224**

Facts

The *Madeleine* was fixed on a three-month time charter for world trading. The charterers purported to cancel on the grounds that on the agreed cancellation date the vessel was not in a position in which she could properly be delivered because she did not then possess either a 'deratisation certificate' or a 'deratisation exemption certificate'. Under the law of India, without a certificate she could not sail from Calcutta, the port of delivery, to any port outside India. On the facts, it would have taken two days to obtain the necessary certificate. The charterers purported to cancel at 8.00 am on the cancellation date and again at 8.48 pm on the same day. The shipowners argued that the charterers had no right to cancel in the circumstances or at the times they purported to do so.

Held

Roskill J: . . . Plainly it is for the charterers to establish the right which they have sought to exercise. One begins by asking what right it is which clause 22 confers upon the charterers. That must be a question of the true construction of that clause. I therefore turn back to its language:

> Should the Vessel not be delivered by the 2nd day of May 1957 the Charterers to have the option of cancelling.

It is well established that clauses in charterparties cannot be construed in isolation from each other. A charterparty like any other contract must be construed sensibly and in its entirety. Where one has a series of clauses in a standard form which has been in use for a great many years, and which has been interpreted many times by the courts and by arbitrators, the court must look at the provisions as a whole. It is plain, when one looks at clause 22, that it is referring to the non-performance by the owners of an obligation which they are required elsewhere in the charterparty to perform because the clause starts: 'Should the Vessel not be delivered . . .'

Plainly, therefore, that provision has reference to an obligation to deliver and one then turns to see where that obligation is imposed. One turns back to clause 1 in the first instance and one finds there that the vessel is to be delivered and placed at the disposal of the charterers:

> . . . between 9 am and 6 pm, or between 9 am and 2 pm if on Saturday, at CALCUTTA in such available berth where she can safely lie always afloat, she being in every way fitted for ordinary cargo service.

. . . One has to see what is the obligation which clause 22 postulates that the owners will not perform. The obligation which clause 22 postulates that the owners will not perform is the owners' obligation under clause 1. That obligation is to deliver the vessel not before April 18, between 9 am and 6 pm on a weekday, or between 9 am and 2 pm on a Saturday (and not, I should add, on Sunday or a legal holiday unless the charterers agree then to take her over) in an 'available berth where she can safely lie always afloat, she being in every way fitted for ordinary cargo service'.

. . . plainly, as a matter of construction, clause 22 is looking back to clause 1 and it is the owners' failure to deliver in accordance with the provisions of clause 1 which gives the charterers the right to cancel under clause 22.

It is important to emphasise that that which the charterers are claiming to exercise is an express contractual right given by clause 22. Their right to cancel does not in any way depend upon any breach of the charterparty by the owners. Entitlement to cancel under clause 22 depends not on any breach by the owners but upon whether the owners have timeously complied with their obligations under clause 1. If they have, there is no right to cancel. If they have not, there is a right to cancel . . .

As I have already said, in my judgment, clause 22 cannot be divorced from clause 1. Clause 1 requires the owners to deliver in a condition in which the vessel was in every way fitted for ordinary cargo service . . . There was here an express warranty of seaworthiness and unless the ship was timeously delivered in a seaworthy condition, including the necessary certificate from the port health authority, the charterers had the right to cancel. That right, in my judgment, they possessed, and I think that the umpire was wrong in holding that they did not possess it.

That brings me to the second point in the case, namely, whether that right was exercised timeously. I have already dealt with the question of time. In my judgment, the owners cannot say they had the whole of May 10 in which to deliver to avoid cancellation. They had to deliver, in my judgment, not later than 6 pm on May 10 if they were to avoid the risk of the charterparty being cancelled by the charterers . . .

[But] both as a matter of construction of the charterparty and as a matter of authority, it is clear law that there is no contractual right to rescind a charterparty under the cancelling clause unless and until the date specified in that clause has been reached. In other words . . . there is no

anticipatory right to cancel under the clause. I respectfully agree with the passage in the 17th edn of *Scrutton* as correctly stating the law. Of course, the fact that there is no contractual right to cancel in advance does not prevent a charterer seeking to claim the right to rescind in advance of the cancelling date, as the learned editors of *Scrutton* put it 'at common law' . . . Where the charterer seeks to say that the contract has been frustrated or that there has been an anticipatory breach which entitles him to rescind, then he has such rights as are given to him at common law.

Note

Roskill J here followed a long-established approach in holding that the charterer was not entitled to exercise a cancelling option before the relevant time had arrived. A unilateral attempt to do so may amount to an anticipatory breach and repudiation of the charter, as it did in the next case.

Fercometal SARL v Mediterranean Shipping Co SA, The Simona
[1989] 1 AC 788

Facts

The *Simona* was chartered to carry a part cargo of steel coils from Durban to Bilbao. The charterers were entitled to cancel the charterparty if the vessel was not ready to load on or before 9 July. On 2 July, the owners requested an extension of the cancellation date. The charterers purported to cancel the contract forthwith and fixed alternative tonnage. The owners did not accept the charterers' repudiation. When the vessel arrived in Durban on 8 July the owners tendered notice of readiness although they were not in fact ready to load. The charterers rejected that notice. On 12 July, when the vessel was still not ready to load, the charterers sent a further notice of cancellation. The owners claimed dead freight. Lords Bridge, Templeman, Oliver and Jauncey agreed with Lord Ackner.

Held

Lord Ackner: My Lords, this appeal raises one short question: did the respondents (the charterers), in the circumstances . . . lose their right to cancel the charterparty which they had entered into with the appellants (the owners)?

. . . It is important at this stage to emphasise that the charterers' right to cancel given by cl 10 was an independent option, only exercisable if the vessel was not ready to load on or before 9 July 1982. Clause 10 did not impose any contractual obligation on the owners to commence loading by the cancellation date.

. . . It is common ground that the action of the charterers in giving the notice purporting to cancel the contract was premature. It constituted an anticipatory breach and repudiation of the charterparty, because the right of cancellation could not be validly exercised until the arrival of the cancellation date, some seven days hence. It is equally common ground that this repudiation was not accepted by the owners . . .

When one party wrongly refuses to perform obligations, this will not automatically bring the contract to an end. The innocent party has an option. He may either accept the wrongful repudiation as determining the contract and sue for damages or he may ignore or reject the attempt to determine the contract and affirm its continued existence. Cockburn CJ in *Frost v Knight* (1872) LR 7 Ex Ch 111 at 112–13 put the matter thus:

> The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v De la Tour* (1853) 2 E & B 678 and *The Danube and Black Sea Co v Xenos* (1863) 13 CBNS 825 on the one hand, and *Avery v Bowden* (1855) 5 E & B 714, *Reid v Hoskins* (1856) 6 E & B 953 and *Barwick v Buba* (1857) 2 CBNS 563 on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and

> await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all the obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.

. . . The way in which a 'supervening circumstance' may turn out to be to the advantage of the party in default, thus relieving him from liability, is illustrated by *Avery v Bowden*, where the outbreak of the Crimean War between England and Russia made performance of the charterparty no longer legally possible. The defendant, who prior to the outbreak of the war had in breach of contract refused to load, was provided with a good defence to an action for breach of contract, since his repudiation had been ignored. As pointed out by Parker LJ in his judgment ([1987] 2 Lloyd's Rep 236 at 240), the law as stated in *Frost v Knight* and *Johnstone v Milling* has been reasserted in many cases since, and in particular in *Heyman v Darwins Ltd* [1942] AC 356 at 361, where Viscount Simon LC said:

> The first head of claim in the writ appears to be advanced on the view that an agreement is automatically terminated if one party 'repudiates' it. That is not so. As Scrutton LJ said in *Golding v London & Edinburgh Insurance Co Ltd* ((1932) 43 LIL R 487 at 488): 'I have never been able to understand what effect the repudiation by one party has unless the other accepts it.' If one party so acts or so expresses himself, as to show that he does not mean to accept and discharge the obligations of a contract any further, the other party has an option as to the attitude he may take up. He may, notwithstanding the so-called repudiation, insist on holding his co-contractor to the bargain and continue to tender due performance on his part. In that event, the co-contractor has the opportunity of withdrawing from his false position, and, even if he does not, may escape ultimate liability because of some supervening event not due to his own fault which excuses or puts an end to further performance.

If an unaccepted repudiation has no legal effect ('a thing writ in water and of no value to anybody': *per* Asquith LJ in *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417 at 421), how can the unaccepted acts of repudiation by the charterers in this case provide the owners with any cause of action? It was accepted in the Court of Appeal by counsel then appearing for the owners that it was an inevitable inference from the findings made by the arbitrators that the *Simona* was not ready to load the charterers' steel at any time prior to the charterers' notice of cancellation on 12 July. Counsel who has appeared before your Lordships for the owners has not been able to depart from this concession. Applying the well established principles set out above, the anticipatory breaches by the charterers not having been accepted by the owners as terminating the contract, the charterparty survived intact with the right of cancellation unaffected. The vessel was not ready to load by close of business on the cancelling date, *viz*, 9 July, and the charterers were therefore entitled to and did give what on the face of it was an effective notice of cancellation . . .

Towards the conclusion of his able address, counsel for the owners sought to raise what was essentially a new point, argued before neither the arbitrators, Leggatt J nor the Court of Appeal. He submitted that the charterers' conduct had induced or caused the owners to abstain from having the ship ready prior to the cancellation date. Of course, it is always open to A, who has refused to accept B's repudiation of the contract, and thereby kept the contract alive, to contend that, in relation to a particular right or obligation under the contract, B is estopped from contending that he, B, is entitled to exercise that right or that he, A, has remained bound by that obligation. If B represents to A that he no longer intends to exercise that right or requires

> that obligation to be fulfilled by A and A acts on that representation, then clearly B cannot be heard thereafter to say that he is entitled to exercise that right or that A is in breach of contract by not fulfilling that obligation. If, in relation to this option to cancel, the owners had been able to establish that the charterers had represented that they no longer required the vessel to arrive on time because they had already fixed [another vessel] and, in reliance on that representation, the owners had given notice of readiness only after the cancellation date, then the charterers would have been estopped from contending they were entitled to cancel the charterparty. There is, however, no finding of any such representation, let alone that the owners were induced thereby not to make the vessel ready to load by 9 July. On the contrary, the owners on 5 July on two occasions asserted that the vessel would start loading on 8 July and on 8 July purported to tender notice of readiness … The non-readiness of the vessel by the cancelling date was in no way induced by the charterers' conduct. It was the result of the owners' decision to load other cargo first.
>
> In short, in affirming the continued existence of the contract, the owners could only avoid the operation of the cancellation clause by tendering the vessel ready to load on time (which they failed to do), or by establishing (which they could not) that their failure was the result of the charterers' conduct in representing that they had given up their option, which representation the owners had acted on by not presenting the vessel on time. I would therefore dismiss the appeal with costs.

Notes

1 The *Niizuru* was time chartered on terms which fixed the lay/can spread as 20 February/28 April 1992. It was also agreed that the shipowners would 'narrow lay/can to a 15 day spread 25 days prior to the narrowed lay/can'. It was held that compliance with the lay/can narrowing provision was a condition precedent to the delivery of the vessel: *Hyundai Merchant Marine Co Ltd v Karander Maritime Inc, The Niizuru* [1996] 2 Lloyd's Rep 66.

2 In contrast, in *Universal Bulk Carriers Ltd v Andre et Cie* [2001] EWCA Civ 588; [2001] 2 Lloyd's Rep 65, the lay/can was 'first half of December' and was to be narrowed by the charterers (not the owners) 32 days in advance. The charterers failed to give notice to narrow and the owners purported to terminate. It was held that the narrowing obligation was not a condition precedent to performance of the contract by the owners and was not a condition of the contract, so that a failure to give notice did not entitle the owners to treat the contract as at an end. The *Niizuru* was distinguished on the grounds that in the present case narrowing the lay/can spread was not important to the owners and any disadvantage to them could be compensated in damages.

4 SPEED AND FUEL CONSUMPTION

Modern forms of time charter often contain detailed provisions relating to the speed and fuel consumption of the vessel. These terms are designed to compensate one or other party if the vessel's performance falls below or exceeds stated levels. Clauses may deal in detail with the way in which compliance with agreements about speed and fuel consumption is to be calculated. Promises as to average speed may define the locations and the wind, sea and navigation conditions in which measurements are to be made, perhaps distinguishing between laden and ballast voyages. Forms which exclude, for example, poor weather conditions when calculating a vessel's average performance on a voyage, may thereafter apply the average figure to the vessel's total mileage, making adjustments to take account of actual conditions.

Cosmos Bulk Transport Inc v China National Foreign Trade, The Apollonius [1978] 1 Lloyd's Rep 53

Facts

By a time charter dated 28 August 1974, the *Apollonius* was described as:

> . . . when fully loaded, capable of steaming about 14.5 knots in good weather and smooth water on a consumption of about 38 tons of fuel oil [of a certain specification].

The ship was delivered on 1 November 1974 and ordered to load steel at Fukiyama for delivery at Ensenada, Argentina. She made the voyage from Japan to Argentina at an average speed of 10.61 knots and was redelivered to her owners. Thereafter, following cleaning of her hull in dry dock, her average speed returned to a normal 14.5 knots. An arbitrator found that the cause of the speed reduction was that the hull of the vessel had become encrusted with molluscs during a stay at Whampoa, Canton, between the date of the charter and the date on which the chartered service had commenced. The charterers made a claim for the loss of 5.821 days, made up of 4.821 days due to fouling of the hull and 24 hours due to unnecessary reduction of engine speed. The questions of law for decision by the court were: (a) were charterers entitled to damages for the loss of 4.821 days due to fouling; (b) were charterers entitled to damages for the loss of one day because of failure to prosecute the voyage with utmost diligence?

Held

Mocatta J: . . . I turn now to the first and most important point of all arising in this case, namely whether the speed warranty in the preamble of the charterparty applies only at the date of the charterparty as is contended by the owners or also or in any case applies at the date of the delivery of the vessel under the charter. The strength of the owners' case on this matter rests on the decision of Atkinson J in *Lorentzen v White Shipping Co Ltd* (1942) 74 LlL Rep 161 which contains an *obiter dictum* favourable to the owners' argument here . . .

The first thing to notice about this statement of Atkinson J is that it was *obiter*, since, as he said, he had to assume that the description in relation to the speed warranty was not true at the date of the charterparty. He was not dealing with a case where there was a breach of a warranty at the date of delivery of a ship under a time charterparty. Secondly, in my judgment little is to be gained from the reference made by Atkinson J to the statement that the classification of a ship as stated in a charterparty is not a condition. In my judgment, the contrary is clearly the case . . .

In addition to this mistake, as I consider it to be, in the reference by Atkinson J to the cases on a vessel's class, another criticism of his reasoning, insofar as his opinion in relation to the speed warranty depended on analogies with the cases on a vessel's class, is that the courts in deciding that a statement as to a vessel's class only applies as at the date that the charterparty is entered into based themselves on very special reasons peculiar to classification . . . I cannot think that analogies drawn with . . . somewhat ancient cases on classification are of much assistance today in the present problem.

. . . Counsel for the owners stressed that the *dictum* of Atkinson J on this point had stood unchallenged since 1942 and that no doubt a number of cases in arbitration had been decided on the basis that the *dictum* was good law and, in all probability, an even greater number of cases had been settled on this basis. I do not feel that this argument is of persuasive weight in the circumstances of this case, since it must be relatively rare for there to be a substantial lapse of time between entering into a time charter of an existing vessel and her delivery thereunder, and, in addition, in most cases . . . it would be immaterial which date was relevant for the decision whether the warranty had or had not been broken.

Counsel for the owners sought to derive support for the owners' case from the principle *noscitur a sociis*, in that in the preamble to this charterparty, in addition to the statement as to the vessel's

class, which has been decided to apply only as at that date, there are other statements descriptive of the vessel which are similarly limited in time. It is true that there is a reference inserted especially in the printed form of this preamble providing for the main holds to be clean and available for dry cargo on delivery. This can be argued to be an unique express reference to the date of delivery and on the basis of this an argument founded on the maxim *expressio unius exclusio alterius* might be mounted. I do not, however, think that there is much weight in this submission. It is noticeable that the various items of description contained in the preamble are not all of the same category . . .

The provisions in relation to the ship's capacity in the preamble, which no doubt did apply at the date of the charter, would in my judgment also be applicable at the date of her delivery and it is not impossible that her owners might commit a breach of this term of the charter, if, for example, they were, before delivery, to insert an additional bulkhead or make some other alteration to the structure of the ship which limited the cubic feet grain capacity stated in the preamble. Therefore, I do not think that the associates, if I may so describe them, of the speed warranty in the preamble to this charter are all of one class in respect of the date at which they are applicable. The owners cannot, in my judgment, therefore derive any succour from the well known maxim relied on by counsel . . .

On the other hand, it seems to be clear that the whole purpose of the description of the vessel containing a speed warranty is that when the vessel enters on her service, she will be capable of the speed in question, subject of course to any protection which her owners may obtain if there has been some casualty between the date of the charter and the date of delivery affecting her speed which, under an exceptions clause, protects them from liability in relation to a failure to comply with the warranty. From the charterer's point of view the speed warranty is clearly of very great importance in relation to his calculations as to the rate of hire it will be possible for him to pay, a matter on which his decision would be affected by his calculations as to the time which the ship would take to complete the one trip voyage for which this time charter engaged the *Apollonius*. From the business point of view, I think it is clear that commercial considerations require this description as to the vessel's speed to be applicable as at the date of her delivery whether or not it is applicable at the date of the charter. It may well be that at the date of the charter the vessel will have been completing a previous period of service under a time charter or a very long voyage under a voyage charter including stops in tropical ports, with the result that her bottom has become fouled and her speed thereby affected. In order to guard against such a contingency preventing her from attaining the described speed under the present time charter, the latter not unnaturally contained in cl 50 an option given to the owners of dry-docking her before delivery. From the charterer's point of view, the vital date therefore for the purposes of the description of the vessel, with the one exception in relation to her class to which special considerations and a long line of somewhat ancient decided cases apply, is the date of her delivery . . .

In my judgment there are overwhelming commercial considerations favouring the charterers' argument that the speed warranty, whenever else it may apply, certainly applies at the date of the delivery of a vessel, subject only to the owners being protected from the consequences of any breach of such warranty by any exception clause that may be applicable. I will deal with this last matter shortly. But for these reasons I decline to follow the *dictum* of Atkinson J on this subject and, but for the question as to the protection afforded by cl 13 ['Responsibility and Exemption'], I would answer the first question of law stated for the decision of the court in the affirmative on the basis of breach of the speed warranty . . .

(Mocatta J went on to conclude that the shipowners were protected from the second of the charterers' claims by an exclusion clause and, whether or not they were protected by the same clause against the first claim, on the special facts found by the arbitrator, the vessel was in any event off hire for the relevant period.)

CHAPTER 12

CARGO AND LOADING

This chapter collects together decisions that relate to cargo and to loading. The first three sections deal with aspects of the duty to provide a cargo. The next section then deals with who is to carry out loading, who pays for it and who is liable if things go wrong. The last section of the chapter deals with liability if the cargo itself causes loss, damage or delay.

1 DUTY TO PROVIDE A CARGO

A promise by a charter to provide a cargo is important, among other things, as the basis of the shipowner's right to earn freight. Words in a charter that excuse a delay in loading will not normally be read as applying to the separate prior duty to tender a cargo.

Grant v Coverdale (1884) 9 App Cas 470

Facts

The plaintiff's vessel *Mennythorpe* was chartered to load a cargo of iron at East Bute Dock, Cardiff. The charterers agreed to load in a fixed time subject to frosts or unavoidable accidents. The charterers had intended that part of the cargo should be taken to the ship from the warehouse by canal. They were unable to load within the fixed time because the canal was frozen. A referee found that while the canal was frozen, the iron could not be taken to the dock by any reasonable means.

Held

> **Earl of Selborne LC:** … it is not denied, and cannot be denied, that unless those words of exception according to their proper construction take this case which has happened out of the demurrage clause, the mere fact of frost or any other thing having impeded the performance of that which the charterer and not the shipowner was bound to perform will not absolve him from the consequences of keeping the ship too long. That was decided under circumstances very similar in many respects, in the case of *Kearon v Pearson* (1861) 7 H & N 386, and decided expressly on the ground, as was pointed out I think by all the learned judges … that there was no contract as to the particular place from which the cargo was to come, no contract as to the particular manner in which it was to be supplied, or how it was to be brought to the place of loading, and that therefore it could not be supposed that the parties were contracting about any such thing.
>
> This exception in the contract being limited to 'accidents preventing the loading', the only question is, what is the meaning of 'loading'? and whether this particular frost did, in fact, prevent the loading. There are two things to be done – the operation of loading is the particular operation in which both parties have to concur. Taken literally it is spoken of in the early part of this charterparty as the thing which the shipowner is to do. The ship is to 'proceed to Cardiff East Bute Dock', 'and there load the cargo'. No doubt, for the purpose of loading, the charterer must also do his part; he must have the cargo there to be loaded, and tender it to be put on board the ship in the usual and proper manner. Therefore the business of both parties meets and concurs in that operation of loading. When the charterer has tendered the cargo, and when the operation has proceeded to the point at which the shipowner is to take charge of it, everything after that is the shipowner's business, and everything before the commencement of

the operation of loading, those things which are so essential to the operation of loading that they are conditions *sine quibus non* of that operation – everything before that is the charterer's part only. It would appear to me to be unreasonable to suppose, unless the words make it perfectly clear, that the shipowner has contracted that his ship may be detained for an unlimited time on account of impediments, whatever their nature may be, to those things with which he has nothing whatever to do, which precede altogether the whole operation of loading, which are no part whatever of it, but which belong to that which is exclusively the charterer's business. He has to contract for the cargo, he has to buy the cargo, he has to convey the cargo to the place of loading and have it ready there to be put on board; and it is only when he has done those things that the duty and the obligation of the shipowner in respect of the loading arises. These words in the exception are as large as any words can be; they mention 'strikes, frosts, floods, and all other unavoidable accidents preventing the loading'. If therefore you are to carry back the loading to anything necessary to be done by the charterer in order to have the cargo ready to be loaded, no human being can tell where you are to stop. The bankruptcy, for instance, of the person with whom he has contracted for the supply of the iron, or disputes about the fulfilment of the contract, the refusal at a critical point of time to supply the iron, the neglect of the persons who ought to put it on board lighters to come down the canal for any distance or to be brought by sea, or to put it on the railway or bring it in any other way in which it is to be brought; all those things are of course practical impediments to the charterer having the cargo ready to be shipped at the proper place and time; but is it reasonable that the shipowner should be held to be answerable for all those things, and is that within the natural meaning of the word 'loading'? Are those things any part of the operation of loading? Nothing, I suppose, is better established in law with regard to mercantile cases of this kind than the maxim, '*Causa proxima, non remota, spectatur*'; and it appears to me that the fact that this particular wharf was very near the Cardiff East Bute Dock can make no difference in principle if it was not the place of loading. If the cargo had to be brought from this wharf on the Glamorganshire Canal, however near it was, if it had to be brought over a passage which in point of fact was impeded, and over which it was not brought, to the place of loading, to say that the wharf on the Glamorganshire Canal was, upon a fair construction of the words, within the place of loading, appears to me to be no more tenable than if the same thing had been said of a place a mile higher up the canal where, according to the actual contract, the persons were to supply the iron, and where the owner of the iron might have been found.

That really is enough to dispose of the whole argument. The case of *Hudson v Ede* (1868) LR 3 QB 412 was referred to. I understand that case as proceeding upon the same principles, but as containing an admission of this distinction, that where there is, in a proved state of facts, an inevitable necessity that something should be done in order that there should be a loading at the place agreed upon, as for instance that the goods should be brought down part of a river from the only place from which they can be brought, even though that place is a considerable distance off, yet it being practically, according to known mercantile usage, the only place from which they can be brought to be loaded, the parties must be held to have contemplated that the goods should be loaded from that place in the usual manner unless there was an unavoidable impediment. And if the facts had been so about this particular wharf on the Glamorganshire Canal, if that had been the only possible place from which goods could be brought to be loaded at the East Bute Dock, that authority might have applied. But not only was that not the case, but in point of fact cargo not only could be, but actually had been brought up by carts to the East Bute Dock and put on board ship; and I infer from the finding of the referee that the whole might have been done by carting, though I agree that it would have been at an expense which was preposterous and unreasonable if you were to look at the interest of the charterer; but if the charterer has engaged that he will do a certain thing, he must of course pay the damage which arises from his not doing it, whatever the cause of his not doing it may be, whether it be his not being willing to incur an unreasonable expense, or whether it be any other cause.

(Lords Watson, Bramwell and Fitzgerald delivered judgments to the same effect.)

2 A FULL AND COMPLETE CARGO

A promise to load a full and complete cargo creates a duty to fill the ship, not merely to provide a cargo equal to the capacity of the ship as stated in the charter.

Hunter v Fry (1819) 2 B & A 421, KB

Facts

The plaintiff chartered *Hunter*, which was described in the charterparty as 'of the burden of 261 tons or thereabouts', to the defendants for a circular voyage from London to Madeira, then from Madeira to the West Indies, then back to London with 'a full and complete cargo' of coffee and logwood. The defendants failed to load as great a cargo as the vessel could have carried.

Held

> **Abbott CJ:** I am of opinion, that the mention of a ship's burden in the description of a ship in the charterparty, in the manner it is here mentioned, is an immaterial circumstance; although it may be made material by the allegation of fraud or other matter. Here, the freighter has not covenanted to load a cargo equivalent to the burden mentioned in the charterparty: he has covenanted to load and put on board a full and complete cargo, and to pay so much per ton for every ton loaded on board. If the covenant had been to pay a gross sum for the voyage, the freighter (upon the arrival of the ship at the foreign port) might have insisted that the captain should take on board as much as the ship would safely contain; and the owner who had covenanted to take a full and complete cargo, would not be justified in saying, that he would take no more than the register tonnage of the ship. It is, indeed, quite impossible that the burden of the ship (as described in the charterparty) should, in every case, be the measure of the precise number of tons which the ship is capable of carrying. That must depend upon the specific gravity of the particular goods; for a ship of given dimensions would be able to carry a larger number of tons, of a given species of goods, that were of a great specific gravity, than she would of another of a less specific gravity, and the freighter would therefore pay freight in proportion to the specific gravity of the goods. Upon the whole, I am of opinion, that the owner was bound to take on board such a number of tons of goods as the ship was capable of containing without injury; and, therefore, that the plaintiff is entitled to have a verdict for £918, which is the difference between the sum actually paid for freight, and that which would have been payable if the shipper had loaded on board a full and complete cargo.

(Bayley, Holroyd and Best JJ delivered judgments to the same effect.)

3 ALTERNATIVE CARGO OPTIONS

Charters often confer an option on the charterer to select the precise cargo to be loaded. Alternative cargo options can give rise to difficult problems of interpretation where one or more of the prescribed type of cargo is not available or cannot be loaded. In the next case, *Reardon Smith v Ministry of Agriculture,* the charter's preferred cargo was affected by a strike. The case is also the leading authority on computing laytime when the phrase 'weather working days' is used as the measure of the time allowance: for this aspect of the decision, see Chapter 13, above.

Reardon Smith v Ministry of Agriculture [1963] AC 691

Facts

The *Queen City* was chartered on terms that the vessel:

> shall . . . receive on board . . . a full and complete cargo . . . of wheat in bulk . . . and/or barley in bulk, and/or flour in sacks as below which the parties of the second part [*viz*, the charterers] bind themselves shall be shipped . . .
>
> *Charterer has the option of loading up to one-third cargo of barley in bulk . . . Charterer has the option of loading up to one-third cargo of flour in sacks* . . . [The words were inserted in the printed form in type.]

The vessel was ordered to Vancouver. Notice of readiness to load was given on 18 February 1953. An elevator strike had begun on the night of 16 February and made it impossible for her to load a full and complete cargo of wheat. The charterers did not exercise their option to load part cargoes of barley or flour. The strike having ended on 7 May, the ship began loading on that day and completed a full cargo by 12 May.

Held

> **Viscount Radcliffe:** . . . Having regard to what has happened and to the form of the exceptions clause, it is at first sight a little difficult, I think, to see how the shipowners can be justified in their claim to be paid demurrage for 75 days as from February 26, on which date, they say, the lay days expired, since it would seem clear that throughout the period of delay the wheat cargo was held up by the strike which is itself an excepted cause.
>
> The owners meet this, in effect, by saying that the charterers have no right to treat their obligation under this charterparty as being simply one to provide a cargo of wheat in bulk, failing an exercise of their option to ship part alternative cargoes of barley or flour. On the contrary, they say, the obligation is essentially an obligation to provide a full and complete cargo of wheat, barley or flour (up to the permitted proportions) as the charterers may select and the mere fact that one of these possible constituents, wheat, is the subject of delay and so within the exceptions clause does not excuse the charterers from their overriding duty to find and ship a full and complete cargo made up of such proportions of these various commodities as the prevailing conditions at Vancouver made it possible to load during the period of the strike.
>
> . . . But in my view . . . the shipowners' interpretation of the basic obligation of the charterparty is misconceived and the charterers' real promise in the opening clause amounts to nothing else than that of providing a full cargo of wheat, unless they should affirmatively decide to vary the make-up of the cargo by substituting barley or flour up to the permitted proportions . . .
>
> . . . It has been apparent throughout the case that the shipowners' argument on this particular issue depends upon the proposition that the parties' rights under the charterparty are governed by principles laid down by the Court of Appeal in 1924 in *Brightman & Co v Bunge y Born Limitada Sociedad* [1924] 2 KB 619 to which I will refer as the *Brightman* case. I think that the decision in the *Brightman* case did lay down certain principles, though not so many or so far-reaching as is sometimes supposed, but in my opinion those principles are not applicable to the relationship established by the charterparty which we are now considering. In order to show why that is so I must make some reference to the essential facts of the *Brightman* case.
>
> Like this, it was a dispute between owners and charterers. The terms of the charterparty had bound the charterers to provide:
>
> > a full and complete cargo of wheat and/or maize and/or rye in bags and/or in bulk, which cargo the said charterers bind themselves to ship.
>
> . . . The decision of the court was to the effect that some demurrage was payable but not to the whole extent claimed by the owners. In arriving at this decision the principles accepted by the court which are relevant to this appeal are, in my opinion, as follows:
>
> (1) If a shipper has undertaken to ship a full and complete cargo made up of alternative commodities, as in the terms 'wheat and/or maize and/or rye', his obligation is to have ready at the port of shipment a complete cargo within the range of those alternatives. Consequently the fact that he is prevented from loading one of the possible types of cargo by a cause within

the exceptions clause, even though that is the type that he has himself selected and provided for, is not an answer to a claim for demurrage. To protect him each of the alternatives or all the alternatives would have to be covered by an excepted cause.

(2) Consistently with this view the shipper's selection of one of the named commodities does not convert the primary obligation to ship a full cargo in one form or the other into a simple obligation to ship a full cargo of the commodity selected. In other words, his selection is not like the exercise of an option to name a port. He may change his mind and alter his choice. He 'retains control of his powers until the final ton is put on the ship', said Atkin LJ [1924] 2 KB 637. This may not be a full statement of the nature or consequences of the right of selection, but I have no doubt that it describes the general situation.

(3) If a shipper finds himself stopped by an excepted cause (eg in that case, the government prohibition) from loading or continuing to load the type of cargo that he has provided for and genuinely intended to ship, he may still rely on delay as covered by the exceptions clause to the extent of a reasonable time 'to consider the position and change [his] cargo' as Scrutton LJ said, or to 'deal with the altered conditions' as Bankes LJ said, or, simply, 'to change over' as Atkin LJ said.

As regards this last principle, I must admit that very careful attention to the three judgments of Bankes, Scrutton and Atkin LJJ has left me uncertain as to its origin or its full implications. I think that on the whole his time for adjustment is better attributed to a term derived from the general position of a shipper under such a charterparty, when confronted with such circumstances, than to a right derived from any possible construction of the exceptions clause itself . . .

In my opinion, however, the principle of the *Brightman* case has no application here, because there is here no primary obligation on the charterers to ship a mixed cargo. The primary obligation is to provide a cargo of wheat only, the exceptions clause covers delay in the shipping of wheat, and there is no obligation on the charterers to lose that protection by exercising their option to provide another kind of cargo that is not affected by a cause of delay, even assuming such a cargo to be readily available. Really, that seems to me to contain the whole point of the dispute. There is in this case no duty on the charterers to 'switch' from wheat to barley or flour, because their choice of loading barley or flour is unfettered and is not at any time controlled in their hands by an overriding obligation to put on board by a fixed date a full cargo which must include those commodities, if it cannot consist of wheat alone.

It comes down, then, to a question of construing the opening clause of the charterparty. Under it the vessel is to receive on board 'a full and complete cargo . . . of wheat in bulk . . . and/or barley in bulk and/or flour in sacks'. There are then added the words in typescript 'as below', and this is a qualification which both affects what has gone before and conditions the meaning of what follows, namely, the charterers' undertaking to ship their cargo. The words 'as below' can only refer to the options which are also added in typescript at the foot of the clause, an option to load up to 'one-third cargo of barley in bulk', subject to an increased rate of freight, and an option to load 'up to one-third cargo of flour in bags', also at an increased freight rate. There is no option relating to wheat: wheat is the one commodity not subject to option.

It is said for the shipowners that there is no special significance in the use of the word option in this clause. Charterers who have stipulated for and undertaken to provide mixed or alternative cargoes have an option anyway, since it is they who retain to the end the right of selecting what cargo they are actually to provide; and it is argued that the total effect of the clause is, just as in the *Brightman* case, to leave the charterers under a primary obligation to put on board at the due date a full cargo made up in one or other of the permitted ways.

I do not think that that is the right construction. I cannot agree that, just because even without mentioning an option the charterers would have had a right of choice, the word 'option', when it is expressly mentioned, means no more than this. Wheat, it is to be noted, though linked indifferently with barley and flour as one of the possible cargoes, is, unlike them, not described as the subject of an option. This supports the view that wheat is to be the basic cargo, displaced only if and as the

> charterers so decide; just as the rate of freight for wheat is to be the basic rate of which other rates are expressed as a variation. Indeed, if the barley and flour options are not intended to be true options in the sense that only the positive exercise of the holder's choice can ever give him any responsibility to load or the shipowners any right to call for those commodities as part of a cargo, I cannot see how the parties could have expressed the option provisions in the way that they did. For, if the language is understood as the shipowners argue that it should be, the phrases introduced by the words 'charterer has the option' convey nothing more than a restriction on the right of selection among the commodities previously mentioned by tying the range of selection down to the permitted proportions; and what is clearly introduced as a right beneficial to the charterers would amount merely to a limitation on their existing power of selection. Moreover, even a short delay in the shipping of the cargo they wanted would turn their right of choice into a burden to ship a cargo they might never require. I cannot think that this was the bargain of the parties . . .

(Lords Cohen, Keith, Evershed and Devlin agreed that the shipowners' appeal on this issue should be dismissed.)

4 LOADING

At common law the obligations to load, stow and discharge cargo fall on the shipowner but can be transferred to the charterer by agreement, provided that clear words are used: *Jindal Iron & Steel Co Ltd v Islamic Solidarity Co Jordan Inc* [2003] EWCA Civ 144; [2003] 2 Lloyd's Rep 87. However, it has been said that a term making the shipper responsible for discharge might be implied in the bill of lading in some circumstances: *Tradigrain SA v King Diamond Shipping SA, The Spiros C* [2000] 2 Lloyd's Rep 315. The cases in this area distinguish between paying for, performing and taking responsibility for an activity. There is no presumption that each of these burdens must fall on the same person, so that if the charterer agrees to pay for loading, there is no presumption that he has agreed to carry it out or to be liable if loading causes damage: *Jindal Iron*, above. Two further factors add complexity to disputes about liability for damage caused in the course of loading. First, where the charterer agrees to load, it is clear that the master of the vessel has a legal right and duty to intervene in that process in some circumstances, most obviously to ensure the stability and safety of the vessel. Second, the conduct of the parties – by interfering in the process or by agreeing to a particular stow or by failing to object – may also affect the incidence of liability. Most of the recent reported decisions in this area turn on the precise terms of the charter in question. The central problems, however, are as old as maritime commerce: the Laws of Oleron in the 13th century protected a master who dropped a tun of wine, but only if the ropes had been shown to and accepted by the merchant. The decision in *The Argonaut* provides a review of the issues and the key decisions.

MSC Mediterranean Shipping Co SA v Alianca Bay Shipping Co Ltd, The Argonaut [1985] 2 Lloyd's Rep 216

Facts

The *Argonaut* was trip chartered for a voyage from South Africa to the Mediterranean/Continent/UK. The charter was in the New York Produce Exchange (NYPE) form and provided:

> 8 . . . Charterers are to load, stow and . . . discharge at their own expense under the supervision and responsibility of the Captain.

The vessel was ordered by the charterers to Durban where she loaded *inter alia* granite blocks for discharge at Marina di Carrara (MDC) and at Sete. The vessel was damaged at both Sete and MDC when granite blocks were dropped by stevedores.

Held

Leggatt J: . . . The issue in this appeal is whether, on a proper construction of the charterparty, the owners were responsible for damage to the vessel caused by stevedores employed by the charterers . . . Each of the parties argued before the arbitrator that the other was liable for stevedore damage except where the complainants were guilty of active intervention . . .

In *Blaikie v Stembridge* (1860) 6 CB(NS) 894 it was held that in the absence of custom or agreement to the contrary, it is the duty of the master, on the part of the owner of a ship, to receive and properly stow on board the goods to be carried; and, for any damage to the goods occasioned by negligence by the performance of this duty, the owner is liable to the shipper. In *Sack v Ford*, (1862) 13 CB(NS) 90, the clause in question provided that the cargoes were to be taken on board and discharged by the charterers, the crew of the vessel rendering customary assistance so far as they might be under the orders of the master; and the charterers were to have liberty to employ stevedores and labourers to assist in the loading, stowage and discharge thereof; but such stevedores and labourers, being under the control and direction of the master, the charterers were not in any case to be responsible to the owners for damage or improper stowage. It was held by the Court of Common Pleas that there was nothing in this charterparty to exonerate the owner from responsibility for negligent and improper stowage by the stevedores employed by the charterers under the clause to which I have referred . . . At p 100, Chief Justice Erle said:

> Ordinarily speaking, the shipowner has by law cast upon him the risk of attending the loading, stowing, and unloading of the cargo: and the question is whether by the terms of this charterparty he is exempted from that liability. I think not: on the contrary, it appears to me that the charterer, seeing what were the consequences resulting from the decision in *Blaikie v Stembridge*, has expressly stipulated that the liability of the owner for bad stowage shall continue, notwithstanding that the charterer was to have liberty to employ stevedores and labourers to assist in the loading, stowage, and discharge of the cargo.

The Chief Justice added at p 101 that the clause which provided that the owners should, in every respect, be and remain responsible as if the ship was loading and discharging her cargo was but a repetition of the same idea. At p 103, Byles J said:

> The master is to have the control of the stevedores – to tell them what they are not to do; and he is to have the direction – to tell them what they are to do. If any difference of opinion should arise as to the proper mode of stowage, between the stevedore and the master, that of the latter is to prevail.

In his judgment all possibility of doubt was removed by the additional clause also relied on by the Chief Justice.

In *The Helene* (1865) 167 ER 426, the charterparty provided that the cargo should be taken alongside by the charterer, and be received and stowed by the master as presented for shipment, the charterer being allowed to appoint a head stevedore at the expense and responsibility of the master for proper stowage. After citing this provision, Dr Lushington said at p 431:

> These words appear to me to answer the objection, and remove the case out of the authority of *Blaikie v Stembridge* where similar words were not contained in the charterparty, and where the court held the true construction of the charterparty to be, that the cargo was to be brought alongside at the risk and expense of the charterer, and that it was to be shipped and stowed by his stevedore, and consequently at his risk – though at the expense of the shipowner, and subject to the control of the master, on behalf of the shipowner, to protect his interests.

. . . In *Union Castle Mail Steamship Co Ltd v Borderdale Shipping Co Ltd* [1919] 1 KB 612, the charterparty provided that the charterers should bear the expense of loading and discharging cargo, but:

> . . . the stowage shall be under the control of the master, and the owners shall be responsible for the proper stowage and correct delivery of the cargo.

Bailhache J held that this clause did not amount to an absolute warranty by the owners, and that it merely meant that they would not be negligent in the stowage of the cargo. Chloride of lime in iron drums, apparently in good condition, was stowed under deck by the charterers' agents, neither they nor the master knowing, or having any reason to suspect, that it would be likely to do harm by being stowed there. The iron drums were in fact defective, and fumes escaping from them damaged other cargo. In those circumstances the judge was not prepared to impute to the master a state of knowledge which was not shared by the charterers' agents. Since no harm would have been done if the drums had been protected in the way suggested, the judge concluded that no negligence was to be imputed to the master, and negligence being necessary to enable the charterers to succeed, the action failed. I see no warrant for importing that necessity and in that respect I decline to follow that case: see *Carver on Carriage by Sea*, 13th edn, s 1097.

In *Ismail v Polish Ocean Lines* [1976] QB 893, stowage instruction had been given by the charterers under the master's supervision and responsibility. At pp 494 and 902E, after referring to the charterers' obligation to load and stow the cargo at their own expense, Lord Denning said:

> Notwithstanding those provisions, the master has an overriding power to supervise the stowage. He must have this as a matter of course . . . The master is responsible for the stowage of the cargo so as to ensure the safety of the ship: and also of the cargo so as to see that it is stowed so as to be able to withstand the ordinary incidents of the voyage. That is the meaning of the last words of cl 49: 'He is to remain responsible for the proper stowage and dunnaging.'

At pp 497 and 907D, Ormrod LJ said of cl 49:

> It would be hard to find a form of words better adapted to promoting disputes between owners and charterers than this. On the face of it it places the master in the impossible position of being under obligations which are, at least potentially, mutually inconsistent. The first part of the clause requires him to comply with the charterer's instructions as to stowage and dunnaging; the second leaves the responsibility for proper stowing and dunnaging on him. So, if he declines to comply with his instructions he may be in breach, and if he does comply with them he may also be in breach if damage occurs due to improper stowage.

It may be relevant to observe that in that case the charterer overrode the master with the result that the court held the charterer to be estopped from complaining about stowage.

Finally, in *Filikos Shipping Corporation of Monrovia v Shipmair BV (The Filikos)* [1981] 2 Lloyd's Rep 555, it was held by Lloyd J that, although certain clauses in the charterparty placed duty and responsibility for discharge upon the charterers, the subsequent clause which provided that, notwithstanding anything to the contrary, the owners were to be responsible towards the charterers as carriers rendered it impossible to hold that as between owners and charterers the owners were not liable for the relevant loss. This decision was unequivocally upheld by the Court of Appeal: see [1983] 1 Lloyd's Rep 9 . . .

The classic exposition of cl 8, albeit without the addition of the words 'and responsibility', is to be found in *Canadian Transport Co Ltd v Court Line Ltd* [1940] AC 934. In that case the House of Lords held that the requirement that cargo was to be stowed under the supervision of the captain did not relieve the charterers of their primary duty to stow safely. But to the extent that the master did supervise the stowage so as to limit the charterers' control of it their liability was correspondingly limited.

Lord Atkin dealt thus with the charterers' argument at pp 166 and 937:

> The first answer which the charterers made was that there was no such liability because the duty of the charterers was expressed to be to stow, etc, 'under the supervision of the captain'. This, it was said, threw the actual responsibility for stowage on the captain; or at any rate threw upon the owners the onus of showing that the damage was not due to an omission by the master to exercise due supervision. This, we were told, was the point of commercial importance upon which the opinion of this House was desired. My Lords, it appears to me plain that there is no foundation at all for this defence; and on this point all the judges so far have agreed. The supervision of the stowage by the captain is in any case a matter of course; he has in any event to protect his ship from being made unseaworthy; and in other respects no doubt he has the right to interfere if he considers that the proposed stowage is likely to impose a liability upon his owners. If it could be proved by the charterers that the bad stowage was caused only by the captain's orders, and that their own proposed stowage would have caused no damage no doubt that might enable them to escape liability. But the reservation of the right of the captain to supervise, a right which in my opinion would have existed even if not expressly reserved, has no effect whatever in relieving the charterers of their primary duty to stow safely . . .

At pp 168 and 943, Lord Wright said:

> It is, apart from special provisions or circumstances, part of the ship's duty to stow the goods properly, not only in the interests of seaworthiness of the vessel, but in order to avoid damage to the goods, and also to avoid loss of space or dead freight owing to bad stowage. In modern times the work of stowage is generally deputed to stevedores, but that does not generally relieve the shipowners of their duty, even though the stevedores are under the charterparty to be appointed by the charterers, unless there are special provisions which either expressly or inferentially have that effect. But under clause 8 of this charterparty the charterers are to load, stow and trim the cargo at their expense. I think these words necessarily import that the charterers take into their hands the business of loading and stowing the cargo. It must follow that they not only relieve the ship of the duty of loading and stowing, but as between themselves and the shipowners relieve them of liability for bad stowage, except as qualified by the words 'under the supervision of the captain', which I shall discuss later. The charterers are granted by the shipowners the right of performing a duty which properly attaches to the shipowners. Presumably this is for the convenience of the charterers. If the latter do not perform properly the duty of stowing the cargo, the shipowners will be subject to a liability to the bill of lading holders. Justice requires that the charterers should indemnify the shipowners against that liability on the same principle that a similar right of indemnity arises when one person does an act and thereby incurs liability at the request of another, who is then held liable to indemnify. That such a liability on the part of the charterers is contemplated is shown by the last words of clause 8 which supposes that the charterers may incur liability for 'damage to cargo'. So far I think is clear. What then is the effect of the words 'under the supervision of the master'? These words expressly give the master a right, which I think he must in any case have, to supervise the operations of the charterers in loading and stowing. The master is responsible for the seaworthiness of the ship and also for ensuring that the cargo will not be so loaded as to be subject to damage, by absence of dunnage and separation, by being placed near to other goods or to parts of the ship which are liable to cause damage, or in other ways . . . But I think this right is expressly stipulated not only for the sake of accuracy, but specifically as a limitation of the charterers' rights to control the stowage. It follows 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.

. . . Lord Wright added at pp 169 and 945:

> The master's power of supervision is obviously not limited to matters affecting seaworthiness.

Lord Maugham agreed with Lord Atkin, and Lord Romer agreed with Lord Atkin and Lord Wright. Finally, at pp 172 and 951 Lord Porter said:

> In my opinion by their contract the charterers have undertaken to load, stow and trim the cargo, and that expression necessarily means that they will stow with due care. *Prima facie* such an obligation imposes upon them the liability for damage due to improper stowage. It is true that the stowage is contracted to be effected under the supervision of the captain, but this phrase does not, as I think, make the captain primarily liable for the work of the charterers' stevedores. It may indeed be that in certain cases as, eg, where the stability of the ship is concerned the master would be responsible for unseaworthiness of the ship and the stevedore would not. But in such cases I think that any liability which could be established would be due to the fact that the master would be expected to know what method of stowage would affect his ship's stability and what would not, whereas the stevedores would not possess any such knowledge. It might be also that if it were proved that the master had exercised his rights of supervision and intervened in the stowage, again the responsibility would be his and not the charterers. The primary duty of stowage, however, is imposed upon the charterers and if they desire to escape from this obligation they must, I think, obtain a finding which imposes the liability upon the captain and not upon them.

This case was considered by Neill LJ in *AB Marintrans v Comet Shipping Co Ltd* [1985] 1 Lloyd's Rep 568 . . . In the course of his judgment, Lord Justice Neill said, referring to *Canadian Transport Co Ltd v Court Line Ltd* (above):

> It is apparent from these speeches, however . . . that the primary responsibility of the charterers may be affected if the captain in fact intervenes by, for example, insisting on his own system of stowage. But in the present case the contract between the parties included the additional words in typescript 'and responsibility'.

The clause had indeed been altered as it was in the present case. After considering the rival submissions in the case before him Neill LJ said at p 575 of the report:

> I have found this question a difficult one to resolve. On the one hand, I see the force of Mr Milligan's submission that the addition of the words 'and responsibility' are apt, when taken in conjunction with cl 32, to transfer responsibility back to the owners and in effect to restore the old rule of maritime law. On the other hand, to limit the responsibility of the charterers to that of providing competent stevedores and paying for them gives little weight to the words in cl 8 . . . Charterers are to load, stow, trim and discharge the cargo . . . Such a narrow construction may also ignore what happens in practice where stowage is treated as a joint undertaking with both the charterers and the ship playing their part.
>
> In the end I have come to the conclusion that the correct approach is to construe the words 'and responsibility' as effecting a *prima facie* transfer of liability for bad stowage to the owners, but that if it can be shown in any particular case that the charterers by, for example giving some instruction in the course of the stowage, have caused the relevant loss or damage the owners will be able to escape liability to that extent. In my judgment, this approach is consistent with that of the House of Lords in the *Court Line* case where it was clearly contemplated that the party primarily responsible might be relieved from liability for loss caused by the other party's intervention. There may therefore be cases where it will be necessary to consider the dominant cause of particular damage.
>
> If this analysis is correct, the added words 'and responsibility' will place the primary duty on the master and owners but with the possibility that their liability will be affected by some intervention by the charterers.

Later in his judgment at p 577 of the report, Neill LJ said:

> . . . having regard to the terms of this charterparty, neither the stevedores nor the surveyor can be treated as the agents of the charterers so as to make their acts or conduct the acts or conduct of the charterers.

I respectfully endorse and follow those conclusions.

> [Counsel] argues that the correct approach is to consider causation. The test, he says, is whether the charterers, in carrying out the mechanics of loading or other operations, have caused loss or damage or whether the owners, in the exercise of their duty of control, have caused the loss or damage. He relies also on *Union Castle Mail Steamship Co Ltd v Borderdale Shipping Co Ltd* [1919] 1 KB 612. But, for the reasons which I have given earlier, that case will not, in my judgment, avail him.
>
> I agree that the charterers' obligation to load, stow and trim the cargo, and discharge, requires them to do so with due care. The primary responsibility for stowage is, however, imposed on the master. Although in the *Court Line* case 'it was clearly contemplated that the party primarily responsible might be relieved from liability caused by the other party's intervention', the concept of 'intervention' may not be entirely apt where what is being exercised on behalf of the charterers is not a right to supervise, such as may take the form of intervention, but a duty to stow properly. At any rate in a case such as the present, I see no need to ascertain what is 'the dominant cause of particular damage'. Either a party is responsible for a particular operation (or damage caused by it) or he is not. The exercise of a right of supervision may impinge upon, override or detract from a duty to stow properly; but it is difficult to see why the fact that responsibility is conferred on the owners should have a corresponding effect of limiting the charterers' control of stowage operations. The fact that there are duties cast upon both parties by cl 8 may militate against a construction which makes the owners liable for charterers' breach of their own duty. But the effect of cl 8 was to confer the primary duty on the owners and in the absence of actual intervention by the charterers, as distinct from stevedores employed by them, the owners' liability will not be avoided. A limitation of the scope of the liability accepted by the owners through the master may be implicit in the word 'responsibility' itself. It may be said that if the word is to be reasonably construed, its application must be limited to matters within the power of the master, and that in the sense in which the word is here used, a master cannot properly be said to be 'responsible' for damage which he cannot avoid by the reasonable exercise of his powers of supervision and control. It seems to me that the scope of such powers, which is objectively ascertainable, goes beyond what was regarded by the arbitrators as having been within the master's 'province' . . .
>
> . . . I would wish to reserve the question whether in other circumstances a master, and so owners, should be held liable for damage directly caused by charterers, which it was not within the owners' power to prevent, except by the adoption of unusual precautions. It may be that in such a case, as in *Ismail v Polish Ocean Lines* [1976] QB 893, owners' liability may be avoided by operation of the doctrine of estoppel.
>
> The charterers' appeal from the interim award will accordingly be allowed, and that of the owners dismissed.

Notes

1 *The Argonaut* was followed by Steyn J in *The Alexandros P* [1986] 1 Lloyd's Rep 421:

> . . . the words 'and responsibility . . .' in clause 8 and the transfer of risk comprehended by it, relate to the entire operation of loading, stowing, trimming and discharging the cargo. Specifically, it covers not only the mechanical process of handling the ship's gear and cargo but also matters of stevedores' negligence in strategic planning of loading and discharge of the cargo.

2 The decision in *The Argonaut* includes a quotation from *Court Line*, where Lord Wright said that if the charterer fails to 'perform properly the duty of stowing the cargo, the shipowners will be subject to a liability to the bill of lading holders'. But in *Jindal Iron & Steel Co Ltd v Islamic Solidarity Co Jordan Inc*, where the shipper agreed to load, it was held that the shipowner was not responsible to the receiver.

3 In *The Santamana* (1923) 14 LlL Rep 159, the court was concerned with claims in respect of a cargo of onions which had been shipped from Alexandria to the UK. The onions were damaged by being in stacks 15 or 16 tiers high with insufficient

dunnage. Hill J was referred to a number of earlier authorities on the effect of the knowledge of the shippers about the method of stowage which was being used. At p 163 he said:

> I have considered these cases very carefully. They seem to me to carry the law at least far enough to show that a shipper who takes an active interest in the stowage, and complains of some defects but makes no complaint of others which are patent to him, cannot be heard to complain of that to which he has made no objection. I think that the onions were stowed 15 or 16 tiers high without a temporary deck by the leave and licence of [the shipper] and that he cannot be heard to complain of that. I therefore hold that, for the damage caused by reason of that defect, namely, stowing 15 or 16 tiers high without use of a temporary deck, the [owners] are not answerable to [the shippers]. For the damage caused by the other defects they are answerable.

4 Stowage and estoppel by conduct. In *Ismail v Polish Ocean Lines, The Ciechocinek* [1976] QB 893, CA, the claim related to a cargo of new potatoes shipped from Alexandria to the UK:

> **Lord Denning MR (p 495):** If a shipper or his representative is present when the goods are loaded – and superintends the stowage – or if he insists on their being stowed in a particular manner, he cannot afterwards complain if they are afterwards damaged by being stowed in a bad manner . . . The present case is a classic one of its kind. Here Mr Ismail instructed the master to carry 1,400 tons of potatoes. He told him that no dunnage was necessary, and that the bags were of a new kind, such that the potatoes would not suffer on the voyage. On those representations, I do not see that the master could possibly have refused to load the cargo. If he had refused, he would expose the owners to a claim for damages which they would be quite unable to refute – because they had no evidence that the representations were untrue. Again, Mr Ismail allayed the master's misgivings by promising to get a surveyor's certificate and a guarantee: and on the faith of that promise the master loaded the 1,400 tons. In this situation it would be quite contrary to all fairness and to all justice that the shipper or owner should be able to hold the master liable for improper stowage . . .

5 The *Imvros* was chartered on the NYPE form (as amended) to carry a cargo of sawn timber in bundles from Brazil on terms that the charterers would load, stow and lash at their expense under the supervision and to the satisfaction of the master. Part of the cargo was lost overboard in the course of the voyage because it had been lashed at intervals of 3 m and not at intervals of 1.5 m as required by the International Maritime Organisation (IMO) Code. The vessel was damaged. The charterers argued that the ship was unseaworthy on sailing and that the owners were the authors of their own misfortune. It was held that: (1) on the facts, the limited duty of seaworthiness imposed on the carrier by the charter had not been broken; (2) the charter transferred responsibility to the charterers for lashing in such a way as to ensure seaworthiness; and (3) the master's right to intervene 'does not normally carry with it a liability for failure to do so let alone relieve the actor from his failure': *Transocean Liners Reederei GmbH v Euxine Shipping Co Ltd, The Imvros* [1999] 1 Lloyd's Rep 848. Arguably either the first or the second element in the decision is sufficient to distinguish *The Kapitan Sakharov* [2002] 2 Lloyd's Rep 255, CA and *The Fiona* [1994] 2 Lloyd's Rep 506, CA, noted in Chapter 10.

5 DANGEROUS CARGO

Liability of shippers for loss or damage caused by their goods has been the subject of a number of reported decisions, both ancient and modern. In addition to the possibility of liability in tort for negligence or for breach of a statutory duty, possible bases of liability have been held to include breach of the contract of carriage by failing to ship

goods which conform to the contractual description (*Islamic Investment Co SA v Transorient Shipping Ltd, The Nour* [1999] 1 Lloyd's Rep 1, CA), breach of an implied warranty or of a collateral contract to ship safe goods or to disclose the identity or nature of goods shipped or to pack goods properly. Liability under an express, implied or statutory agreement to indemnify is also possible. The precise scope of a shipper's duty at common law was disputed for many years: the balance of authority favoured the view that the shipper could be liable even if blamelessly ignorant of the fact that the goods were dangerous. The minority view was that there was no satisfactory ground on which to allocate responsibility to an innocent shipper and that damage should rest where it was suffered. The position was reviewed by the House of Lords in the *Giannis NK.*

Effort Shipping Co Ltd v Linden Management SA, The Giannis NK
[1998] AC 605

Facts

A part cargo of ground nut pellets was loaded on the vessel at Dakar under a bill of lading which incorporated the Hague Rules. Unknown to the shippers, the shipment was infested with Khapra beetle which in its larval form was proved to be capable of consuming a grain cargo. Bulk wheat pellets had been loaded at previous loading ports. The presence of the beetles was discovered and discharge from the vessel was prohibited in the Dominican Republic and Puerto Rico. After unsuccessful attempts to fumigate, the shipowners were required to return the cargo to its port of origin or dump it at sea. The shipowners brought proceedings against the shippers seeking damages for delay. The House of Lords held that the owners were entitled to be indemnified by the shippers under Art IV r 6 of the Hague Rules. The House went on to consider an alternative claim that the owners were entitled to rely on an undertaking implied at common law that a shipper will not ship goods of such a dangerous character that they are liable to cause physical damage to the vessel or its cargo, or to cause detention or delay, without giving notice to the owner of the character of the goods.

Held

> **Lord Lloyd of Berwick:** … What is the nature and scope of any implied obligation at common law as to the shipment of dangerous goods? [This] … question does not need to be decided. But as it has been the subject of differing views over many years, and as we have heard full argument on the point, it seems desirable for us to express an opinion. Even though that opinion will not form part of the *ratio decidendi*, it may at least help to resolve a long-standing controversy…
>
> The point at issue arises because of a difference of opinion in *Brass v Maitland* (1856) E & B 470. The facts in that case were that the plaintiffs were owners of a general ship. The defendants shipped a consignment of chloride of lime, better known as bleaching powder, on board the plaintiffs' vessel. Chloride of lime is a corrosive substance liable to damage other cargo if it escapes. The plaintiff shipowners were unaware of the dangerous nature of the cargo. They claimed damages from the defendants on two counts. The third plea by way of defence was that the defendants had bought the goods from a third party already packed, and that they had no knowledge, or means of knowledge, that the packing was insufficient, and that they were not guilty of negligence. It was held by the majority that the third plea was bad in law. Lord Campbell CJ said, at p 481:
>
> > Where the owners of a general ship undertake that they will receive goods and safely carry them and deliver them at the destined port, I am of the opinion that the shippers undertake that they will not deliver, to be carried in the voyage, packages of goods of a dangerous nature,

> which those employed on behalf of the shipowner may not on inspection be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they are of a dangerous nature.

On the question whether absence of knowledge or means of knowledge on the part of the shippers is a good defence, Lord Campbell CJ said, at p 486:

> The defendants, and not the plaintiffs, must suffer, if from the ignorance of the defendants a notice was not given to the plaintiffs, which the plaintiffs were entitled to receive, and from the want of this notice a loss has arisen which must fall either on the plaintiffs or on the defendants. I therefore hold the third plea to be bad.

Crompton J took a different view. He would have held that knowledge on the part of the shipper is an essential ingredient of liability. He said, at p 492:

> I entertain great doubt whether either the duty or the warranty extends beyond the cases where the shipper has knowledge, or means of knowledge, of the dangerous nature of the goods when shipped, or where he has been guilty of some negligence, as shipper, as by shipping without communicating danger which he had the means of knowing and ought to have communicated.

A little later he said, at p 493:

> where no negligence is alleged, or where the plea negatives any alleged negligence, I doubt extremely whether any right of action can exist.

Mr Johnson [counsel] relies heavily on the dissenting judgment of Crompton J and the commentary in *Abbott's Merchant Ships and Seamen*, 13th ed (1892), a work of great authority, where it is said that the powerful reasons urged by Crompton J rendered the decision, to say the least, doubtful. In the 14th ed (1901) it is said, at p 647, that Crompton J's views are more in accordance with later authorities.

But when one looks at the later authorities, and in particular at *Bamfield v Goole and Sheffield Transport Co Ltd* [1910] 2 KB 94 and *Great Northern Railway Co v LEP Transport and Depository Ltd* [1922] 2 KB 742 it is the majority view which has found favour. It was suggested by Mr Johnson that the *Bamfield* and the *Great Northern Railway* cases can be explained on the ground that the plaintiffs in those cases were common carriers. That may or may not be a relevant distinction. What matters is that in both cases the court regarded itself as being bound by the majority decision in *Brass v Maitland*, 6 E & B 470, which was not a case of a common carrier.

Mr Johnson advanced a number of more wide ranging arguments, that to hold the shippers strictly liable for shipping dangerous goods would be impracticable and unreasonable, and create an anomalous imbalance between the rights and liabilities of shippers and carriers. But equally strong arguments of a general nature can be advanced on the other side.

The dispute between the shippers and the carriers on this point is a dispute which has been rumbling on for well over a century. It is time for your Lordships to make a decision one way or the other. In the end that decision depends mainly on whether the majority decision in *Brass v Maitland*, which has stood for 140 years, should now be overruled. I am of the opinion that it should not. I agree with the majority in that case and would hold that the liability of a shipper for shipping dangerous goods at common law, when it arises, does not depend on his knowledge or means of knowledge that the goods are dangerous.

An incidental advantage of that conclusion is that the liability of the shipper will be the same whether it arises by virtue of an implied term at common law, or under article IV, r 6 of the Hague Rules.

For the reasons mentioned earlier I would dismiss the appeal.

FURTHER READING

Bulow, L, 'Dangerous cargoes' (1989) LMCLQ 342
Girvin, S, 'Shipper's liability for dangerous cargoes' (1996) LMCLQ 487
Rose, F, 'Cargo risks: dangerous goods' [1996] 55 CLJ 142

CHAPTER 13

LAYTIME AND DEMURRAGE

The first extract in this chapter, from the UNCTAD (United Nations Conference on Trade and Development) report *Charter Parties,* is now 30 years old. Nevertheless, it remains a valuable introduction to the role and function of laytime and demurrage agreements. The next sections of the chapter contain extracts from cases that define the moment from which laytime commences in the absence of special agreement and the circumstances in which it ceases or does not run continuously. Leading decisions from the extensive case law dealing with special laytime clauses are summarised in the notes to these sections. The remainder of the chapter deals with the circumstances in which demurrage and despatch is payable.

UNCTAD, *Charter Parties*, Report by the Secretariat of UNCTAD, 1974, New York: UN

221 In principle, any time during which a tramp vessel is not working and earning represents a loss in freight for the owner, since fixed overheads, such as depreciation, insurance, and interest on invested capital – which generally represent the greater part of the running costs – continue to accrue irrespective of whether the vessel is actually employed. The time factor is therefore of major importance to the shipowner.

222 In connexion with the performance of a charter voyage, the time factor comes into particular play where the vessel's stay in port is prolonged. The freight, which must not only cover all the owner's costs but also leave him a reasonable profit margin, is the same irrespective of the duration of the voyage. Every day that the vessel is detained, the owner will incur overheads which will reduce his calculated profit and – in the case of a protracted delay – perhaps turn it into a realised loss. In addition, the owner will lose new business for the time corresponding to the period of detention. His principal concern is therefore to have his vessel working continuously and to limit its stay in port to the shortest possible time.

223 The charterer, on the other hand, must have the vessel available during a long enough period to effect cargo loading and discharge and his concern is to be able to perform his part of the cargo-handling operations at a pace convenient and economical to him.

224 The usual solution in respect of duration of port stay is to allow an appropriate period time to cover loading and discharging, generally called 'laytime' or, sometimes, 'lay days', which is at the charterer's free disposal, and to grant him the possibility, in case of need, of detaining the vessel beyond the agreed time, against payment of compensation to the owner for the use of the additional time; such compensation is called 'demurrage'. Laytime and demurrage thus fulfil functions of fundamental importance, from both an economic and a practical standpoint, and their terms are invariably regulated in standard voyage charter party forms.

225 Laytime and demurrage constitute a complicated field, both from a technical and a legal standpoint. The rules of law provided on these matters diverge on many points under the different legal systems. Moreover, a considerable variation exists in the regulatory terms governing laytime and demurrage under various standard forms; this, however, is to a certain extent unavoidable, since different trades and commodities, as also the particular circumstances of the voyage, may require individual provisions on various aspects involved. As a consequence of this complexity, laytime and demurrage give rise to many difficulties and frequent disputes.

1 START OF LAYTIME

Unless a different agreement has been made, in general three conditions must be satisfied before laytime will start: the ship must have arrived at her destination – she is then said to be an arrived ship; she must be ready to load; and notice of readiness to load must have been given.

1.1 Arrival

The time of arrival depends on the destination on which the parties have agreed. In practice, the destination selected is generally either a port, or a specified area within a port such as a dock, or a particular loading place, such as a named berth, quay, wharf, or a mooring. If the stipulated destination is either a dock or a berth, the vessel is an arrived ship when she is in the specified area or at the agreed place. The rule applicable to a port charter has changed over the years. In *Leonis Steamship v Rank* [1908] 1 KB 499, the Court of Appeal held that where a port was referred to in a charterparty – a commercial document – 'the term is to be construed in a commercial sense in relation to the objects of the particular transaction'. On this basis, 'port' meant 'the commercial area of the port'. In *The Aello* [1961] AC 135, the *Leonis* test was held to require that the vessel should be in that part of the port where she was to be loaded when a berth became available, with the result that it was found that the *Aello* had not arrived in the port of Buenos Aires while waiting at a usual waiting area within the port which was 22 miles from the loading area. Influenced by changes 'in the kinds of ships used in maritime commerce, in means of communication and in port facilities and the management of ports' (*per* Lord Diplock) the House of Lords abandoned the *Aello* approach in *The Johanna Oldendorff*, although some phrases and ideas used in the earlier cases continued to be used in the judgments in that case.

EL Oldendorff & Co GmbH v Tradax Export SA, The Johanna Oldendorff
[1974] AC 479

Facts

The *Johanna Oldendorff* was chartered to carry a bulk grain cargo from the United States to Liverpool/Birkenhead. No berth was available when the vessel arrived on 2 January 1968, and she was ordered by the port authority to anchor at the bar light vessel. Her owners gave notice of readiness. The vessel lay at anchor at the bar from 3 to 20 January ready, so far as she was concerned, to discharge.

Held

> **Lord Reid:** . . . The question at issue is who is liable to pay for the delay . . . The argument before your Lordships turned on the time when the vessel became an arrived ship. The main contention for the owners is that she became an arrived ship when she anchored at the bar anchorage because that is within the port of Liverpool, it is the usual place where vessels lie awaiting a berth, and it was the place to which she had been ordered to go by the port authority. The reply of the charterers is that that anchorage is at least 17 miles from the dock area, or commercial area of the port, that arrival at that anchorage is not arrival at the port of Liverpool /Birkenhead and that the ship did not arrive until she proceeded to her unloading berth in the Birkenhead docks . . .
>
> [T]he essential factor is that before a ship can be treated as an arrived ship she must be within the port and at the immediate and effective disposition of the charterer and that her geographical position is of secondary importance. But for practical purposes it is so much easier to establish

that, if the ship is at a usual waiting place within the port, it can generally be presumed that she is there fully at the charterer's disposal.

I would therefore state what I would hope to be the true legal position in this way. Before a ship can be said to have arrived at a port she must, if she cannot proceed immediately to a berth, have reached a position within the port where she is at the immediate and effective disposition of the charterer. If she is at a place where waiting ships usually lie, she will be in such a position unless in some extraordinary circumstances proof of which would lie in the charterer . . .

If the ship is waiting at some other place in the port then it will be for the owner to prove that she is as fully at the disposition of the charterer as she would have been if in the vicinity of the berth for loading or discharge . . .

Lord Diplock: . . . A dock encloses a comparatively small area entered through a gate. There is no difficulty in saying whether a vessel has arrived in it. As soon as a berth is vacant in the dock a vessel already moored inside the dock can get there within an interval so short that for the practical business purpose of loading or discharging cargo it can be ignored. For such purposes she is as much at the disposal of the charterer when at her mooring as she would be if she were already at the actual berth at which the charterer will later make or accept delivery of the cargo, but is unable for the time being to do so.

The area of a port, however, may be much larger. It may sometimes be less easily determinable, because of absence of definition of its legal limits or variations between these and the limits within which the port authority in actual practice exercises control of the movement of shipping; but I do not believe that in practice it is difficult to discover whether a place where ships usually wait their turn for a berth is within the limits of a named port; or is outside those limits as is the case with Glasgow and with Hull . . .

. . . If a port is congested so that on arrival within its limits the chartered vessel cannot proceed immediately to a berth to load or to discharge, it is of no business importance to the charterer where she waits within those limits, so long as it is a place (1) where she counts for turn if the port is one where vacant berths are allotted to waiting vessels in order of arrival; (2) where the charterer can communicate with her as soon as he knows when a berth will become available for the cargo to be loaded or discharged; and (3) from which the vessel can proceed to the available berth when she receives the charterer's communication, so as to arrive there as soon as the berth has become vacant or so shortly thereafter as not to be significant for practical purposes.

. . . Since it is to the interest of all concerned, of port authorities as well as charterers and shippers, that time should not be wasted by leaving berths vacant when they are available for loading or discharging cargo, the usual places for ships to wait their turn for a vacant berth are those which do possess the three characteristics that I have mentioned, if there are any such places within the limits of the port. In days of sailing ships close proximity to berths likely to become vacant may have been necessary in order that a place should possess those characteristics, but distance from the actual berth becomes of less importance as steam and diesel power replaces sail and instantaneous radio communication is available between ship and shore. In modern conditions it is possible for port authorities and charterers to know at least some hours in advance, when a berth presently occupied by a loading or discharging vessel will become vacant and available for use by the chartered vessel. Notice of similar length can be given by the charterer to the waiting vessel so as to enable her to reach the berth as soon as it becomes vacant, if she can make the journey from her waiting place to the berth within that time. And if she can she is as effectively at the disposal of the charterer for loading or discharging while at that waiting place as she would have been if waiting in the immediate vicinity of the berth.

My Lords, this no doubt is why the bar anchorage, which is within the legal limits of the Port of Liverpool and included in the area in which the port authority is entitled to control the movement of shipping, has become the usual place to which vessels are directed by the port authority to wait their turn for a berth. And the same must generally be true of usual waiting places within the limits

> of other ports where congestion is liable to occur. I would therefore accept as a convenient practical test as to whether a vessel has completed her loading voyage or her carrying voyage under a port charter so as to cast upon the charterer the responsibility for subsequent delay in finding a vacant berth at which her cargo can be loaded or discharged, the test as it is formulated by my noble and learned friend, Lord Reid, at the conclusion of his speech . . .

In *The Johanna Oldendorff* the usual waiting area was within the limits of the port of Liverpool. The next case, which was argued in the House of Lords not long after *The Johanna Oldendorff* had been decided, dealt with a charter to a port where the usual waiting area was outside the port limits. It was almost as though the House of Lords were being asked to confirm that they had meant what was said in the earlier decision about the location of the waiting anchorage. But since *The Johanna Oldendorff* had abandoned the rule in *The Aello* very quickly, perhaps it was reasonable to ask if the House wanted to make a further change.

Federal Commerce and Navigation Co Ltd v Tradax Export SA, The Maratha Envoy [1978] AC 2

Facts

The *Maratha Envoy* was chartered to carry grain to Brake in the river Weser. The usual waiting area for Weser ports was the Weser lightship anchorage, about 25 miles from the mouth of the river and outside the limits of Brake. While waiting for a berth, the vessel sailed up river and, off Brake, served a notice of readiness. She then returned and anchored at the lightship.

Held

> **Lord Diplock:** . . . My Lords, in *EL Oldendorff & Co GmbH v Tradax Export SA (The Johanna Oldendorff)* [1974] AC 479, the purpose of this House was to give legal certainty to the way in which the risk of delay from congestion at the discharging port was allocated between charterer and shipowner under a port charter which contained no special clause expressly dealing with this matter. The standard form of charterparty used in *The Johanna Oldendorff* was also that used in the instant case – the Baltimore berth grain charterparty – although in each case the destination of the carrying voyage was a port, not a berth. The allocation of this risk under this kind of charterparty depends upon when the vessel becomes an 'arrived ship' so as to enable laytime to start running and demurrage to become payable once laytime has expired . . . After a hearing extending over six days in the course of which the position of ports where the usual waiting place lies outside the limits of the port of discharge was fully considered and cases dealing with such ports were cited, this House substituted for the Parker test [*The Aello*, above] a test which I ventured to describe as the 'Reid test', which in its most summary form is stated by Lord Reid thus, at p 535:
>
> > Before a ship can be said to have arrived at a port she must, if she cannot proceed immediately to a berth, have reached a position within the port where she is at the immediate and effective disposition of the charterer.
>
> . . . The Reid test applies to a port charter in which there is no express provision dealing with how the misfortune risk of delay through congestion at the loading or discharging port is to be allocated between charterer and shipowner. In such a case it allocates the risk to the charterer when the waiting place lies within the limits of the port; but to the shipowner when it lies outside those limits. In a berth charter, on the other hand, it had long been settled law that, in the absence of express provision providing for some other allocation of the risk, the risk is allocated to the shipowner wherever the waiting place lies. In the case of both port and berth charters, however, it is the common practice, by the use of standard clauses, which too have been the subject of judicial exegesis, to provide expressly for the way in which the risk of delay by congestion at the loading or discharging port is to be allocated . . .

There are also standard clauses dealing specifically with the commencement of laytime at individual ports at which the usual anchorage for vessels waiting turn lies outside the limits of the port. A typical clause of this kind relating to the ports of Avonmouth, Glasgow and Hull is cited in the judgment of Roskill LJ in *The Johanna Oldendorff* [1974] AC 479, 505. A similar clause is used in the case of the four ports on the River Weser, for all of which the usual waiting place for vessels of considerable draught is an anchorage at the Weser Lightship which lies outside the limits of any of the ports. The Weser Lightship clause runs as follows:

> If vessel is ordered to anchor at Weser Lightship by port authorities, since a vacant berth is not available, she may tender notice of readiness upon arriving at anchorage near Weser Lightship, as if she would have arrived at her final loading/discharging port. Steaming time for shifting from Weser Lightship to final discharging port, however, not to count.

The use of the time lost clause or of standard clauses relating to particular ports whose waiting place is outside the limits of the port may well seem to be particularly appropriate to cases where the charterparty reserves to the charterer an option to choose a loading or discharging place out of a range of ports at some of which the risk of congestion may be greater than at others or at some of which the usual waiting place lies inside and at others outside the limits of the port; for, in the absence of any such express provision, the existence of the option means that the charterer by the way he requires the contract to be carried out may influence the incidence or extent of the risk to be borne by the shipowner.

Nevertheless, even where the extent of the risk is potentially variable according to the way in which the charterer exercises his options, a shipowner may be willing to assume that risk in the course of bargaining rather than to transfer it to the charterer and accept a lower freight rate or demurrage rate or both. He may be content to back his own knowledge and experience of conditions at the ports included in the option range and to rely also on the fact that it will generally be in the charterer's own interest to exercise his options in such a way as to cause as little delay as possible.

The instant case is about a claim to demurrage upon a vessel the *Maratha Envoy* laden with a cargo of grain for which the discharging port nominated by the charterer under a port charter was the port of Brake. This is one of the four ports on the River Weser. The other three are Bremerhaven at the mouth of the river, Nordenham downstream from Brake, and Bremen upstream, for all of which the usual waiting place for vessels of the *Maratha Envoy*'s draught is the Weser Lightship.

. . . The history of the carrying voyage is set out in detail in the judgments of the courts below. It is sufficient for your Lordships' purpose to mention that the *Maratha Envoy* reached the anchorage at the Weser Lightship on 7 December 1970. She took her turn for discharge at any of the Weser ports on her arrival at the anchorage but no valid nomination of Brake as the discharging port was made by the charterers until 10 December. When this nomination was received, it never crossed the minds of the shipowners or their agents that the *Maratha Envoy* was already an arrived ship while at the Weser Lightship anchorage. They knew she had to get to a place within the limits of the port of Brake itself before she would be entitled to give notice of readiness to discharge. Accordingly on 12 December when the tide was right, she carried out a manoeuvre which has been variously described as 'showing her chimney', 'a charade' and 'a voyage of convenience'. She weighed anchor at the lightship, proceeded up the river until she was opposite the port of Brake, turned round in midstream and went back immediately to the lightship anchorage where she remained until 30 December 1970, when her turn came round and she moved to her discharging berth in Brake. During the ten minutes or so that it took for her to turn round in the river, on 12 December notice of readiness was served upon the charterers' agents.

. . . Donaldson J held that the voyages of convenience did not serve to make the *Maratha Envoy* an arrived ship at the port of Brake.

From this judgment the shipowners appealed to the Court of Appeal [which allowed the appeal on the ground that arrival at the Weser Lightship anchorage constituted the *Maratha Envoy* an arrived ship for discharge at the port of Brake].

. . . My Lords, it is conceded by counsel for the shipowners that the Weser Lightship anchorage is outside the legal, fiscal and administrative limits of the port of Brake. It lies 25 miles from the mouth of the river in an area in which none of the port authorities of Weser ports does any administrative acts or exercises any control over vessels waiting there. It was held by a German court in 1962 that a ship waiting at the Weser Lightship anchorage is not an arrived ship. A similar decision was reached by Donaldson J in *Zim Israel Navigation Co Ltd v Tradax Export SA (The Timna)* [1970] 2 Lloyd's Rep 409, and approved by Megaw LJ when the case came before the Court of Appeal [1971] 2 Lloyd's Rep 91. Counsel also concedes that charterers, shippers and shipowners who use the Weser ports would not regard the waiting area at the lightship as forming part of any of them. All the evidence is to the contrary, the conduct of the parties and their agents, the correspondence and the oral evidence that was accepted by the judge. So is the common use in charterparties of the special Weser Lightship clause, when it is intended that time spent in waiting there for a berth should count as laytime. This way of reconciling loyal adherence to the Reid test with an inclination to find in favour of the shipowners in the instant case is not, in my view, available.

. . . Your Lordships would be doing a disservice to the shipping community if, so shortly after the Reid test had been laid down by this House in *The Johanna Oldendorff*, you did not reaffirm it and insist upon its application to the instant case.

I turn to the second ground relied on by the Court of Appeal as justifying departing from the Reid test . . . The form of charterparty used incorporated as one of the printed clauses dealing with time for discharge:

> Time to count from the first working period on the next day following receipt . . . of written notice of readiness to discharge, *whether in berth or not*.

The words italicised are surplusage in a port charter. Their presence, however, is readily explicable. The parties took a printed form appropriate to a berth charter as respects both loading and carrying voyages, and used it for an adventure in which the destination of the carrying, though not the loading voyage, was a range of named ports, not berths. The effect of this well known phrase in berth charters has been settled for more than half a century. Under it time starts to run when the vessel is waiting within the named port of destination for a berth there to become vacant. In effect it makes the Reid test applicable to a berth charter. It has no effect in a port charter; the Reid test is applicable anyway . . .

. . . Finally, there is the voyage of convenience down to Brake and back. This was rejected by Donaldson J and, in the Court of Appeal, by Stephenson and Shaw LJJ. Lord Denning MR characterised it as commercial nonsense but said [1977] QB 324, 341 that he 'would swallow the commercial nonsense if it was the only way in which justice could be done'.

My Lords, I cannot swallow it, nor, for reasons I have stated earlier, do I see that justice would be done if I could bring myself to do so.

Notes

1 *Port charter or berth charter?* A ship was chartered to 'proceed to one or two safe ports East Canada or Newfoundland, place or places as ordered by charterers and/or shippers . . .'. It was held that these words conferred an express power to nominate the berth or berths at which the ship should load so that the vessel did not become an arrived ship until she berthed: *Stag Line v Board of Trade* [1950] 2 KB 194, CA. In the case of a berth charter, a notice of readiness given before berthing will be invalid, in the absence of a special agreement to the contrary: see *Glencore Grain Ltd v Goldbeam Shipping Inc, The Mass Glory* [2002] EWHC 27; [2002] 2 Lloyd's Rep 244, below.

2 *Demurrage in respect of waiting time*. Special agreements intended to deal with the effect of congestion have a long history. The *Werrastein* was chartered for a voyage from Australia to Hull to deliver grain at any customary dock, wharf or pier as

ordered by the charterers 'provided that if such discharging place is not immediately available, demurrage in respect of all time waiting thereafter shall be paid . . .'. The only discharging place available for grain at Hull at the relevant time was the King George Dock, which was congested. The *Werrastein* was instructed by port authorities to wait at a customary waiting anchorage off Spurn Head, 22 miles from the King George Dock and outside the geographical, legal and fiscal limits of the port. The charterers had in the circumstances no option as to the dock, but did eventually nominate a particular berth. The shipowner's claim was made against holders and endorsees of bills of lading which incorporated all terms, conditions, clauses and exceptions in the charter. Sellers J said that the claim would have failed if the shipowner had had to show that the *Werrastein* was an arrived ship; but his Lordship held that they did not. The right to 'demurrage' in the clause quoted arose when the vessel was kept waiting because a discharge place was not immediately available; that right was quite independent and distinct from a right to demurrage after lay days had run: *Roland-Linie Schiffart GmbH v Spillers* [1957] 1 QB 109.

3 *Time lost in waiting for a berth to count as laytime*. The *Darrah* was chartered to carry cement from Novorossisk to Tripoli. The charterparty was a port charterparty on the printed GENCON form, with amendments. The fixed laytime was based on an agreed rate of discharge per weather working day of 24 consecutive hours, Fridays and holidays excepted. Time from noon on Thursday or noon on the day before a legal holiday until 8 am on the next working day was not to count. The charter also provided that time lost in waiting for a berth was to count as laytime. The vessel reached the usual waiting place in the port of Tripoli and became an arrived ship. She waited six calendar days for a berth. The shipowners claimed for those six days despite the fact that they included a Friday and a holiday and the periods from noon on the day before each. The House of Lords held: (1) that time lost clauses are superfluous in a port charter so far as concerns time spent in waiting in turn within the limits of the port. 'This counts as laytime anyway; it is laytime': *per* Lord Diplock, p 166. Thus, in a port charter, it is only where the usual waiting area is outside the limits of the port that the clause has any effect; (2) in a berth charter, the effect of the clause is that a waiting vessel which cannot berth because of congestion is treated as though she were in fact in berth. The result is that a waiting vessel cannot count all waiting days against laytime, but only those which would count if she were actually in berth; (3) notice of readiness is not required to start time running under a 'time lost' clause: *Aldebaran Maritima v Aussenhandel* [1977] AC 157.

4 *Time lost to count if cargo inaccessible? The Massalia (No 2)* [1962] 2 QB 416 concerned a dispute relating to demurrage under a charterparty of the vessel for a voyage from Antwerp and Bordeaux to Colombo with a part cargo of flour in bags. The owners had liberty to complete cargo en route, which they exercised at Port Said where a small amount of additional cargo (less than 10% by weight of the flour cargo) was loaded and carried under bills of lading. On arrival at Colombo, the flour was mostly overstowed by the Port Said cargo. The *Massalia* waited six days for a berth. The charter provided that time lost in waiting for a berth was to count as discharging time. Diplock J held that the owners were entitled to rely on this clause and rejected the charterers argument that no time has been 'lost' in waiting for a berth because the vessel was not ready to discharge the flour as soon as she got to berth.' But compare the next case.

5 *Time lost and overlapping charters*. In the *Agios Stylianos* [1975] 1 Lloyd's Rep 426, the shipowners entered into two separate charterparties (both in the GENCON form)

for the carriage of part cargoes from Constanza. One charter was for carriage of 8,800 metric tons of cement, the other for 450 tons of vehicles. Both charters contained time lost clauses and agreements to pay demurrage at the rate of $1,500 a day. The vessel waited 14 days at the discharge port (Lagos) for a berth. Both cargoes were discharged at the same berth. The owners were awarded demurrage at the agreed rate against the vehicle charterers for the 14-day waiting period. They sought to recover a similar amount from the cement charterers. It was common ground between the parties that laytime did not begin to run under the cement charter until the vehicles had been discharged. Donaldson J held that 'time lost waiting for a berth' meant 'time lost waiting for a cement berth'. The time at Lagos was lost in waiting for a vehicle discharging berth. 'Once the vehicles had been discharged the cement charterers had the right and duty to nominate a berth, but this did not arise at any earlier point in time.' *The Massalia* was to be distinguished because the present point had not been argued in that case.

6 *Berth reachable on arrival*. 'Arrival' in the absence of any other agreement between the parties means the physical arrival of the vessel at the point where the indication or nomination of a particular loading place would become relevant if the vessel were to be able to proceed without being held up: *The Angelos Lusis* [1964] 2 Lloyd's Rep 28. 'Reachable' means able to be reached: *The President Brand* [1967] 2 Lloyd's Rep 338. 'Reachable on arrival' means immediately reachable on arrival: *Nereide v Bulk Oil*, *The Laura Prima* [1982] 1 Lloyd's Rep 1, noted more fully below.

7 The *Laura Prima* was chartered on the Exxonvoy 1969 form to load at one safe berth Marsa El Hariga (Libya). Clause 6 of the charterparty provided that on arrival at the port of loading, notice of readiness to load could be given 'berth or no berth' and laytime (agreed at 72 hours) would commence either six hours later or when the vessel arrived at her berth if that occurred earlier. But this clause concluded by stating that 'where delay is caused to vessel getting into berth after giving notice of readiness for any reason over which charterer has no control, such delay shall not count as used laytime'.

Clause 7 of the form provided that time consumed by the vessel on moving from loading port anchorage to loading berth would not count as laytime. Clause 9 provided that the loading place to be designated or procured by the charterers would be reachable on arrival.

The *Laura Prima* arrived at her loading port and gave the required six hours' notice of readiness. She could not reach a loading berth at once since all were occupied by other vessels. She waited nine days for a berth. The shipowners claimed demurrage. The charterers claimed to be protected by cl 6, alleging the reason for the delay (congestion) was something over which they had no control. The House of Lords held that 'reachable on arrival' meant immediately reachable on arrival. Clause 6 only protected the charterers once they had designated a loading place which actually was so reachable. It was only thereafter if some intervening event occurred causing delay over which the charterers had no control that the last sentence of cl 6 would apply: *Nereide v Bulk Oil*.

8 *Berth or no berth*. In *SA Marocaine de l'Industrie du Raffinage v Notos Maritime* [1987] 1 Lloyd's Rep 503 the *Notos* was chartered on the STB form for a voyage from Ras Tanura (Saudi Arabia) to Mohammedia (Morocco). Clause 6 of the charterparty was in a form similar to that in *The Laura Prima*. But the charters in this case had not undertaken that a berth would be reachable on arrival. After giving notice of readiness at Mohammedia, the *Notos* was delayed because swell

prevented vessels from using the sea line. The shipowners argued that the charterers were obliged to ensure that a berth was available for the vessel on arrival and relied on their right to give notice of readiness 'berth or no berth' under cl 6 of the charter. The House of Lords held those words did no more than provide that a notice of readiness could be given on arrival whether or not a berth was then available. *The Laura Prima* was distinguished on the grounds that that case was concerned with a charter which was materially different in terms. Swell was held to be a cause of delay over which the charterer had no control within the meaning of cl 6.

9 *Whether in berth or not*. The *Kyzikos* was fixed under a berth charterparty to carry a cargo of steel from Italy to the US Gulf. She was ordered to discharge at Houston. A berth was available on arrival at the port, but she could not proceed to it immediately because the pilot station was closed by fog. The charterparty provided that laytime was to commence whether the vessel was in berth or not. The House of Lord held that WIBON meant 'whether in berth (a berth being available) or not in berth (a berth not being available)'. This agreement did not cause laytime to start in cases where a berth was available on arrival at the port but was unreachable by reason of bad weather: *Seacrystal Shipping Ltd v Bulk Transport Group Shipping Co Ltd, The Kyzikos* [1989] 1 Lloyd's Rep 1.

10 *Duty to provide a cargo*. The House of Lords held in *The Aello* that if the provision of a cargo is necessary to enable a ship to become an arrived ship, the charterer has an absolute obligation to provide the cargo, or at any rate a reasonable part of it, in time to enable the ship to perform its obligation. Where the charterer fails to provide a cargo and prevents the arrival of the vessel, it was held in *Glencore Grain Ltd v Goldbeam Shipping Inc, The Mass Glory* that the shipowner is entitled to recover damages for detention in respect of the delay before she becomes an arrived ship and that those damages are to be calculated without reference to the laytime provisions and exceptions which apply from arrival; only when the vessel reaches her destination, serves notice of readiness and becomes an arrived ship, does delay fall to be regulated by the laytime agreement.

11 *Charterers' duty to facilitate arrival*. In *Sunbeam Shipping v President of India* [1973] 1 Lloyd's Rep 483, the *Atlantic Sunbeam* was chartered for a voyage from the United States Gulf to one or two safe berths or ports on the east coast of India. She was ordered to discharge at Madras and Calcutta. She could not become an arrived ship at Calcutta until the consignees (who were for this purpose the same as the charterers) obtained a document called a jetty challan from the port commissioners. The owners alleged that a delay in obtaining the jetty challan delayed the ship and this was the responsibility of the charterers. Arbitrators made an award in the form of a special case in favour of the owners. Kerr J held that a term was to be implied in the charter that 'the charterers were bound to act with reasonable despatch and in accordance with the ordinary practice of the port of Calcutta in doing those acts which had to be done by them as consignees to enable the ship to become an arrived ship' (p 488). It has been suggested that this decision cannot be reconciled with *The Aello*, above, but the difference between a promise to provide a cargo and a promise to act generally to facilitate arrival is a convincing basis for distinguishing the cases.

12 *Order not to berth and load*. The *Ulyanovsk* was chartered to carry a cargo of gas oil from Skikda. The charterers had contracted to pay their suppliers by reference to a formula which depended on a market price around the bill of lading date. Anticipating a fall in price, they ordered the vessel not to berth and load on arrival.

In disregard of these instructions, on arrival notice of readiness to load was given by the ship to the refinery and shippers and the vessel proceeded to berth and load. It was held that charterers could make use of the total agreed laytime of 72 running hours as they wished and they were entitled to delay the commencement of loading: *Novorossisk Shipping Co v Neopetro Co Ltd, The Ulyanovsk* [1990] 1 Lloyd's Rep 425.

1.2 Readiness

Readiness to load or unload is the second of the three requirements generally necessary before laytime will start. Absolute readiness is not necessary according to the decision in *The Tres Flores*.

Compania de Naviera Nedelka SA v Tradax Internacional SA, The Tres Flores [1974] QB 264

Facts

The *Tres Flores* was chartered to carry maize in bulk from Bulgaria to Cyprus. The vessel gave notice of readiness at the loading port but on later inspection fumigation for pests was found necessary.

Held

Lord Denning MR: … The dispute is whether laytime commenced at the time for which the master gave his notice of readiness, that is, 14.00 hours on Monday, 23 November, or only at the time when the vessel had been fumigated and was suitable to receive the cargo, that is, at 14.00 hours on Tuesday, 1 December 1970.

It seems to me that this dispute is really covered by the specific sentence in the charterparty which I have already read but which I will repeat now:

> Before tendering notice master has to take necessary measures for holds to be clean, dry, without smell and in every way suitable to receive grain to shippers/charterers' satisfaction.

That lays down a condition precedent to the validity of a notice of readiness to load. That condition precedent was not fulfilled until the fumigation had been completed on 30 November and therefore the notice of readiness could not validly be given until that time.

That is sufficient for the decision of this case; but, as the contrary has been discussed before us, it may be desirable for the members of the court to give their views upon it.

One thing is clear. In order for a notice of readiness to be good, the vessel must be ready at the time that the notice is given, and not at a time in the future. Readiness is a preliminary existing fact which must exist before you can give a notice of readiness: see *per* Atkin LJ in *Aktiebolaget Nordiska Lloyd v J Brownlie & Co (Hull) Ltd* (1925) 30 Com Cas 307, 315.

The next question, when can a ship be said to be ready? Conversely, if some things are yet to be done, what are the things which make her unready to receive cargo?

The leading case is *Armement Adolf Deppe v John Robinson & Co Ltd* [1917] 2 KB 204, where the hatch covers had not been removed at the time when the notice of readiness was given. It would be necessary for them to be removed before discharging could take place. The notice of readiness was held to be good. Then there is *Sociedad Financiera de Bienes Raices SA v Agrimpex Hungarian Trading Co for Agricultural Products, The Aello* [1961] AC 135, where a police permit was necessary before a ship could be loaded. It was held that the absence of a police permit did not prevent the *Aello* from being 'ready to load' while at the anchorage: see *per* Lord Radcliffe at pp 174–75. And finally *Shipping Developments Corporation v V/O Sojuzneftexport (The Delian Spirit)* [1972] 1 QB 103, where the vessel had not obtained free pratique and would need it before she could load. It was held that she was entitled to give notice of readiness.

> In considering the cases, it seems to me that the submission which Mr MacCrindle [counsel] put forward was correct. In order to be a good notice of readiness, the master must be in a position to say 'I am ready at the moment you want me, whenever that may be, and any necessary preliminaries on my part to the loading will not be such as to delay you'. Applying this test it is apparent that notice of readiness can be given even though there are some further preliminaries to be done, or routine matters to be carried on, or formalities observed. If those things are not such as to give any reason to suppose that they will cause any delay, and it is apparent that the ship will be ready when the appropriate time arrives, then notice of readiness can be given.
>
> In the present case there were pests in the hold such as to make the ship unready to receive cargo. Fumigation was not a mere preliminary, nor a routine matter, nor a formality at all. It was an essential step which had to be taken before any cargo could be received at all. Until the vessel had been fumigated, notice of readiness could not be given. It has always been held that, for a notice of readiness to be given, the vessel must be completely ready in all her holds to receive the cargo at any moment when she is required to receive it . . .
>
> So, both under the specific clause and at common law, I am of opinion that the presence of pests in the hold invalidated the notice of readiness. I think the decision of Mocatta J was right and I would dismiss this appeal.

(Cairns and Roskill LJJ agreed that the charter made fumigation a condition precedent to the giving of notice of readiness.)

Notes

1 *Readiness in respect of overstowed cargo*. In *The Massalia No 2* Diplock J held that a requirement under a charterparty to give notice of readiness in respect of 'cargo', means readiness to discharge the cargo which is the subject of the charter, not readiness to discharge other cargo overstowed on it. Notice of readiness in respect of an inaccessible part cargo could not be given until that cargo was actually accessible.

2 *Readiness in respect of the whole of the cargo*. The *Virginia M* was chartered to carry a cargo of bagged calcium ammonium nitrate from Constanza to Lagos. She arrived and gave notice of readiness with insufficient fresh water on board to enable her to discharge the whole cargo by her own steam power. It was held that: (1) readiness means readiness in a business and mercantile sense and does not involve the completion of what are mere formalities; and (2) the readiness required is readiness to discharge the whole of the cargo that is the subject matter of the charterparty. Readiness to discharge some of the cargo only is not sufficient. The case was remitted to arbitrators to decide, among other things, whether taking more water on board at a discharge berth was a mere formality which would not impede or hold up discharge and not prevent the vessel from being ready to discharge the whole cargo: *Unifert International SAL v Panous Shipping Co Inc, The Virginia M* [1989] 1 Lloyd's Rep 603.

1.3 Notice of readiness

The parties to a charter can agree on any form of notice they wish, even oral notice (*Franco-British Steamship v Watson & Youell* (1921) 9 LlL Rep 282, p 283) or they can dispense with notice altogether. In the absence of special agreement or a legally binding custom, the shipowner must give notice of readiness to load (*Stanton v Austin* (1892) LR 7 CP 651) but is not obliged to give notice of readiness to discharge: *Houlder v GSN* (1862) 3 F & F 170. The reason for the distinction between loading and discharge has been said to be that the charterer can be expected to take an interest in the movements of the vessel once his cargo has been loaded which he would not take

prior to loading: *per* Donaldson J, *Christensen v Hindustan Steel* [1975] 1 Lloyd's Rep 398. However, notice of readiness to discharge must be given if the shipowner, as is usual, has contracted to do so, as for example when the bill of lading contains a space for the insertion of the name of the 'party to be notified' and the space has been completed: *Clemens Horst v Norfolk* (1906) 11 Com Cas 141; or where the shipowner intends to rely on a 'near' clause and discharge at a place other than the primary contractual destination: *The Varing* [1931] P 79, p 87.

In order to give a valid notice of readiness, the ship must first be an arrived ship and must in fact be ready to load: *Nelson v Dahl* (1879) 12 Ch D 581. Where a charterparty expressly relates the commencement of laytime to the giving of a notice of readiness, the notice will be premature if the ship is not at the time at the agreed place (*The Agamemnon* [1998] 1 Lloyd's Rep 675) or in a fit condition to load (*Cobelfret NV v Cyclades Shipping Co Ltd, The Lindaros* [1994] 1 Lloyd's Rep 28) or physically able to discharge (*The Mexico 1* [1990] 1 Lloyd's Rep 507, CA) or in the state required by the charter (*Surrey Shipping v Compagnie Continentale, The Shackleford* [1978] 1 WLR 1080, CA). A premature notice of readiness is a nullity and does not mature into an effective notice when the vessel reaches the right place or becomes ready: *The Mexico 1*. Nor in such a case does laytime start when the charterer knows or ought to have known of the readiness. One reason for this approach was said to be the need to avoid uncertainty about the moment at which laytime starts. However, the practical advice given by the courts to shipowners anxious to avoid disputes about premature notices – serve a further notice on any change in a vessel's circumstances – also produces uncertainty; and a second or later notice runs the risk of being seen as an admission that an earlier notice was invalid.

A notice which is despatched out of hours, just before the earliest moment permitted by the charter, in the knowledge that it would be dealt with at the start of the next working day, has been treated as a proper tender: *The Petr Schmidt* [1998] 2 Lloyd's Rep 1.

The series of decisions dealing with notices of readiness that were invalid for prematurity did not decide what should happen if no further notice was served, but the vessel thereafter started to load or discharge. When did laytime start? Did it start at all? A number of possible answers were discussed in the cases. The Court of Appeal reviewed the problem in *The Happy Day.*

Glencore Grain Ltd v Flacker Shipping Ltd, The Happy Day
[2002] EWCA Civ 1068; [2002] 2 Lloyd's Rep 487

Facts

The ship was chartered on the Synacomex form to carry grain from Odessa to Cochin. She missed the tide and could not enter Cochin on arrival on 25 September 1998. Nevertheless the master purported to give notice of readiness immediately. The notice was invalid because the charter was a berth charter and there was no congestion: see *The Kyzikos*, above. The vessel berthed the following day and discharge commenced. No further NOR (notice of readiness) was ever given. Discharge was not completed until 25 December. Langley J on appeal from arbitrators held that as no valid NOR had been given, no demurrage ever became payable. The shipowners appealed to the Court of Appeal and argued that laytime had started at the commencement of discharge or thereafter at the earliest moment that a valid notice could have expired either because the notice had been accepted, or on grounds that the charterers were

estopped from denying the validity of the notice or that there had been a waiver or a variation of the contract.

Held

Potter LJ: 18 . . . In the absence of contract or custom, there is no common law requirement that the shipowner must give NOR to unload to the charterers. However, where (as is usual) NOR is required, the proper contents of the notice depend upon the terms of the charter. In the absence of any specific additional requirements it should state (i) that the vessel has arrived at the place (eg a particular port, area or berth) where, under the terms of the charter, she may tender notice and (ii) that the vessel is ready to perform the cargo operation required. A notice which states that the vessel is ready, but which is given at a time when it is not actually ready, is not a valid notice. These matters are not in issue. Nor is it in issue that the purpose of NOR is that of defining the time at, or following which, laytime starts to run for the purpose of calculating the period allowed to the charterers under the charter for loading or discharging; that will in turn regulate the liability of the charterers to pay demurrage if the period for loading is exceeded and charterers' right to payment by owners of despatch in respect of working time saved. That being so, if, having given premature NOR, the vessel arrives at berth and the work of unloading proceeds with the knowledge and consent of the charterers but exceeds the period of laytime provided for in the charter, the question arises whether the law is such that it permits the charterers to treat laytime as never having commenced, to deny liability for demurrage and, indeed, to claim despatch for the entire period of laytime. It is the submission of the owners on this appeal that that is a surprising proposition productive of injustice and cannot be derived from the authorities relied upon before the judge. The charterers, on the other hand, assert (as the judge held) that such is indeed the effect of the authorities and is in any event the correct position. [His Lordship considered the authorities and continued.]

38 . . . the law at the time of the decision of Langley J was to the following effect. In a case where NOR has been given which is invalid for prematurity, the doctrine of 'inchoate' notice is not available to the owners to start laytime running as soon as the vessel becomes ready to unload (even though the charterers are aware that it is in fact ready). Time will not start to run until valid NOR is given, in the absence of an agreement to dispense with such notice, or unless there is a waiver or an estoppel binding upon the charterers in respect of the necessity for further (valid) notice. The question whether or not such agreement, waiver or estoppel can be established (which is a mixed question of law and fact) must depend upon the circumstances of the case. In particular, in a case where unloading has commenced with the knowledge and consent of the charterers or their agents and without any reservation of the charterers' position, the question arises whether that fact alone gives rise to an (implied) agreement, waiver or estoppel (as suggested by the decision of Horridge J in the *Franco-British Steamship* case (1921) 9 LIL Rep 282 and of Donaldson J in *The Helle Skou* [1976] 2 Lloyd's Rep 205 but doubted and left for later decision by Mustill LJ in *The Mexico 1* [1990] 1 Lloyd's Rep 507). By his decision, Langley J answered that question in the negative . . .

Variation by agreement

61 Although variation, waiver and estoppel by representation are traditionally treated as virtually interchangeable pleas in support of the assertion that, on the basis of particular facts, a party has lost or may not now enforce his rights under a written contract, they are by no means synonymous. In particular (a) a variation alters the obligations to be performed under the original contract, whereas waiver and estoppel are conduct on the part of one party which does not alter the terms of the contract but merely affects the remedies in respect of a breach of those terms by the other party . . . (b) because the same formalities apply to a variation as to the formation of an original contract, a plea of variation must sustain analysis in terms of offer, acceptance and certainty of terms.

62 Mr Eder [counsel] submits that the appropriate analysis in contractual terms is that of an offer by the owners to allow the charterers to discharge the vessel on the basis that the previously

tendered NOR was valid and that laytime would run throughout discharge, which was accepted by charterers without suggesting that the NOR was invalid or that laytime was not running; alternatively, an offer by charterers to discharge the vessel on the basis that the previously tendered NOR was valid and/or that laytime would run during discharge, accepted by owners in allowing discharge to proceed. In this connection he relies upon the principle that the law applies an objective test as to the communications between the parties, whether by words or conduct, and submits that each must be taken to have appreciated that the other was acting on the basis attributed to them.

63 The difficulty with such a formulation however is that the court is being asked to spell positive offer and acceptance out of conduct alone in a situation where the parties' obligations were governed by a formal written contract pursuant to which the owners were at all times purporting to act. There was thus no apparent *bilateral* intention to vary or re-negotiate the express terms of the charter, as opposed to an apparent willingness on the part of the charterer to treat as valid a notice appropriate in form and purportedly served in compliance with the terms of the charter (see 'Waiver' below).

Waiver

64 Broadly speaking, there are two types of waiver strictly so-called: unilateral waiver and waiver by election. Unilateral waiver arises where X alone has the benefit of a particular clause in a contract and decides unilaterally not to exercise the right or to forego the benefit conferred by that particular clause . . .

In such a case, X may expressly or by his conduct suggest that Y need not perform an obligation under the contract, no question of an election by X between two remedies or courses of action being involved. Waiver by election on the other hand is concerned with the reaction of X when faced with conduct by Y, or a particular factual situation which has arisen, which entitles X to exercise or refrain from exercising a particular right to the prejudice of Y. Both types of waiver may be distinguished from estoppel. The former looks principally to the position and conduct of the person who is said to have waived his rights. The latter looks chiefly at the position of the person relying on the estoppel. In waiver by election, unlike estoppel, it is not necessary to demonstrate that Y has acted in reliance upon X's representation . . .

65 So far as waiver by election is concerned, the basic proposition is that where two possible remedies or courses of action are to his knowledge open to X and he has communicated his intention to follow one course or remedy in such a manner as to lead Y to believe that his choice has been made, he will not later be permitted to resile from that position . . .

66 Thus, it is clear that whether or not the party entitled to notice has waived a defect upon which he subsequently seeks to rely, will depend upon the effect of the communications or conduct of the parties, the intention of the party alleged to have waived his rights being judged by objective standards. This being so, it seems to me clear that, in an appropriate commercial context, silence in response to the receipt of an invalid notice in the sense of a failure to intimate rejection of it, may, at least in combination with some other step taken or assented to under the contract, amount to a waiver of the invalidity or, put another way, may amount to acceptance of the notice as complying with the contract pursuant to which it is given.

67 Waiver is closely associated with the law of estoppel in that, in the case of estoppel (and at this point I leave aside estoppel by convention), it is necessary for there to have been an unequivocal representation of fact by words or conduct and, in waiver, there must similarly have been an unequivocal communication of X's intention, whether by words or conduct . . .

68 In relation to waiver, it is important to note certain features of the doctrine around which the submissions of the parties have revolved:

(1) In order to demonstrate awareness of the right waived, it must generally be shown that X had knowledge of the underlying facts relevant to his choice or indication of intention . . .

(2) The court will examine any act or conduct alleged to be unequivocal in its context, in order to ascertain whether or not it is sufficiently clear and unequivocal to give rise to a waiver . . .

(3) The courts will also examine with care any agency relationship between X and any person alleged to have made the unequivocal communication on his behalf. If that person lacked the actual or ostensible authority to waive the right or rights concerned there will be no waiver . . .

69 On the basis of the findings of fact made by the arbitrators in this case, it was, in my view, properly open to them to conclude that, as at the time discharge commenced, the charterers had waived any reliance on the invalidity of the NOR served upon the receivers or their agents in accordance with the requirements of the charterparty as a means of deferring operation of the laytime regime provided for in Clause 30. The context was as follows. The owners had served NOR upon the receivers' agents in purported compliance with the charter at a time shortly before she arrived at berth. Having arrived at berth the vessel was in fact ready to commence the cargo operation required and neither the owners nor the Master received any intimation of rejection or reservation so far as the validity of the NOR was concerned. The charterers were well aware of the matters which the NOR was concerned to convey, namely the arrival of the vessel and its readiness to discharge . . . On an objective construction of those matters, although the charterers were not under a contractual duty to indicate rejection of the NOR, by their failure to do so, coupled with their assent to commencement of discharging operations, they intimated, and a reasonable shipowner would have concluded, that the charterers thereby waived reliance upon any invalidity in the NOR and any requirement for a further notice . . .

73 . . . If, it is to be said that, by participating in the commencement of discharge on Saturday 26 September 1998, the charterers/receivers accepted the validity of the NOR, does that indicate an intention that laytime commences immediately, or does it require that NOR be treated as notionally given at the time discharge commenced, leaving intact *mutatis mutandis* the specific provisions in Clause 30 as to the interval before laytime starts to run and as to the days to be included in it? It seems to me that the latter is plainly the case. Not only was it the conclusion of the arbitrators. It entirely accords with commercial good sense. The unequivocal indication arising from commencement of loading was that the notice previously tendered was at that point accepted as valid, but it was no more than that. On that basis, the detailed provisions as to laytime contained in Clause 30 were apt to apply as from the time of the validation of the notice by acceptance, and neither the conduct of the charterers/receivers nor the circumstances of the case suggested waiver in that respect . . .

76 . . . if the charterparty provides that NOR is to be served not upon the charterers but upon the receivers/agents through whom the charterers propose to perform their obligation to discharge then, so far as the owners are concerned, the receivers are not only the charterer's agent to receive the NOR but also the persons to whom he is entitled to look to make decisions as to the readiness of the vessel and its equipment for such discharge to begin . . .

Estoppel by convention

79 Since I am of that opinion, it is not strictly necessary to consider Mr Eder's alternative submission, namely that at, or as from, the time of commencement of discharge, the parties were operating upon a common assumption that the NOR was valid and/or that it was unnecessary for the owners to serve a further NOR in order to start laytime running, so that an estoppel by convention arose whereby the charterers were precluded from later asserting that the NOR served was invalid.

80 Estoppel by convention may be held to arise where both parties to a transaction:

> . . . act on an assumed state of facts or law, the assumption being either shared by both or made by one and acquiesced in by the other: see *Republic of India v India SS Co Limited (No 2)* [1988] AC 878 at 913. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow them to go back on the assumption . . .

82 For the doctrine to operate, there must be some mutually manifest conduct by the parties, which is based on a common assumption which the parties have agreed on, and for that purpose 'Agreement need not be expressed, but may be inferred from conduct or even silence', *per* Staughton LJ, giving the judgment of the Court of Appeal in *Republic of India v India Steamship Co Limited ('The Indian Grace') (No 2)* [1997] 2 WLR 538 at 549.

83 . . . it seems to me that, contrary to the position on waiver, the findings of the arbitrators are inadequate to sustain their decision on the basis of (an inferred) estoppel by convention . . .

Conclusion

85 In the context of this case I would answer the question of law in relation to which leave was granted as follows. Laytime can commence under a voyage charterparty requiring service of a notice of readiness when no valid notice of readiness has been served in circumstances where: (a) a notice of readiness valid in form is served upon the charterers or receivers as required under the charterparty prior to the arrival of the vessel; (b) the vessel thereafter arrives and is, or is accepted to be, ready to discharge to the knowledge of the charterers; (c) discharge thereafter commences to the order of the charterers or receivers without either having given any intimation of rejection or reservation in respect of the notice of readiness previously served or any indication that further notice of readiness is required before laytime commences. In such circumstances, the charterers may be deemed to have waived reliance upon the invalidity of the original notice as from the time of commencement of discharge and laytime will commence in accordance with the regime provided for in the charterparty as if a valid notice of readiness had been served at that time. By answering the question in that way, I should not be thought to doubt that, in appropriate circumstances, the same result may follow by application of the doctrines of variation and estoppel . . .

Notes

1 By a charterparty on the standard form of Richards Bay coal charter, the *Lindaros* was fixed to load a cargo of coal for carriage from Richards Bay, South Africa to Antwerp. The charter provided that laytime would commence 18 hours after notice of readiness and that 'any time lost subsequently by vessels not fulfilling requirements for . . . readiness to load in all respects, including Marine Surveyor's Certificate . . . shall not count as notice time, or as time allowed for loading'. The vessel gave notice of readiness. After berthing the marine surveyor failed her for loading because of water and rust which he found in her hatches. She was subsequently passed on the following morning. It was argued that while in general a valid notice cannot be given unless and until the vessel is in truth ready to load, it was always open to the parties to alter the position by agreement to the contrary. It was held that the clause contemplated a notice being given at a time when the vessel was not in fact ready to load and that the effect of the clause was to contract out of the normal rule requiring that a vessel must be ready at the time of giving notice: *Cobelfret NV v Cyclades Shipping Co Ltd, The Lindaros*. See also to the same effect *The Jay Ganesh* [1994] 2 Lloyd's Rep 358 (WorldFood charterparty form).

2 *Acceptance of notice of readiness/estoppel.* In *Surrey Shipping v Compagnie Continentale, The Shackleford*, the vessel was chartered on the Baltimore form C grain charter for a voyage to Constanza. By a special clause it was agreed that the vessel would obtain customs entry before notice of readiness was given. The master purported to give (to the charterer's agents) notice of readiness before the vessel had been entered with customs at Constanza. The charterer's agents, who had authority to receive a valid notice of readiness, were found also to have authority to accept a premature notice of readiness which, on the facts, they were held to have done. The charterers were estopped from denying that the premature notice of readiness was valid and effective. The shipowners had relied on the acceptance of the notice of readiness to

their detriment by not attempting to procure customs entry as soon as they could otherwise have done.

3 The *Helle Skou* was chartered on the GENCON form to carry a cargo of skimmed milk powder. Her previous cargo had been fish meal. By cl 22 of the berth charter she was 'to be presented with holds clean and dry and free from smell'. Notice of readiness was given although she was not in fact free from smell. The charterers were found to have accepted the invalid notice of readiness when they began to load:

> Whether it is labelled as waiver or estoppel or something else, I do not consider that the charterers can resile from this position, save upon grounds of fraud (Donaldson J).

The charterers were not allowed to reject the notice later the same day when the smell became more apparent and it was decided that the milk powder which had been loaded had to be discharged and the vessel cleaned: *Sofial v Ove Skou Rederi* [1976] 2 Lloyd's Rep 205.

2 FIXED LAYTIME

It is conventional law that a charterer who agrees to load or discharge within a fixed period is not excused if cargo operations are delayed by circumstances outside his control, unless perhaps the contract is frustrated. But the charterer may be excused by exceptions in the charter, or if prevented from loading or discharging by the shipowner or those for whom he is responsible ('fault of the shipowner'), and possibly if the shipowner makes use of the ship for his own purposes. The first judgment in this section contains a general statement of the law. The next case – *The Fontevivo* – deals with fault of the shipowner. The final decision is the controversial recent case of the *Stolt Spur,* in which it was held that both laytime and demurrage will be interrupted if the shipowner makes use of the ship, even if there is no interference with loading or discharge.

2.1 General principles

***William Alexander & Sons v A/S Hansa* [1920] AC 88**

Facts

The *Hansa* was chartered to carry to Ayr a cargo of wood that the charterer agreed to discharge in a fixed time. A shortage of labour at Ayr meant that the discharge was delayed.

Held

> **Viscount Finlay:** . . . On this appeal a great many cases were cited laying down the rule that if the charterer has agreed to load or unload within a fixed period of time (as is the case here, for *certum est quod certum reddi potest*), he is answerable for the non-performance of that engagement, whatever the nature of the impediments, unless they are covered by exceptions in the charterparty or arise through the fault of the shipowner or those for whom he is responsible. I am here adopting in substance the language used by Scrutton LJ in his work upon *Charterparties and Bills of Lading*, art 131 . . . Although no authority upon the point was cited which would in itself be binding upon your Lordships' House, there has been such a stream of authority to the same effect that I think it would be eminently undesirable to depart in a matter of business of this kind from the rule which has been so long applied, even if your Lordships felt any doubt as to the propriety of these decisions in the first instance. I myself have no doubt as to their correctness, and I

understand that this is the opinion of all your Lordships. It seems to me that the appeal on this point must fail . . .

Notes

1 '*Exceptions in the charterparty*'. This is a reference to specific exceptions which are expressed to apply to the laytime provisions. A general exceptions clause in a charterparty will not normally be read as applying to provisions for laytime and demurrage unless the language is clear: *The Johs Stove* [1984] 1 Lloyd's Rep 38.

2 '*Whatever the nature of the impediments*'. Charterers have been held liable on an obligation to load or unload within a fixed time notwithstanding that they could not do so because of congestion, as in *Randall v Lynch* (1810) 2 Camp 352; ice, *Barret v Dutton* (1815) 4 Camp 333; bad weather preventing access to the ship, *Thiis v Byers* (1876) 1 QBD 244; strikes of stevedores, *Budgett v Binnington* [1891] 1 QB 35; and even absence of the vessel from the port, the ship having been ordered away by an act of the sovereign authority, *Cantiere Navale Triestina v Soviet Naptha* [1925] 2 KB 172, CA, where it was said that it was just as if the ship had been driven to sea by stress of weather:

> . . . there can be no reason why the absence of the ship from the harbour, once the lay days have begun to run, without any fault on the part of the owner, should prevent the lay days from continuing to run and the ship going on demurrage (*per* Atkin LJ, p 207).

However, it seems that the charterer may be excused, on the principle of *Ralli v Compania Naviera* [1920] 2 KB 287, if the loading or unloading becomes illegal by the law of the port of loading or unloading. But it is insufficient if the law applied in the port merely limits the time for loading, as opposed to preventing it completely: *Compania Crystal de Vapores v Herman & Mohatta, The Maria G* [1958] 2 QB 196.

2.2 'Fault of the shipowner'

The charterer will not be in breach of an obligation to load or discharge within a fixed period if prevented from doing so by the shipowner or by those for whom the shipowner is responsible.

Gem Shipping of Monrovia v Babanaft, The Fontevivo
[1975] Lloyd's Rep 399

Facts

The *Fontevivo*, a tanker, was chartered to carry gasoline from Turkey to Lattakia in Syria. She arrived at Lattakia and began discharging her cargo. However, when part only had been discharged, she sailed away claiming that the port had become unsafe owing to war risks. Three days later she returned and completed the discharge.

Held

> **Donaldson J:** . . . The issue raised by this award, in the form of a special case, is whether the time she was away from her berth counts as part of the laytime. Mr Cedric Barclay, sitting as the arbitrator, held that it did not.
>
> In the absence of express exceptions, the charterer's obligation to load and discharge the vessel within the lay days is unconditional, once the vessel has reached the appropriate place. Nevertheless, it is subject to the qualification which applies to all contracts that a party is not liable for the commission of a breach if the breach arose because the other party prevented him from performing the contract and did so without lawful excuse. (See *Budgett & Co v Binnington & Co* [1891] 1 QB 35 *per* Lord Esher MR at p 38, Lindley LJ at p 40, and Lopes LJ at p 41.)

> Mr Pardoe, who has appeared for the shipowners, submits that if the safety of the ship and cargo requires the removal of the vessel from the discharging berth, the removal is lawfully excused and laytime continues to run. (See *Houlder v Weir* [1905] 2 KB 267, and *Compania Crystal de Vapores of Panama v Herman and Mohatta (India) Ltd* [1958] 2 QB 196.) In the former case laytime was held to run although discharge was temporarily interrupted in order to ballast the vessel. In the latter case it continued to run whilst the vessel was temporarily away from the berth in order to avoid the danger of bore tides.
>
> … The reasoning underlying both *Houlder's* case and the *Crystal* case is that the mere fact that the shipowner by some act of his prevents the continuous loading or discharging of the vessel is not enough to interrupt the running of the lay days; it is necessary to show also that there was some fault on the part of the shipowner …
>
> The issue in this case is, therefore, whether discharge of the vessel was prevented by some action on the part of the shipowner and, if so, whether that action constituted fault on his part. The initial burden of proof lies on the charterers, but this they discharge by proving the removal of the vessel from the berth in the course of discharging. Thereafter the burden lies upon the shipowner of justifying this action or showing that it was involuntary.

(His Lordship then reviewed the facts and continued:)

> The long and the short of it is that the crew of this Somali vessel had a severe attack of cold feet in a hot climate and the master decided that the cure was to leave Lattakia. There is no finding that this was necessary for the safety of ship or cargo or that, had he left the ship at the discharging berth, she would not have been at the disposal of the charterers for the purpose of discharging.
>
> Whatever may be the responsibility of a shipowner for the activity or inactivity of his crew in this context – a point which was left open by Lord Esher in *Budgett v Binnington* [1891] 1 QB 35, at p 39 – there is no doubt as to his responsibility for the actions of the master who decided to leave the discharging berth. On the facts found that cannot be justified and accordingly I hold that time does not run against laytime during the period of the vessel's absence from Lattakia.

Notes

1 Neither a justified nor an involuntary act of the shipowner is a 'fault', so that laytime will continue to run where loading or discharge is delayed because the carrying ship is damaged by collision without any negligence on the part of the owner, or is removed from berth to take on necessary ballast (*Houlder v Weir*, above) or to avoid damage by weather or tides (*Compania Crystal de Vapores of Panama v Herman and Mohatta (India) Ltd*, above) or to comply with a governmental order (*Cantiere Navale Triestina v Soviet Naptha*, above). But laytime or demurrage will continue to run if the vessel is removed from berth unnecessarily or only for the convenience of the owner (*Re Ropner* [1927] 1 KB 879) or is negligently run aground, even where the charter excludes liability for negligent navigation (*Blue Anchor Line v Toepfer, The Union Amsterdam* [1982] 1 Lloyd's Rep 432). As this last case shows, it is not necessary to constitute 'fault of the shipowner' that the owner's act should be a breach of contract.

2 In *Overseas Transportation v Mineralimportexport, The Sinoe* [1971] 1 Lloyd's Rep 514, affirmed on appeal [1972] 1 Lloyd's Rep 201, CA, the time allowed for discharging was exceeded because of the incompetence of the stevedores. The owners claimed demurrage. The charterparty provided that the stevedores were to be employed by charterers but 'considered as owners' servants'. Sir John Donaldson held that in employing or causing or allowing these stevedores to be employed, the charterers were in breach of their duty to the owners and could not rely upon the neglect of the stevedores as barring the owners' claim to demurrage. The charterers were, alternatively, liable to the owners in a like amount as damages for breach of their obligation to employ competent stevedores.

2.3 Use of a waiting ship by the owner

The statement of general principle in *Alexander v Hansa,* above, which is repeated in later cases, does not mention the possibility that laytime or demurrage might cease to run if a shipowner makes some use of the vessel while waiting for the charterer to load or unload. It seems likely that this omission was deliberate. In *Alexander v Hansa* the House of Lords accepted the law as laid down by the Court of Appeal in *Budgett v Binnington*. And in that case it was held that it was not an implied term of a voyage charter that the ship would be able and willing to load at every moment after laytime started. On that basis, it was thought that where laytime had begun but no berth or cargo was available, the shipowner could make use of the delay to refuel, clean, maintain or repair the ship without affecting the charterer's obligations, provided that no delay to loading or discharge was caused. However, in the next case, *The Stolt Spur*, the ship was a parcels tanker chartered to carry a part cargo. She was discharged, cleaned and loaded with other cargo while waiting for a berth. The court reviewed the older cases and identified a wider principle – wider than 'fault of the shipowner' – which can result in the interruption of laytime and demurrage.

Stolt Tankers Inc v Landmark Chemicals SA, The Stolt Spur
[2002] 1 Lloyd's Rep 786

Facts

The *Stolt Spur*, a parcels tanker designed to carry several distinct liquid cargoes at the same time, was chartered to carry a part cargo from Rotterdam to Bombay. The vessel arrived, gave an effective notice of readiness and laytime commenced. No berth was available for 17 days because of congestion. While the laytime was running, the ship left the waiting anchorage for six days to discharge cargo carried under a concurrent charter and to clean the discharged tanks. While on demurrage she again shifted to load cargo under another part charter.

Held

Andrew Smith J: … The charterers … contend that the law is correctly stated in *Scrutton on Charter Parties* (20th ed) in the following passage (italics added):

> Demurrage becomes payable when the lay-days allowed for loading or unloading have expired. … *However, in order to be entitled to claim demurrage, the shipowner is under an obligation to have the vessel ready and available to load or discharge. Thus*, if the shipowner for his own purposes removes the vessel from the charterer's disposition, eg for bunkering, or if when on demurrage at the first port of loading she is moved to a second loading port named in the charter, no demurrage is payable for the period when the vessel is so removed from the charterer's disposition or is on passage (at p 302, art 155).

The sentence in italics was introduced into the 20th ed of the work which was published in 1996, and is not found in the 19th ed, published in 1984. The authority cited in support of it is the decision of Mr Justice Evans in *Ellis Shipping Corporation v Voest Alpine Intertrading (The Lefthero)* [1991] 2 Lloyd's Rep 599 at p 608.

… Although these views are expressed in relation to whether demurrage is payable, the same principles must apply to the question whether laytime runs.

The Lefthero concerned the charter-party of a vessel for a voyage to Bandar Khomeini in 1983, at the time of Iran/Iraq war. Because of the war the pilot refused to take the vessel north of Bushire, and in the end the parties agreed terms under which the cargo was to be discharged there. Discharge at Bushire took longer than it would have taken at Bandar Khomeini, and the first point that arose for decision upon the owners' claim for demurrage was whether the charterers were

protected by a provision exempting responsibility for the result of 'restraint of princes'. Mr Justice Evans held that they were. However, the charterers advanced a second defence to the demurrage claim, that the additional period of delay resulted from the owners' own breach of contract in failing to proceed to Bandar Khomeini, and this 'default' prevented them from claiming demurrage, even though the breach was excused by the 'restraint of princes' provision. Mr Justice Evans held that the owners were not guilty of 'default' or 'fault'. However, he continued as follows:

> It seems to me that charterers, if they are to succeed on this issue, must rely upon the 'wider principle' referred to by Mr Justice Parker, in *The Union Amsterdam* …
>
> The authorities show … that the charterer undertakes an absolute obligation to pay demurrage, subject to exceptions and to 'fault', but this depends in its turn, in my judgment, upon the shipowners' obligation to have the vessel ready and able to give discharge in accordance with contract. This cannot be stated as an absolute obligation … but it is nevertheless a qualified obligation, non-performance of which will prevent the shipowner from recovering demurrage. Thus, no claim lies when the ship is proceeding from one loading, or discharging, port to another; not because the time on passage is an exception, but because the ship is proceeding on the voyage, not being detained by the charterers, during that period: *Breynton v Theodorou & Co* (1924) 19 LIL Rep 409. The wider principle underlying the authorities is like the larger theme which goes through the Enigma Variations, but which is never played.

[After a full review of the cases his Lordship continued] I consider that if a vessel is unavailable for cargo operations, it is natural to regard that in itself as preventing the loading or discharge of the vessel. It is a cause of any delay in cargo operations. This, it seems to me, is why the 'wider principle' in no way conflicts with such authorities as *William Alexander* …

Mr Houghton [for the owners] submits that this conclusion would introduce uncertainty into the routine and largely mechanical calculation of laytime and demurrage, and raise questions as to whether it would be necessary for the vessel throughout her wait to maintain an absolute state of readiness to shift to her berth. I am not persuaded by these arguments: the requirement is one of what Mr Justice Hobhouse in *The Virginia M* [1989] 1 Lloyd's Rep 603 at p 606 described as 'readiness in a business and mercantile sense [which] does not involve completion of what are mere formalities'.

Demurrage is payable, as Mr Justice Donaldson pointed out in *Navico AG v Vrontados Naftiki Etaira PE* [1968] 1 Lloyd's Rep 379 at p 383 because the shipowner, having agreed freight to cover the voyage and an agreed time for loading and discharging processes, 'faces serious losses if the processes take longer than he had bargained for and the earning of freight on the ship's next engagement is postponed', and the charterer agrees to compensate him for those losses by way of demurrage. If a vessel is not available for the charterers' cargo operations but being used by the owners for their own purposes, there is no reason that they should pay compensation. She is not being detained by the charterers.

The commercial arbitrators in this case came to the clear view that it would be wrong for the owners to be able to claim that laytime ran during the first period and demurrage accrued during the second period when they were employing the vessel for their own purposes. I agree with that view, and uphold their award.

Note

The 'wider principle' that defeated the claim for demurrage in this case is expressed in the judgment in at least three different ways. First, in the words used by Scrutton, the claim did not succeed because the shipowner failed *'to have the vessel ready and available to load'*. *The Lefthero* used a very similar phrase but added a second idea, that the claim in that case failed because the ship was *'not being detained by the charterer'*. The third possibility, using the words in the penultimate paragraph above of the judgment in *The Stolt Spur,* is that the claim failed because the vessel was *'was not available for the charterers' cargo operations but being used by the owners for their own purposes'*.

All three formulations are open to objection. The first is inconsistent with the decisions of the Court of Appeal in *Budgett v Binnington* and *Cantiere Navale Triestina v Soviet Naptha*, which rejected the notion that continued readiness is a precondition of a claim to demurrage. It is also inconsistent with *The Tres Flores*, above, which recognised that a ship is ready enough if she is ready when wanted.

The second version of the wider principle – *the ship was not detained by the charterer* – raises problems of causation. On the facts if a berth had been available for *The Stolt Spur*, the vessel would not have attempted to discharge, clean or load other cargo; the owners' acts caused no extra delay; no time would have been saved for the charterers if the ship had remained in the waiting anchorage. The effective cause of the 17-day delay was congestion, something for which the charterers had agreed to be responsible, so that the ship could properly be said to have been detained by them.

The third version of the wider principle – *the ship was not available for the charterers' cargo operations but being used by the owners for their own purposes* – treats the ship as unavailable to the charterer because the owners managed to make some economic use of her while waiting. The use made by the owners ought to be treated as irrelevant. They did not contract to keep her in a continuous state of readiness or to keep her inactive if she was detained by the charterer: it is plain that a parcels tanker may be put to profitable use if kept waiting under a part charter. But the reported evidence does not show the nature or extent of the additional benefit, if any, that accrued to the owners by discharging, cleaning and then loading other cargo. It cannot be assumed that the shipowners did receive a windfall, or that if they did, this windfall was unanticipated or was not taken into account in negotiating the relevant charters or that in justice it ought to be shared with these particular charterers. If there is the potential for windfall profit in the case of part charters of parcels tankers, the identification of a fair solution is something that ought to be left for negotiation by the parties themselves. The need for a 'wider principle' is not therefore clear. And wide new principles with alternative formulations are unsettling. In this case, laytime ceased for a period because the owners were cleaning tanks. Must all laytime and demurrage calculations now include extracts from engine and deck logs, so that any beneficial use made of a ship is excluded from the calculations? Will a series of decisions be necessary to settle questions such as the credit to be given to a charterer if an engineer undertakes a routine replacement of a part? Where is the line to be drawn? Must credit be given if the crew of a waiting ship spends their time chipping rust or washing the decks?

3 CALCULATING FIXED LAYTIME

If a charterparty does not contain an express term fixing the time to be taken in loading and discharging cargo, it is implied that those operations will be carried out within a reasonable time. Voyage charters which do not fix laytime are very unusual today, but the older cases are summarised in the next section. Today it is almost invariable practice for laytime to be fixed. This can be done directly, for example cargo to be loaded within five days. It can also be fixed a little less directly by an agreement that a specified weight or measurement of cargo will be loaded or discharged in a particular period of time, for example 100 tons per working day 'and as the burden of the ship was known and *id certum est quod certum reddi potest*, this was equivalent to naming a certain number of days': *Postlethwaite v Freeland* (1880) 5 App Cas 599, p 618, *per* Lord Blackburn.

Where loading or discharge cannot be carried on continuously, as for example in the case of dry cargo which cannot be unloaded in wet weather or in the case of ports which do not work on particular days, it is common for the agreed laytime to be based on an estimate of the actual time that will be needed, with exclusions for periods such as holidays or wet days. The *prima facie* meanings and effect of a number of words or phrases in common use in calculating laytime were considered by Lord Devlin in *Reardon Smith Line v Ministry of Agriculture* [1963] AC 691:

> *Day*: a calendar day of 24 hours ('*in the beginning a day was a day – a Monday, a Tuesday or a Wednesday, as the case may be*').
>
> *Conventional day*: a day of 24 hours which starts from the time when a notice of readiness expires. Replaces calendar day when a charter provides, eg, that time for loading shall commence 12 hours after written notice has been given between 9.00 am and 6.00 pm.
>
> *Working day*: a description of a type of day of 24 hours, not a reference to the part of a day in which work is carried out. A day for work as distinguished from a day for religious observance or for play or rest.
>
> *Weather working day*: *prima facie* a species of working day. ('It is well established that whether a day is a weather working day or not depends on the character of the day and not on whether work was actually interfered with.') When bad weather occurs, a reasonable apportionment should be made 'according to the incidence of the weather upon the length of day that the parties either were working or might be expected to have been working at the time'.

Notes

1 *Holidays excepted*. A charterparty provided that the vessel should proceed to and load at one safe port US Gulf, loading at the average rate of 1,000 tons per weather working day of 24 consecutive hours Saturday afternoon, Sundays and holidays excepted. The vessel was ordered to Lake Charles, Louisiana. The question stated by the arbitrator for the court was whether at that port Saturday mornings did or did not count as laytime. Donaldson J held that: (1) on the evidence, that Saturday was a working day in the port as it was a day on which work was ordinarily done; (2) that a working day could nevertheless be a holiday; and (3) that whether a day was a holiday depended on local law and custom. An act of the Louisiana legislature declared all Saturdays to be holidays in an area which included Lake Charles and that was conclusive: *Controller of Chartering of the Govt of India v Central Gulf Steamship, The Mosfield* [1968] 2 Lloyd's Rep 173.

2 *Holidays worked*. In *James Nelson v Nelson Line* [1908] AC 108, the House of Lords held that where holidays were excepted from laytime but nevertheless loading continued during the holidays, an agreement to treat a holiday as a working day and count it among the lay days could not be inferred. Such an agreement had to be proved.

3 *Time lost through rain*. The contract provided 'should any time be lost whilst steamer is in a loading berth owing to work being impossible through rain . . . the amount of actual time so lost during which it is impossible to work owing to rain . . . to be added to the loading time'. It was held by Greer and Romer LJJ (Scrutton LJ dissenting) that to take advantage of this provision, the charterers must show: (1) that rain in fact made work impossible; and (2) that, for that reason, time was in fact lost: *Burnett Steamship v Danube and Black Sea Shipping Agencies* [1933] 2 KB 438, CA.

4 *Weather permitting*. It has been held that there is no material difference between a clause which fixes laytime by reference to 'working days weather permitting' and clauses which do so by reference to 'weather permitting working days' (*The Camelia* and *The Magnolia* [1978] 2 Lloyd's Rep 182) or to 'running days weather permitting' or 'running hours weather permitting' (*Gebr Broere v Saras* [1982] 2 Lloyd's Rep 436). In *Dow Chemical v BP Tanker, The Vorras* [1983] 1 Lloyd's Rep 579, the Court of Appeal held that '72 hours weather permitting' meant '72 hours during which the weather conditions are such that loading or discharging is possible'. In that case, a port charter, the *Vorras* had arrived at the loading port but was awaiting a berth: Sir John Donaldson MR said that in his judgment (p 584):

> the weather prohibited any vessel of this general type from loading and it is nothing to the point that owing to the presence of another vessel in the berth, the prohibition was not the operative cause which prevented the vessel from loading.

5 *Cargo be loaded at the average rate of [100] tons per working hatch*. The alternative expressions working hatch/available working hatch have been held to mean an upper deck hatch which can be worked either because under it is a hold into which cargo can be loaded or a hold out of which cargo can be discharged, in either event being a hatch which the party responsible for loading or discharging is not for any reason disabled from working: *Cargill v Rionda de Pass, The Giannis Xilas* [1982] 2 Lloyd's Rep 511, *per* Bingham J, following the decision of the Court of Appeal in *The Sandgate* [1930] P 30. On this basis, it has been said that a hatch might be unworkable because the loading or discharging of that hatch has been completed or because of physical damage or perhaps because the master insists that the centre holds are loaded first to preserve the vessel's trim. The reference to an average rate of loading means that there is no obligation to load any particular amount on a particular day.

But in considering workability it is necessary to disregard any unevenness in loading (or discharge) which arises from the shippers' choice as opposed to reasons which disable them from working the hatches evenly: *Cargill v Marpro, The Aegis Progress* [1983] 2 Lloyd's Rep 570, p 574. If the rule were otherwise, and the laytime calculation was based simply on the way in which the holds are in fact loaded or discharged, then charterers might be able unfairly to influence the total of the lay days. For example, suppose a charterer agrees to load a ship at an average rate of 300 tons per working hatch per day, the vessel has three hatches, and a capacity in tons in No 1 hold of 1,200 tons, No 2 hold, 900 tons and No 3 hold, 600 tons. If the charterer loads at the agreed rate but concentrates on one hold at a time, and each were to be treated as 'unworkable' when filled, the loading could take six days. But if all holds were loaded simultaneously at the average rate, loading might be completed in four days, which is the time taken to load the largest hold. To prevent the length of laytime depending on the whim of the charterer, the laytime calculation under this clause therefore ignores the way in which the charterer in fact chooses to load the vessel: *Compania de Navigacion Zita SA v Louis Dreyfus & Cie, The Corfu Island* [1953] 1 WLR 1399, explaining *The Sandgate*. The result of this is that in most cases the length of laytime can be found by taking the quantity of cargo passing through the hatch or hold receiving or discharging the largest quantity and then dividing that figure by the average rate figure fixed by the charterparty.

This approach ('the *Sandgate* formula') has to be modified in exceptional cases, such as the *Aegis Progress*, where more than one hatch had to be taken into account in calculating the laytime. In the *Aegis Progress* the vessel loaded at two ports and

different holds were workable in the two ports. Permitted laytime was held to consist of the time required to load the critical hold in Port 1 added to the time required to load the hold which was critical in Port 2.

Although this type of clause was described in *The Sandgate* by Scrutton LJ as 'ambiguous and mysterious', more recently Hobhouse J in the *Aegis Progress* (at p 573) has explained that:

> The convenience of such an approach where one is concerned with an fob shipment such as the present is obvious. The vessel is provided by the buyers. The sellers will normally not know at the time of contracting what the vessel is to be, nor what its capacity will be, nor its number of holds. They do not know whether it will be part laden. They do not know whether it will be loading other cargo. They do not know what draft, trim or stability restrictions it may be subject to. They will not normally have any right to give orders or directions to the vessel. These points are illustrated in the present case. The vessel had seven hatches; she was already partly laden; the master did impose restrictions on the way in which the vessel could be loaded. The workable hatch approach provides a sensible basis for dealing with this situation ...

6 *Cargo to be discharged at the average rate of 1,000 metric tons basis five or more available workable hatches pro rata if less number of hatches per weather working day*. The House of Lords (Lord Templeman dissenting) held that this clause selected an overall rate for the ship which was qualified only to the extent that the overall rate was to be reduced *pro rata* if one or more hatches were unavailable at the start of loading or became unavailable temporarily in the course of discharge. But on this form of words the reference to available workable hatches did not override the overall rate for the ship and substitute a rate per available hatch. The mere fact that discharge of any particular hatch was completed would not itself affect the computation of laytime. Lord Templeman dissented, holding that 'available workable hatch' had an established meaning which could not be ignored: *President of India v Jebsens (UK) Ltd, The General Capinpin* [1991] 1 Lloyd's Rep 1.

7 *Cargo to be loaded at the average rate of 120 metric tons per hatch per weather working day*. The vessel had five hatches. It was held that this clause was no more than a roundabout way of saying that the vessel should be loaded at an average rate of 600 tons per day. *The Sandgate* [1930] P 30 and *Zita v Louis Dreyfus, The Corfu Island* (above) were distinguished by the absence of a reference to 'working' or 'available working' hatches: *Lodza Compania de Navigacione SA v Govt of Ceylon, The Theraios* [1971] 1 Lloyd's Rep 209, CA.

8 *Charterers to have right to average the days allowed for loading and discharging*. In the absence of an agreement of this sort, time for loading and discharging have to be considered and calculated separately: *Marshall v Bolckow Vaughan* (1881) 6 QBD 231. Under this clause if the charterer chooses to exercise the right the two calculations are still kept 'entirely separate until the very end when a balance is struck. If time is saved on discharge it is set against the excess time of loading, or vice versa, and in that way, a net result is arrived at': *Alma v Salgaoncar* [1954] 2 QB 94, *per* Devlin J. The implications of using this method depend on the meaning of 'time saved' and on rates of demurrage and despatch. Where, as is often the case, the despatch rate is half the demurrage rate, it will be in the charterer's interests to be able to average.

9 *Loading and discharge time to be reversible*. The words 'to be reversible' give a charterer the right to choose either to draw up separate time sheets for loading and

discharge ports and calculate demurrage/despatch accordingly or, if preferred, to draw up one time sheet dealing with both ports and so, in effect, pool or aggregate the laytime at each end of the voyage: *Fury Shipping v State Trading Corp of India, The Atlantic Sun* [1972] 1 Lloyd's Rep 509.

10 *Completion of loading*. The *Argobec* was chartered on the Baltimore berth grain form and ordered to load a cargo of grain at Sorel for carriage to the United Kingdom. The charter provided that the vessel was 'to be loaded according to berth terms, with customary despatch and if detained longer than five days ... charterer to pay demurrage ...'. Regulations of statutory force in the port required grain carried in the *Argobec*'s 'tween deck to be in bags. A certificate of the port authorities that the regulations had been complied with was also required before the vessel could sail. At Sorel, the cargo of bulk wheat was put on board by elevators. After the lay days expired, loose grain continued to be poured into the *Argobec*'s 'tween deck where it was bagged by stevedores employed on behalf of the ship. Charterers argued that the vessel was 'loaded' once the elevators had stopped and a full cargo of bulk grain had been put on board. The shipowners claimed that the vessel was not loaded until the grain had also been bagged and stowed. The Court of Appeal, upholding the owner's argument, held that the cargo was not loaded until the cargo was so placed in the ship that the ship could proceed on her voyage in safety. It made no different that this work had to be done at the end of the loading operation or that the shipowner had to pay the costs involved: *Argonaut Navigation v Ministry of Food* [1949] 1 KB 14, CA.

On what seems to be the same principle, Webster J held as an alternative ground of decision in *Total Transport v Amoco Trading, The Altus* [1985] 1 Lloyd's Rep 423 that time spent by a tanker in avoiding pollution by flushing pipelines through which the vessel has been loaded, was part of loading. A reasonable time to disconnect terminal hoses is probably also part of loading, although in tanker charters there is often an express agreement on this point.

11 *Concurrent charterparties*. In *Sarma Navigation v Sidermar* [1982] 1 Lloyd's Rep 13, CA, the *Sea Pioneer* was the subject of two charters in the GENCON form between the same parties, for the carriage of part cargoes of, respectively, steel bars and steel coils. In the event, the port of delivery for both cargoes was the same. At that port (Puerto Cabello, Venezuela) she was delayed for approximately three weeks. Both charters provided that time waiting for a berth should count as discharging time. The freight rates differed under the charters, but both provided for discharge at the rate of 1,000 metric tons per weather working day and both provided for demurrage at the rate of $3,000 per running day. The steel coils were discharged first, followed by the bars: there was an overlap of a few hours during which time both cargoes were being discharged concurrently. The owners claimed demurrage under both charters. The Court of Appeal held that the two charters were complementary and were to be read together. But while the charterers were entitled to the laytime allowed by both charters which was to be added together (that is, the rate of discharge per day was *not* doubled), the owners were only entitled to $3,000 per day for detention.

A result which differs from that in *The Sea Pioneer* was reached in *The Oriental Envoy* [1982] 2 Lloyd's Rep 266. In that case, two charters (the 'June' and 'July' charters) were agreed between the same parties: both charters dealt with cargoes of rice in bags. Both cargoes were eventually discharged at the same port. However, the July agreement was made six weeks after the June charter and the freight rates,

demurrage rates, and cargo quantities differed as between the two agreements. Neither charter related to a specific vessel, but both gave the owners a right to nominate. The owners, as they were entitled to do, nominated the named vessel to lift the first and part of the second chartered cargo. It was held that the two charterparties had to be read separately. It was also held that the owners became entitled to demurrage under the June charter when laytime expired under that charter (27 December) and under both charters when laytime had also expired under the July charter (7 March).

4 LAYTIME NOT FIXED

The approach to be applied where laytime is not fixed is summarised by Lord Atkinson in the following extract from *Van Liewen v Hollis.*

***Van Liewen v Hollis, The Lizzie* [1920] AC 239**

Facts

This was an action brought in the Hull County Court to recover 11 days' demurrage allegedly incurred while the ship waited for a berth in the congested Victoria Dock. The claim was based on a custom of the Port of Hull governing discharge of timber cargoes. The House of Lords held that the custom did no more than impose an obligation on charterers to discharge within a time that was reasonable in all circumstances outside their control.

Held

Lord Atkinson: … If by the terms of the charterparty the charterers have agreed to discharge the chartered ship within a fixed period of time, there is an absolute and unconditional engagement for the non-performance of which they are answerable, whatever be the nature of the impediments which prevented them from performing it, and thereby causing the ship to be detained in their service beyond the time stipulated. If no time be fixed expressly or impliedly by the charterparty the law implies an agreement by the charterers to discharge the cargo within a reasonable time, having regard to all the circumstances of the case as they actually existed, including the custom or practice of the port, the facilities available thereat, and any impediments arising therefrom which the charterers could not have overcome by reasonable diligence: *Postlethwaite v Freeland* (1880) 5 App Cas 599; *Hick v Raymond & Reid* [1893] AC 22; and *Hulthen v Stewart & Co* [1903] AC 389.

Notes

1 *Laytime fixed by implication*. A charterparty in the Chamber of Commerce White Sea Wood form ('Merblanc') provided for discharge 'with customary steamship despatch as fast as the steamer can … deliver'. It was argued that the shipowner would know and the charterer could ascertain the time required for delivery of the cargo when the ship was working as fast as she could. Since that time could be measured by days and hours, it was contended that, in effect, the time for discharge had been fixed. The House of Lords rejected this argument. The clause was insufficient to fix laytime. Lord Macnaghten said that:

> in order to impose such a liability the language used must in plain and unambiguous terms define and specify the period of time within which delivery of the cargo is to be accomplished (*Hulthen v Stewart* [1903] AC 389).

Similarly, obligations to load or discharge 'with all dispatch according to the custom of the port' (*Postlethwaite v Freeland*, above), or 'with all dispatch as customary' (*Castlegate Steamship v Dempsey* [1892] 1 QB 854, CA and *Lyle Shipping v Cardiff Corp* [1900] 2 QB 638) have also been held to be insufficiently definite and free from ambiguity for the charterparty in question to be treated as having a fixed laytime. In all these cases, therefore, the obligation was to load or unload within a reasonable time.

References to 'custom' in this context are taken to refer primarily to the customary or established working practices of the port; they are interpreted as references to the manner of loading or discharge rather than to the time which those activities take: *Dunlop v Balfour, Williamson* [1892] 1 QB 507, CA; *Castlegate Steamship v Dempsey*, above.

2 *Reasonable time*. Since 'all the circumstances' are relevant, it is clear that a reasonable time will depend on the terms of the particular contract of affreightment (*Carlton v Castle Mail* [1898] AC 486, p 491, *per* Lord Herschell), which must include both the nature of the cargo and the vessel. Both the normal features of the port and any unusual circumstances can also be taken into account. Thus, both delay caused by tides (*Carlton v Castle Mail*) and by strikes (*Hick v Raymond & Reid* [1893] AC 22) can extend the period which would otherwise be allowed. Delays arising out of the settled and established working practices of the port are also relevant. This is so whether or not the contract expressly incorporates a phrase of the 'according to the custom of the port' type mentioned above: *Postlethwaite v Freeland*, p 613, *per* Lord Blackburn, but compare Lord Herschell in *Hick v Raymond*, at p 30. However, circumstances to be taken into account do not include those caused by a default for which the charterer is held responsible, or which the charterer could be expected to have avoided.

3 A cargo of wheat was shipped under bills of lading on the *Derwentdale* at Taganrog for carriage to London. Time for discharge was not fixed by the bills of lading. The respondents, who were consignees and holders of the bills of lading, employed the dock company to discharge the vessel. After discharge had been commenced, a strike of dock workers began. Completion of discharge was delayed by nearly four weeks. It was admitted that during the strike it was not possible for the respondents either to find any other person to provide the labour or to obtain the necessary labour themselves. It was held that the respondents' obligation was to discharge within a reasonable time under the circumstances as they actually existed, since those circumstances had not been caused or contributed to by them. The respondents were not therefore liable to damages for detention of the vessel: *Hick v Raymond*.

4 The *Cumberland Lassie* was chartered to deliver at East London at a safe wharf or as near thereto as she could safely get, a cargo of steel rails and fastenings. The cargo was 'to be discharged with all dispatch according to the customs of the port'. The vessel had to be lightened before it could cross the harbour bar at East London. Because of the lack of lighters and the number of ships awaiting discharge the vessel had to wait for 24 working days before lightening could begin. No more lighters could have been obtained from any other source in the time available. Discharge was completed as rapidly as possible in all the circumstances. It was held that the shipowner was not entitled to demurrage for the delay:

> Difficult questions may sometimes arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If (as in the present case) an obligation, indefinite as to time, is qualified or partially defined by express or implied reference to the custom

or practice of a particular port, every impediment arising from or out of that custom or practice, which the charterer could not have overcome by the use of any reasonable diligence, ought (I think) to be taken into consideration [*Postlethwaite v Freeland* (1880) 5 App Cas 599, *per* Lord Selborne LC].

5 The *Ardandearg* was chartered to load a cargo of coal at Newcastle, New South Wales for carriage to Java. Time for loading was not fixed. The cargo was to be loaded in the usual and customary manner. The vessel was delayed for 31 days because the charterers had failed to procure a cargo. Held: the charterers' primary duty to provide a cargo was distinct from their subsequent duty to load that cargo in a reasonable time. The primary duty was, on the facts, absolute and unqualified. An assertion that the charterers did nothing unreasonable was therefore no answer to the shipowners' claims for damages for detention of the vessel where breach of the primary duty caused the delay: *Ardan Steamship v Andrew Weir* [1905] AC 501.

6 The *Julia* was chartered to carry oak logs from Danzig to Millwall Dock. The more usual method of discharge at that dock was to lift the logs direct into railway trucks. It was found that it was also practicable to discharge into lighters. Discharge took an extra four days because too few trucks and no lighters were provided by the defendants, who were receivers of the cargo. The defendants were held liable in an action for damages for detention because they failed to show that they had used reasonable exertions to get either railway trucks or lighters:

> As the result I come to the conclusion that it has not been shown that the defendants used reasonable care to provide for the discharge, and I am of opinion that they did not exhaust all available means. It is therefore unnecessary to discuss all the cases . . .Where there are alternative methods of discharge it is clear that the defendant must use all available methods and exhaust all efforts to effect the discharge. There will, therefore, be judgment for the plaintiffs for four days demurrage (*Rodenacker v May* (1901) 6 Com Cas 37, *per* Mathew J).

5 DEMURRAGE

Failure by a charterer to load or discharge within the agreed laytime is a breach of contract. The shipowner is then entitled to damages for the period during which he is deprived of the use of his ship: *The Dias* [1978] 1 Lloyd's Rep 325. It is common practice in voyage charters to specify a demurrage rate, that is, an amount payable as agreed damages for each day or part of a day that a vessel is detained by the charterer. An agreement to demurrage is not, therefore, the payment of the contractual price for the exercise of a right to detain: *The Lips* [1987] 2 Lloyd's Rep 311. It is no different in nature from any agreement providing for payment of liquidated damages: *Chandris v Isbrandtsen-Moller* [1951] 1 KB 240.

But damages for detention are not always governed by demurrage clauses. A shipowner will be entitled to unliquidated damages for detention for failure to load or discharge within the agreed time, if either: (a) laytime has expired and there is no agreement to pay demurrage; or (b) a demurrage period is fixed and has expired; for example, if the charterparty provides for 72 hours for loading and 72 hours on demurrage and a further delay then occurs. If the demurrage period is not fixed, the demurrage rate applies not just for a reasonable time but for as long as the ship is in fact detained under the contract: *Western Steamship v Amaral Sutherland* [1913] 3 KB 366.

The cases dealt with in this section deal with three questions: to which breaches of contract do demurrage clauses apply? Is demurrage payable continuously after commencement? How long can a charterer insist that a ship wait on demurrage?

5.1 Effect of an agreement to pay demurrage

An agreement to pay demurrage is normally treated as preventing the shipowner recovering from the charterer more than the agreed sum for the wrongful detention of his vessel. This is so however the delay is caused, whether by simply failing to load or discharge within the laytime, even if the delay could be described as deliberate: *Suisse Atlantique v NV Rotterdamsche Kolen Centrale*, below; or by failing to provide a cargo: *Inverkip Steamship v Bunge* [1917] 2 KB 193, CA; or by providing a cargo of the wrong sort: *Chandris v Isbrandtsen-Moller*, noted below. But while a demurrage clause limits damages recoverable for delay, it does not prevent the recovery of damages of some other character (such as deadfreight) if a breach of contract other than failure to load or discharge within the laytime has also occurred: *A/S Reidar v Arcos* [1927] 1 KB 352, noted below.

Suisse Atlantique v NV Rotterdamsche Kolen Centrale [1967] AC 361

Facts

The appellants chartered the *General Guisan* to the respondents to carry coal from the US to Europe; the charter was for a total of two years' consecutive voyages. Loading and discharge times were fixed with demurrage at $1,000 a day. As a result of failures by the charterers to load and discharge within the lay days, the ship did not complete as many voyages as she could have done. The owners claimed damages calculated on the basis of the freights they would have earned if the vessel had not been wrongfully detained. They argued that demurrage provisions ceased to apply where the breach for which a charterer was responsible was such as to entitle the owner to treat the charterparty as repudiated. It was held that: (1) there is no rule of law which deprives demurrage provisions of effect when the breach for which the charterer is responsible is such as to entitle the shipowners to treat the charterparty as repudiated; and (2) it is a question of construction of the contract as a whole whether demurrage provisions apply in the circumstances of a particular breach of contract. The demurrage provisions in this case applied to the whole of the periods of detention.

Held

> **Lord Wilberforce:** … [W]hat is the legal nature of the demurrage clause; is it a clause by which damages for breach of the contract are agreed in advance, a liquidated damages clause as such provisions are commonly called, or is it, as the appellants submit, a clause limiting damages?
>
> … The form of the clause is, of course, not decisive, nor is there any rule of law which requires that demurrage clauses should be construed as clauses of liquidated damages; but it is the fact that the clause is expressed as one agreeing a figure, and not as imposing a limit; and, as a matter of commercial opinion and practice, demurrage clauses are normally regarded as liquidated damage clauses …
>
> The clause being, then, one which fixes, by mutual agreement, the amount of damages to be paid to the owners of the vessel if 'longer detained' than is permitted by the contract, is there any reason why it should not apply in the present case in either of the assumed alternatives, ie, either that the aggregated delays add up to a 'frustrating' breach of contract, or that the delays were 'deliberate' in the special sense?
>
> … In either case, why should not the agreed clause operate? Or what reason is there for limiting its application to such delays as fall short of such as 'frustrate the commercial purpose' or such as are not 'deliberate'? I can see no such reason for limiting a plain contractual provision …

Notes

1 In *AS Reidar v Arcos* [1927] 1 KB 352, CA, the *Sagatind* was chartered to load a full and complete cargo of timber (850 standards) at Archangel. She was to be loaded at an agreed rate per day and demurrage at £25 per day was payable if she was detained beyond the time required to load at the agreed rate. There was no provision for a fixed number of days on demurrage. If she had been loaded at the agreed rate she could have carried a full summer cargo of 850 standards to the discharge port (Manchester) to which she was eventually ordered. Because loading was delayed beyond the agreed time, the master could not lawfully carry more than a winter deck load to a UK port, which was in fact loaded. The Court of Appeal held that the shipowners were entitled to recover damages for loss of freight in addition to demurrage at the agreed rate. Although there is little hostility to the outcome of the case, the basis of the decision has long been a matter of dispute: the three judgments given in the Court of Appeal are impossible to reconcile. In *Suisse Atlantique* in the House of Lords it was said that *Reidar v Arcos* was to be treated as a decision that the charterers were in breach of two distinct obligations: (a) failure to load a full and complete cargo; and (b) detaining the vessel beyond the lay days. The provisions as to demurrage quantified only the damages arising from the detention of the vessel.

   For another analysis of *Reidar v Arcos*, see *The Altus* [1985] 1 Lloyd's Rep 423, p 435 and *The Adelfa* [1988] 2 Lloyd's Rep 466, p 472, which were not followed in *The Bonde* [1991] 1 Lloyd's Rep 136.

2 In *Chandris v Isbrandtsen-Moller* [1951] 1 KB 240, a voyage charter provided that the cargo was to consist of lawful general merchandise, excluding dangerous cargo. Demurrage was fixed at £100 per day. A general cargo was loaded, which included 1,546 tons of turpentine. The vessel arrived at the discharge port (Liverpool) and began discharging in dock on 27 May 1941. Because of the dangerous nature of the turpentine, she was ordered by the authorities to move out of the dock and unload in the Mersey into lighters. The discharge took 16 days longer than it otherwise would. In arbitration, the shipowner claimed demurrage, damages for detention for the 16 days, and interest. The arbitrator stated a special case for the court. Devlin J held that turpentine was a dangerous cargo and that the charterers were in breach of contract but that the damages recoverable for the delay were limited by the demurrage clause.

5.2 Once on demurrage, always on demurrage

This maxim is misleading. It is not a rule of law but an approach to the interpretation of laytime and demurrage clauses and means only that if the parties to a charter intend that demurrage should not continue to be payable in some circumstances, they must say so clearly. (For exclusion from demurrage of periods of delay caused by the fault of the shipowner or on the principle recognised in *The Stolt Spur*: see p 252, above.)

Dias Compania Naviera v Louis Dreyfus, The Dias
[1978] 1 Lloyd's Rep 325, HL

Facts

The *Dias* was chartered to carry wheat from the United States to China. Demurrage became payable while the vessel was waiting for a berth. While waiting, the cargo was fumigated for a total of 16 days. The fumigation itself caused no additional delay. Clause 15 of the charter provided:

At discharging, Charterers/Receivers have the option at any time to treat at their expense ship's holds/compartments/hatchway and/or cargo and time so used to not count. The Master to co-operate with the Charterers/Receivers or their representative with a view to the treatment being carried out expeditiously.

Held

Lord Diplock: … The only question in this appeal is whether demurrage is payable for the period of 16 days six hours during which fumigation was being carried out …

My Lords, the principles that apply to laytime and demurrage under voyage charterparties are clear. What 'laytime' and 'demurrage' mean was stated succinctly by Lord Guest (with the substitution of 'lay days' for 'laytime') in *Union of India v Compania Naviera Aeolus SA* [1964] AC 868 at p 899:

> Lay days are the days which parties have stipulated for the loading or discharge of the cargo, and if they are exceeded the charterers are in breach; demurrage is the agreed damages to be paid for delay if the ship is delayed in loading or discharging beyond the agreed period.

… As Mocatta J, a judge of great experience in these matters, said in his judgment in the instant case:

> In my experience, so far as it goes, phrases like 'to count' or 'not to count' are generally used in charters in reference to laytime.

If laytime ends before the charterer has completed the discharging operation he breaks his contract. The breach is a continuing one; it goes on until discharge is completed and the ship is once more available to the shipowner to use for other voyages. But unless the delay in what is often, though incorrectly, called redelivery of the ship to the shipowner, is so prolonged as to amount to a frustration of the adventure, the breach by the charterer sounds in damages only. The charterer remains entitled to continue to complete the discharge of the cargo, while remaining liable in damages for the loss sustained by the shipowner during the period for which he is being wrongfully deprived of the opportunity of making profitable use of his ship. It is the almost invariable practice nowadays for these damages to be fixed by the charterparty at a liquidated sum per day and *pro rata* for part of a day (demurrage) which accrues throughout the period of time for which the breach continues.

Since demurrage is liquidated damages, fixed by agreement between the parties, it is possible by apt words in the charterparty to provide that, notwithstanding the continuance of the breach, demurrage shall not be payable in respect of the period when some event specified in the charterparty is happening; but the effect of such an agreement is to make an exception to the ordinary consequences that would flow in law from the charterer's continued breach of his contract, *viz*, his liability in damages. As was said by Scrutton LJ in a passage in his work on charterparties that was cited by Lord Reid in the *Union of India* case (above) at p 879:

> When once a vessel is on demurrage no exceptions will operate to prevent demurrage continuing to be payable unless the exceptions clause is clearly worded so as to have that effect.

This is but an example of the general principle stated by Lord Guest in the same case in continuation of the passage that I have already cited:

> … an ambiguous clause is no protection. 'If a party wishes to exclude the ordinary consequences that would flow in law from the contract that he is making he must do so in clear terms' (*Szymonowski & Co v Beck & Co* [1923] 1 KB 457 at p 466 *per* Scrutton LJ).

With these principles in mind I turn to the clause (cl 15) principally relied upon by the charterers as excluding the accrual of demurrage during the period while fumigation, which did not commence until after the expiration of laytime, was being carried out. Appearing as it does in a set of six clauses dealing with the discharging operation, laytime allowed for it, and demurrage, my immediate reaction, like that of Mocatta J, is that the answer to the question: 'for what purpose is

time used in fumigation 'not to count'?' would be: 'for the purpose of calculating laytime'. These words do not seem to me to be an apt way of saying that the time so used is not to be taken into account in assessing the damages payable by the charterer for breach of contract for failing to complete the discharging operation within the stipulated time . . .

For my part, I think that when construed in the light of established principles, cl 15 is unequivocal. It means that time used in fumigation is not to be taken into account only in the calculation of laytime. The provision that time is 'not to count' has no further application once laytime has expired. But even if I were persuaded that the clause was in some way ambiguous, this would not be enough to save the charterers from their liability to pay demurrage during the period while fumigation was being carried out after laytime had expired. For these reasons, and in agreement with Mocatta J and Browne LJ I would allow this appeal.

Notes

1 The reason for the 'clear exceptions only' rule was considered by the House of Lords in *Union of India v Compania Naviera Aeolus* [1964] AC 868, where a clause provided that no claim for damages or demurrage should be made for delay caused by a strike. It was held that the clause did not apply for a strike which began only after laytime had ended. Lord Reid explained that:

> If a strike occurs before the end of the laytime neither party can be blamed in any way. But if it occurs after demurrage has begun to accrue the owner might well say: true, your breach of contract in detaining my ship after the end of the laytime did not cause the strike, but if you had fulfilled your contract the strike would have caused no loss because my ship would have been on the high seas before it began: so it is more reasonable that you should bear the loss than that I should. So it seems to me right that if the respondents are to escape from paying demurrage during this strike they must be able to point to an exceptions clause which clearly covers this case. And in my judgment they cannot do that.

2 Once laytime has been exceeded, there has been a breach and a clause operating at this time may be of a type which excludes or limits the liability in demurrage or it may be one which suspends the continuing obligation to discharge and therefore, *pro tanto*, suspends the breach which would otherwise have given rise to the obligation to pay demurrage. These types of clauses, whether excusing breaches, relieving *prima facie* obligations, or simply excluding or reducing the liability in liquidated damages are all provisions of the character of exclusion or exceptions clauses and therefore must be clearly expressed if they are to have that effect. Unclear or ambiguous clauses will be ineffective for that purpose. This is an application of the ordinary rules of contractual construction governing such clauses. They must be clearly worded [*The Forum Craftsman* [1991] 1 Lloyd's Rep 81, *per* Hobhouse J].

3 The *Kalliopi A* was chartered for the carriage of a cargo of shredded scrap from Rotterdam to Bombay. She was affected by congestion both during laytime and thereafter. The charterers claimed to be excused from any liability to pay demurrage by a clause in the charter which provided that '. . . unavoidable hindrances which may prevent . . . discharging . . . always mutually excepted'. It was held that the clause was not clear enough to exempt the charterers from liability in respect of periods when the vessel was on demurrage and they were in breach of contract: *The Kalliopi A* [1988] 2 Lloyd's Rep 101, CA, applied in *The Lefthero* [1992] 2 Lloyd's Rep 109, CA and *The Solon* [2000] 1 Lloyd's Rep 292.

4 A typed addition to a charter in the Pacific Coast Grain form provided by cl 62 that 'Charterers shall not be liable for any delay in . . . discharging . . . which delay . . . is caused in whole or in part by strikes . . . and any other causes beyond the control of the charterers'. Other provisions of the charter dealt with causes beyond the charterers' control which interrupted laytime. The vessel came on demurrage at the discharge port and was then delayed for 26 days by a strike of port workers.

It was held that cl 62 did relieve the charterers from liability for demurrage: *President of India v N G Livanos Maritime Co, The John Michalos* [1987] 2 Lloyd's Rep 188.

5.3 How long must a ship remain on demurrage?

If a charterer fails to load, how long must the shipowner wait before he is entitled to sail away, assuming that the charter does not deal with the point? The leading case is *Universal Cargo Carriers v Citati* [1957] 2 QB 401.

Facts

A charterparty in the GENCON form provided that the *Catherine D Goulandris* was to proceed to Basra and load 6,000 tons of scrap iron for Buenos Aires. The lay/can spread was 5 July to 25 July 1951. The vessel arrived at Basrah on 12 July 1951. The charter allowed six weather working days for loading. Despite repeated enquiries, no shipper or berth was nominated and the cargo did not materialise. The owners purported to cancel the charter on 19 July when the lay days had run for only two-thirds of the time allowed. The question stated by the arbitrator for the opinion of the court was whether the owners were entitled to terminate the charterparty on 18 July.

Held

Devlin J:

(1) The charterer was on 18 July in breach of the charter in failing to nominate a berth and in failing to provide a cargo in sufficient time to enable the vessel to be loaded within the lay days (the arbitrator had found that on 18 July the cargo could not have been loaded within the laytime which remained).

(2) For the same reason, the charterer was on 18 July also in anticipatory breach of the express obligation to complete loading by 21 July, or (alternatively) possibly on the same date was in breach of an implied term that he would not by his own act or omission put it out of his power to load by 21 July. 'But whether the breach is said to be an actual breach of an implied term or an anticipatory breach of an express term is not to my mind at all important; and it must be one or the other' (p 429).

(3) The breaches in question were breaches of warranty not of condition.

(4) 'It follows that the owners were not entitled *ipso facto* to rescind on July 18. But a party to a contract may not purchase indefinite delay by paying damages and a charterer may not keep a ship indefinitely on demurrage. When the delay becomes so prolonged that the breach assumes a character so grave as to go to the root of the contract, the aggrieved party is entitled to rescind. What is the yardstick by which this length of delay is to be measured? Those considered in the arbitration can now be reduced to two: first, the conception of a reasonable time, and secondly, such delay as would frustrate the charterparty. The arbitrator, it is clear, preferred the first. But in my opinion the second has been settled as the correct one by a long line of authorities.'

(His Lordship reviewed the earlier cases and continued.)

'... Having settled the proper yardstick, the next question that arises for determination could, I think, have been put very conveniently in the form adopted in *Stanton v Richardson* (1872) LR 7 CP 421, namely, was the charterer on July 18, 1951, willing and able to load a cargo within such time as would not have frustrated the object of the venture; and the answer to that question would have determined the case. But in the arbitration the main argument was on anticipatory breach, and the emphasis on one mode of it, namely, renunciation. The chief findings of the arbitrator relate entirely to renunciation. I must therefore consider the nature of anticipatory breach and the findings thereon which the arbitrator has made.

The law on the right to rescind is succinctly stated by Lord Porter in *Heyman v Darwins Ltd* [1942] AC 356 as follows:

> The three sets of circumstances giving rise to a discharge of contract are tabulated by Anson, *Law of Contract*, 20th edition, p 319 as: (1) renunciation by a party of his liabilities under it; (2) impossibility created by his own act; and (3) total or partial failure of performance. In the case of the first two, the renunciation may occur or impossibility be created either before or at the time for performance. In the case of the third, it can occur only at the time or during the course of performance.

The third of these is the ordinary case of actual breach, and the first two state the two modes of anticipatory breach. In order that the arguments which I have heard from either side can be rightly considered, it is necessary that I should develop rather more fully what is meant by each of these two modes.

(5) A renunciation can be made either by words or by conduct, provided it is clearly made. It is often put that the party renunciating must 'evince an intention' not to go on with the contract. The intention can be evinced either by words or by conduct. The test of whether an intention is sufficiently evinced by conduct is whether the party renunciating has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract.

. . . Since a man must be both ready and willing to perform, a profession by words or conduct of inability is by itself enough to constitute renunciation. But unwillingness and inability are often difficult to disentangle, and it is rarely necessary to make the attempt. Inability often lies at the root of unwillingness to perform. Willingness in this context does not mean cheerfulness; it means simply an intent to perform. To say: 'I would like to but I cannot' negatives intent just as much as 'I will not' . . . If a man says 'I cannot perform', he renounces his contract by that statement, and the cause of the inability is immaterial.

(6) In considering whether the charterer had renounced by evincing an intention not to perform the charterparty and so committed an anticipatory breach, only events known to the shipowner at the time could be considered.

(7) The arbitration award in the owner's favour on the issue of renunciation could not stand because it was based on an erroneous concept of the length of delay necessary to amount to a repudiation.

(8) Impossibility could arise even if the disability was not deliberately created. However, a party electing to treat 'impossibility' as a repudiatory breach must prove that the inability was still effective at the time fixed for performance.

In my judgment, therefore, if the owners can establish that in the words of Lord Sumner (*British & Beningtons v N W Cachar Tea* [1923] AC 48, 72) the charterer had on July 18 'become wholly and finally disabled' from finding a cargo and loading it before delay frustrated the venture, they are entitled to succeed. Lord Sumner's words expressly refer to the time of breach as the date at which the inability must exist. But that does not mean in my opinion that the facts to be looked at in determining inability are only those which existed on July 18; the determination is to be made in the light of all the events, whether occurring before or after the critical date, put in evidence at trial.

(9) The test of impossibility did not depend on how the matter would have appeared to a reasonable shipowner or to a reasonable and well informed person on 18 July.

An anticipatory breach must be proved in fact and not in supposition. If, for example, one party to a contract were to go to another and say that well informed opinion on the market was that he would be unable to fulfil his obligations when the time came, he might get the answer from his adversary that the latter did not care to have his affairs discussed on the market and did not choose to give any information about them except the assurance that he could and would fulfil his obligations. If that assurance was rejected and the contract

rescinded before the time for performance came and the assurance in fact turned out to be well founded, it would be intolerable if the rescinder was entitled to claim that he was protected because he had acted on the basis of well informed opinion.

(10) His Lordship concluded by dealing with procedural and factual submissions and ordered that the award be remitted to the arbitrator to answer the question whether the charterer was on 18 July 1951 willing and able to perform the charterparty within such time as would not have frustrated the commercial object of the adventure. Subsequent proceedings on these issues are reported at [1957] 1 WLR 979 and [1958] 2 QB 254.

6 DESPATCH

The object of demurrage is to encourage the charterer to load or discharge within agreed laytime and, if he does not, to compensate the shipowner for the delay. However, the prospect of paying demurrage is no encouragement to a charterer to load or discharge in less than the agreed laytime. Unless the parties have agreed that despatch money will be paid by the shipowner if charterers use less than the agreed time (despatch is only payable by agreement) charterers may find it suits them best to spread loading or discharge – as they are entitled to do – over the whole of the period allowed, even if they could have completed their activities more quickly. Thus, if demurrage is a stick for the charterer, despatch is a carrot.

Agreements for the payment of despatch can give rise to difficult questions of interpretation in charters which provide for lay days subject to exceptions such as Sunday and holidays. How is time to be calculated for the purpose of paying despatch money where the charterparty only refers imprecisely in such cases to 'any time saved in loading and/or discharging' or to 'each clear day saved loading' or 'each running day saved'? As Bailhache J said in *Mawson Shipping v Beyer* [1914] KB 304, p 307:

> Is despatch money payable in respect only of lay days saved or in respect of all time saved to the ship? In other words is despatch for this purpose on the same footing as demurrage?

In *Mawson*, Sundays were excluded from lay days; the despatch clause referred to 'all time saved in loading'. In cases before *Mawson*, Bailhache J thought that question he formulated had been decided both ways. *Laing v Hollway* (1878) 3 QBD 437, CA and *In re Royal Mail Steam Packet and River Plate Steamship Co* [1910] 1 KB 600 held that time saved meant all the time saved to the ship; *The Glendevon* [1893] P 269, DC, and *Nelson & Sons v Nelson Line* [1907] 2 KB 705, CA, decided it meant only laytime saved, so that in neither of those two cases was despatch payable in respect of a Sunday which was saved to the ship.

As a judge at first instance, Bailhache J in *Mawson* loyally attempted to reconcile and to follow the earlier decisions. Nevertheless, his personal views were also clear: 'I should, I fear, have decided all the four reported cases in favour of the charterers.' This has commercial logic. In origin exceptions such as Sundays and holidays were carved out of the agreed loading periods because these were days the charterers could not use (or could not use as cheaply) to load or discharge. But a ship which has completed loading or discharge and left port has always been able to make good use of these excepted periods. Consequently, 'one would naturally expect that this despatch money would be proportionate to the advantage derived by the shipowners from the extra speed in loading …': *Nelson & Sons*, p 719, *per* Fletcher Moulton LJ (dissenting).

There is an additional point. Despatch is often dealt with, both in charterparties and in the preceding negotiations, in close relationship with demurrage. And the general rule of construction is that laytime exceptions do not apply while the vessel is on demurrage, in the absence of a clear agreement to the contrary. Since the laytime exceptions do not normally apply when the shipowner is receiving demurrage to compensate for time which is lost, might it not be expected that the exceptions would not normally apply when the shipowner is paying despatch for the advantage of time which he gains?

The conclusion which Bailhache J reached in *Mawson* in his careful reserved judgment was that, on the authorities:

(1) *Prima facie* under this type of despatch clause, shipowners must pay for all time saved to the ship, calculated in the way in which, in the converse case, demurrage would be calculated; that is, taking no account of lay day exceptions: *Laing v Hollway* and *In Re Royal Mail Steam Packet*, above.

(2) The *prima facie* presumption is displaced where either (a) lay days and time saved by despatch are dealt with in the same clause and demurrage in another clause (*The Glendevon*); or (b) lay days, time saved by despatch and demurrage are dealt with in the same clause, on construction of which the court is satisfied that 'days saved' are used in the same sense as 'lay days' and not in the same sense as days lost by demurrage (*Nelson & Sons v Nelson Line*).

In the *Mawson* charterparty, lay time, demurrage and despatch were dealt with in three separate clauses; the case fell within the first of Bailhache J's classes and the charterers succeeded.

The second stage of the *Mawson* approach is probably too mechanical to be generally accepted today. But some support for the basic *Mawson* presumption can be found in *Bulk Transport v Sissy Steamship, The Archipelagos* [1979] 2 Lloyd's Rep 289, Com Ct. That case involved a motion to set aside or remit an arbitration award arising out of a dispute as to the calculation of despatch money. Parker J held that the arbitrators ought to have begun with the *prima facie* presumption laid down in *Mawson* and then gone on to consider whether the wording of the clauses rebutted the presumption. The despatch agreement in this case was in the demurrage clause; but the agreement provided for despatch 'on *all laytime* saved'. Looking at the rest of the charterparty, Parker J held that by 'laytime', the parties were referring to 'laytime used for or required to be used for, in the sense of availability for, loading'. Only time that could be counted as laytime could therefore be saved under that despatch agreement.

In *The Themistocles* (1949) 82 LI LR 232 Morris J took a quite different approach. There too despatch was dealt with in the same clause as demurrage and laytime was dealt with in another clause. The agreement provided for despatch 'on all time saved at port of loading'. Morris J said:

> Inasmuch as my task is to construe the particular words of the contract now before me, it does not seem to me that cases which decide the meaning of other words in other contexts can be of governing authority. Indeed, I doubt how far any question of principle is involved in what I have to decide or was involved in the various reported cases . . . Unless terms of art are used, or unless the court is bound by some decision relating to a contract in virtually identical form, then, while deriving such assistance as the decisions afford, the task of the court, as it seems to me, is merely one of the construction of particular words as used in their context in a particular contract.

On the point in question, Morris J concluded that despatch was payable not just on loading time saved, but on total saving on the time that the vessel might have stayed in port.

FURTHER READING

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CHAPTER 14

FREIGHT

Freight is the consideration paid to the shipowner for performing his part of the contract of carriage. Typically this means that an agreed rate is payable according to the weight or volume of cargo (such as £10 per long ton) carried to and delivered at its destination. In general, it is open to the parties to make whatever agreement they want about how freight shall be calculated, earned and paid. But unless a special agreement is made, for example for payment in advance, or for a lump sum, payment of freight and delivery of the cargo at the port of discharge are concurrent conditions: *Black v Rose* (1864) 2 Moore PC(NS) 277; *Paynter v James* (1867) LR 2 CP 348.

1 DELIVERY FREIGHT

A shipowner is entitled to freight if either he is willing and able to deliver in accordance with the contract of carriage or if he is only prevented from delivering by some act or omission of the cargo owner. However, no freight is payable if the shipowner cannot deliver the goods because they have been lost or destroyed. It does not matter how or why the goods are lost or destroyed, or (probably) even if they destroy themselves through inherent vice (see *Matheos v Dreyfus* [1925] AC 655, p 667, *per* Lord Sumner). No freight is payable even where the loss occurs without fault on the part of the shipowner and even if the cause of the loss is an excepted peril: excepted perils may prevent the shipowner from being sued for losing or damaging the cargo, but they do not normally confer a right to freight. Destruction of the merchantable character or commercial identity of a cargo has the same effect on the right to freight as a total destruction of the goods. Where only part of a cargo is delivered, freight is payable on that part; delivery of a complete cargo is not a condition precedent to the recovery of freight: *Ritchie v Atkinson* (1808) 10 East 294. Freight is payable in full on cargo which is delivered damaged. No deductions can be made from or set off against freight which is payable on goods delivered, for the value of other goods which are lost or damaged; but a separate action (or a counterclaim) may be brought to recover damage for which the shipowner is responsible. The leading case is *Dakin v Oxley.*

Dakin v Oxley (1864) 15 CBNS 647, 660 Court of Common Pleas

Facts

The shipowner sued the charterer for the freight on a cargo of coal carried from Newport to Nassau. The charterer alleged that the coal was damaged during the voyage and that on arrival at the port of discharge it was worth less than the freight. He claimed that in these circumstances, as a matter of general maritime law, he had the right to abandon the cargo to the shipowner and to be free of any further liability.

Held

> **Willes J:** … the question for us to consider is, whether a charterer whose cargo has been damaged by the fault of the master and the crew so as upon arrival at the port of discharge to be worth less than the freight, is entitled to excuse himself from payment of freight by abandoning the cargo to the shipowner. We think not: and we should not have taken time to consider, but for the general importance of the subject, and of its having been suggested that our law was silent upon

this question, and that the plea was warranted by the usage and law of other maritime countries, which, it was said, we ought to adopt . . .

It ought to be borne in mind, when dealing with such cases, that the true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed; and, according to the law of England, as a rule, freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant, though they be in a damaged state when they arrive. If the shipowner fails to carry the goods for the merchant to the destined port, the freight is not earned. If he carry part, but not the whole, no freight is payable in respect of the part not carried, and freight is payable in respect of the part carried unless the charterparty make the carriage of the whole a condition precedent to the earning of any freight – a case which has not within our experience arisen in practice . . .

Little difficulty exists in applying the above test where the cargo upon arrival is deficient in quantity. Where the cargo, without loss or destruction of any part, has become accidentally swelled (*Gibson v Sturge* 10 Exch 622), or, perhaps, diminished, as, by drying (*Jacobsen's Sea Laws*, Book 3, ch 2, p 220), freight (usage of trade apart) is payable upon the quantity shipped, because that is what the contract refers to . . .

In the case of an actual loss or destruction by sea-damage of so much of the cargo that no substantial part of it remains; as, if sugar in mats, shipped as sugar and paying so much per ton, is washed away, so that only a few ounces remain, and the mats are worthless, the question would arise whether practically speaking any part of the cargo contracted to be carried has arrived . . .

Where the quantity remains unchanged, but by sea-damage the goods have been deteriorated in quality, the question of identity arises in a different form, as, for instance, where a valuable picture has arrived as a piece of spoilt canvas, cloth in rags, or crockery in broken shreds, iron all or almost all rust, rice fermented or hides rotten.

In both classes of cases, whether of loss of quantity or change in quality, the proper course seems to be the same, *viz*, to ascertain from the terms of the contract, construed by mercantile usage, if any, what was the thing for the carriage of which freight was to be paid, and by the aid of a jury to determine whether that thing, or any and how much of it, has substantially arrived.

If it has arrived, though damaged, the freight is payable by the ordinary terms of the charterparty; and the question of fortuitous damage must be settled with the underwriters, and that of culpable damage in a distinct proceeding for such damage against the ship captain or owners. There would be apparent justice in allowing damage of the latter sort to be set off or deducted in an action for freight; and this is allowed in some (at least) of the United States, *Parsons on Mercantile Law*, 172, n. But our law does not allow deduction in that form; and, as at present administered, for the sake perhaps of speedy settlement of freight and other liquidated demands, it affords the injured party a remedy by cross-action only: *Davidson v Gwyne* 12 East 381; *Stinson v Hall* 1 Hurlst & N 831; *Sheels (or Shields) v Davies* 4 Campb 119, 6 Taunt 65; the judgment of Parke B in *Mondel v Steel* 8 M & W 858; *The Don Francisco* 32 LJ Adm 14, *per* Dr Lushington. It would be unjust, and almost absurd that, without regard to the comparative value of the freight and cargo when uninjured, the risk of a mercantile adventure should be thrown upon the shipowner by the accident of the value of the cargo being a little more than the freight; so that a trifling damage, much less than the freight, would reduce the value to less than the freight; whilst, if the cargo had been much more valuable and the damage greater, or the cargo worth a little less than the freight and the damage the same, so as to bear a greater proportion to the whole value, the freight would have been payable, and the merchant have been put to his cross-action. Yet this is the conclusion we are called upon by the defendant to affirm in his favour, involving no less than that that damage, however trifling, if culpable, may work a forfeiture of the entire freight, contrary to the just rule of our law, by which each party bears the damage resulting from his own breach of contract, and no more.

The extreme case above supposed is not imaginary; for, it has actually occurred on many occasions, and notably upon the cessation of war between France and England in 1748, which

caused so great a fall in prices that the agreed freight in many instances exceeded the value of the goods. The merchants in France sought a remission of freight or the privilege of abandonment, but in vain. (2 Boulay-Paty, *Cours de Droit Commercial*, 485, 486.)

It is evident enough from this review of the law that there is neither authority nor sound reason for upholding the proposed defence. The plea is naught, and there must be judgment for the plaintiff.

Note

The general principle adopted in *Dakin v Oxley* is that the shipowner acquires a right to freight only if the service in respect of which the freight was contracted to be paid has been substantially performed. In the case of delivery freight it is therefore necessary to ask if the goods for the carriage of which freight was to be paid have arrived. Damage so serious that it causes a change in the identity of the cargo may prevent arrival, so that no freight is earned, as the decision in *Asfar v Blundell* memorably illustrates.

***Asfar v Blundell* [1896] 1 QB 123, CA**

Facts

Dates were shipped on the vessel *Govino* under bills of lading which made freight payable to the plaintiffs on right delivery in London. The ship collided with another vessel in the Thames and sank. She was raised but the dates were found to be unfit for human consumption. The trial court found the dates were unmerchantable as dates although a proportion were still recognisable and the cargo was still valuable and was sold for £2,400 for export for distillation. On a claim against underwriters who had insured the carrier against loss of freight, it was held that no freight was payable.

Held

Lord Esher MR: I am of opinion that this appeal should be dismissed. The first point taken on behalf of the defendants, the underwriters, is that there has been no total loss of the dates, and therefore no total loss of the freight on them. The ingenuity of the argument might commend itself to a body of chemists, but not to businessmen. We are dealing with dates as subject matter of commerce; and it is contended that, although these dates were under water for two days, and when brought up were simply a mass of pulpy matter impregnated with sewage and in a state of fermentation, there had been no change in their nature, and they still were dates. There is a perfectly well known test which has for many years been applied to such cases as the present – that test is whether, as a matter of business, the nature of the thing has been altered. The nature of a thing is not necessarily altered because the thing itself has been damaged; wheat or rice may be damaged, but may still remain the things dealt with as wheat or rice in business. But if the nature of the thing is altered, and it becomes for business purposes something else, so that it is not dealt with by business people as the thing which it originally was, the question for determination is whether the thing insured, the original article of commerce, has become a total loss. If it is so changed in its nature by the perils of the sea as to become an unmerchantable thing, which no buyer would buy and no honest seller would sell, then there is a total loss. That test was applied in the present case by the learned judge in the court below, who decided as a fact that the dates had been so deteriorated that they had become something which was not merchantable as dates. If that was so, there was a total loss of the dates. What was the effect of this upon the insurance? If they were totally lost as dates, no freight in respect of them became due from the consignee to the person to whom the bill of lading freight was payable – that is, to the charterers – and there was a total loss of the bill of lading freight on these dates . . .

Notes

1 In *Duthie v Hilton* (1868) 4 CP 138 (an action for freight), the plaintiffs contracted to carry 300 casks of cement on the *John Duthie* from London to Sydney. Freight was

to be paid 'within three days after arrival of ship and before delivery of any portion of the goods'. Before delivery and within three days of arrival, the ship was scuttled in Sydney to extinguish an accidental fire. The cement hardened and the casks were destroyed. The parties agreed on these facts that the cement no longer existed as cement. The plaintiffs admitted that this was a case of total loss but alleged that the freight had become payable on arrival of the vessel and before the loss occurred. It was held that the plaintiffs had to be ready to deliver the goods on demand throughout the agreed period. Since they were not, freight was not payable. If no time had been fixed, the shipowner must be ready to deliver for a reasonable time to earn freight.

2 The holders of a respondentia bond on a cargo (for whom the cargo owners were found to be responsible) obtained an order of the Court of Admiralty for the removal and sale of the cargo. It was held that freight was payable as performance of the contract had been (in effect) prevented by the cargo owners: *The Cargo Ex The Galam* (1863) 33 LJ Adm 97, Privy Council on appeal from the Court of Admiralty.

3 The *Caspian Sea* was chartered for a voyage from Punta Cardon to Genoa with freight payable on delivery. She was loaded with 'Bachaquero Crude', a Venezuelan crude oil normally free of paraffin. The charterers took physical delivery at the port of discharge, but denied that freight was payable because they alleged that the cargo had been contaminated by paraffinic products from residues of a previous cargo. Arbitrators stated a case for the opinion of the court. The award was remitted to the arbitrators, the court finding that the owners would be entitled to freight if what they had delivered could, in commercial terms, bear a description which sensibly and accurately included the words 'Bachaquero Crude'. The arbitrators had to decide whether 'Bachaquero Crude' meant a 'paraffin-free crude'; if it did, the owners were not entitled to freight. Or did it mean 'a crude from the Bachaquero region which in its natural state contains no paraffin'; in this case, the owners would be entitled to freight unless the cargo was so contaminated that it was not possible to describe it even as 'contaminated Bachaquero Crude': *Montedison v Icroma* [1980] 1 Lloyd's Rep 91, *per* Donaldson J.

4 Is the proper starting point in a case such as the *Caspian Sea* to ask, what description did the shipper apply to the goods? Or should we ask instead, what precisely was it that the parties agreed would be the service on performance of which freight would be paid? Does this mean we must consider not only the words the shipper used to describe the cargo, but also what both parties knew or must be taken to have known about, such as any special susceptibilities of that cargo?

5 The idiosyncratic English rule is that, in the absence of an agreement to the contrary, a claim for loss or damage to cargo cannot be asserted by way of deduction from or equitable set off against freight. There is no general agreement on the reason for this rule, although suggested explanations include: (1) alleged judicial tenderness for shipowners which is suggested to have been appropriate when communications were poor and facilities for transfer of money limited; and (2) a special desire to encourage prompt payment and avoid spurious delaying complaints in case of contracts for carriage by sea. The rule is inconsistent with the law of some other maritime jurisdictions and with the English rule applied to contracts for the sale of goods and for work. Nevertheless, in *Aries Tanker v Total Transport, The Aries* [1977] 1 All ER 398, the House of Lords refused to abandon the rule because the parties had contracted on the basis of and against the background of the established position and to avoid retrospectively disturbing many other

contracts similarly entered into. In *Colonial Bank v European Grain & Shipping Ltd, The Dominique* [1989] 1 Lloyd's Rep 431 (noted below), the House of Lords held that a repudiatory breach of a voyage charter, like the non-repudiatory breach considered in *The Aries* (above), was equally incapable of giving rise to a defence by way of equitable set off to a claim for accrued freight under a voyage charterparty. *The Aries* rule is significantly modified in application to time charter hire.

6 It is not unusual in a charterparty for it to be expressly agreed that freight shall be paid in full without deductions for cargo claims, for instance by making freight payable 'in cash without discount', as was done in the *Aries* charter, above. In practice, when a dispute arises, it is common for shipowners to seek payment of freight in full, but for the cargo owner's position to be safeguarded by a guarantee of payment of any damages for which the shipowners are ultimately held responsible to be given by the shipowner's P and I club.

2 LUMP SUM FREIGHT

A lump sum freight is one which is not tied directly to the quantity of cargo actually carried. It is a definite sum agreed to be paid for the hire of a ship for a specified voyage (*Williams v Canton Insurance* [1901] AC 462, p 473, *per* Lord Lindley): for example, £1,000 for a voyage from Y to Z. This may be the easiest way to define the freight obligation when the charterer does not know the exact quantity of cargo which will be loaded or when it is difficult to measure the quantity actually loaded. An alternative, often used in contracts of affreightment which are not tied to a particular vessel, is to fix a rate based on the size of the vessel: for example, £10 per deadweight ton. Freight which is computed on intaken quantity and to be paid on that quantity despite a shortage on outturn, shares at least some of the characteristics of lump sum freight: *Shell v Seabridge, The Metula* [1978] 2 Lloyd's Rep 5, CA.

The two basic rules about payment of lump sum freight are, first, that if the ship is put at the disposal of the freighter, the whole of the freight is payable even though no cargo or less than a full cargo is loaded: *Robinson v Knights* (1873) 8 CP 465, p 468. Second, the whole sum is payable if any part of the cargo shipped is delivered, at least if the remainder is lost due to excepted perils. But it is not easy to identify a consistent legal theory which explains these rules. The explanation adopted in *The Norway* (1865) 3 Moore PC(NS) 245 and later followed in *Robinson v Knights* (above) was that a charterparty at a lump sum freight was a contract to pay for the use and hire of a ship for a given voyage, rather than a contract to pay for the carriage and delivery of a particular cargo. On this analysis, the shipowner is clearly entitled to full freight even if he only manages to deliver part of the cargo loaded. He earns freight, it could be said, by making the agreed voyage, not by delivering cargo. But this rationalisation implies that freight can be earned even if no cargo ever arrives, so long as the chartered vessel reached the port of discharge; on the other hand, it also suggests that no freight would be earned if the ship herself does not arrive, even if the whole cargo is in fact delivered in perfect condition. It was largely for these reasons that in *Thomas v Harrowing* a different explanation of the nature of a contract at a lump sum freight was adopted.

Thomas v Harrowing Steamship [1913] 2 KB 171, CA; affirmed [1915] AC 58, HL

Facts

The *Ethelwalda* was chartered to load a cargo of pit props in Finland for carriage to a dock at Port Talbot for a specified lump sum freight. The freight was payable under article 9 on unloading and right delivery of cargo. The charterparty contained the usual exception of perils of the seas. The *Ethelwalda* arrived with her cargo, which consisted in part of a deckload, outside the port of discharge, when owing to heavy weather she was driven against the breakwater and became a total loss. About two-thirds of the cargo was washed ashore and was collected on the beach by the directions of the master of the *Ethelwalda*, acting on behalf of the plaintiffs, and placed on the dock premises and there delivered to the defendants, the residue of the cargo being lost by perils of the seas. The plaintiffs brought the present action to recover the lump sum freight.

Held

Kennedy LJ: … [T]wo questions of law, each of which is of considerable general importance, have been raised by the appellants … They contend, in the first place, that, as the stipulated freight was a lump freight, it could be earned by the plaintiffs only if the cargo was carried to its destination in the *Ethelwalda*, and therefore, inasmuch as she was wrecked outside the breakwater, and the cargo, as it came ashore, was conveyed to the dock in the way in which I have described, no freight could become due, even if the whole cargo had been thus delivered to the defendants. Secondly, they contend that, if they are wrong in this, yet, inasmuch as part of the cargo loaded on board of the *Ethelwalda* was lost and not delivered, that circumstance bars the maintenance of the plaintiffs' claim.

I proceed to consider each of these contentions.

… The only sort of authority which the defendants' counsel put forward for their contention consisted of inferences which they invited us to draw from expressions to be found in the judgments in two reported cases, in each of which the freight reserved by the charterparty under consideration was a lump sum. In the judgment of the Privy Council in *The Norway* (cited above) it was said that the lump sum called freight was not properly so called, but was more properly a sum in the nature of a rent to be paid for the use and hire of the ship. In *Robinson v Knights* (above) Keating J described the freight payable under the charterparty in that case as an entire sum to be paid for the hire of the ship for one entire service, and Brett J, as he then was, in regard to it used the expression 'a stipulated gross sum to be paid for the use of the whole ship for the whole voyage'. It appears to me that none of these statements really afford support to the contention of the present appellants. They must, of course, be read in each case in reference to the particular charterparty which was under the consideration of the court and in reference to the particular question which had to be decided in respect of that charterparty. Neither in *The Norway,* nor in the case in the Common Pleas, was there any question as to the arrival of the chartered vessel at the port of destination. In each case the vessel had in fact arrived, and therefore the courts had not to consider any question of the shipowner's right, in Lord Ellenborough's words, to earn the whole freight by forwarding the goods by some other means to the place of destination. What they had to decide was the distinct and different question whether under the particular terms of the charterparty before them the shipowner was entitled to claim payment, without deduction, of the whole freight where only part of the cargo was delivered out of the arrived ship – a question involved in the second contention of the defendants which I shall consider presently. Further, it is to be noted that in each of these cases the terms of the charterparty, as I understand the report, were in a material respect different from those of the charterparty with which we are concerned in the present case. In both of them the lump freight was, as to some portion, expressly made payable at a time to be ascertained by reference to the ship's arrival at her destination. In *The*

Norway, as is pointed out in the judgment on p 409 of Browning and Lushington's report, one-third in cash was made payable 'on arrival at the port of delivery'. In *Robinson v Knights* the provision was that freight should be paid in cash half on arrival and the remainder on unloading and right delivery of cargo. I must not be understood to say that even such stipulations in a charterparty ought, if that question should ever arise for decision, to be held to affect the shipowner's right, in case of his ship's disablement in the course of the chartered voyage, to forward the cargo and earn the lump sum freight. But the presence of those stipulations in the particular charterparty in each case under consideration cannot properly be left out of sight when we have to consider the expressions in the judgments to which I have referred, and it differentiates the charterparties which contained such stipulations from the charterparty in the present case, which, except that the freight is to be a lump sum and not calculated per standard or per fathom of the timber shipped, in no way differs from the ordinary charterparty for the services of a ship to carry a particular cargo to a particular port, and which expressly provides for the payment of the lump freight, not in reference to the arrival of the ship, but, according to article 9, 'on unloading and right delivery of cargo'. I agree with Pickford J [the trial judge] when he says:

> I do not say that there may not be lump sum charters in which the freight, being payable for the use of the particular ship, is not to be paid unless the ship completes her voyage. There may be such charters, but I do not think that this is the effect of the present one.

I may add in this connection that it may be worth noting that by the terms of this charterparty in this case the charterers' agents were to load a full and complete cargo.

I now come to that which I have called the second contention of the defendants, which is that only a part of the cargo was delivered, and, therefore, the contract not having been completely performed by the plaintiffs, they are, according to the principle exemplified by the leading case of *Cutter v Powell* (1795) 6 TR 320, not entitled to claim the lump sum which constituted the agreed remuneration for the performance of the contract of affreightment. Upon this point also I am of opinion that the judgment of Pickford J in favour of the plaintiffs was right. What, under the contract contained in the charterparty, was the condition precedent to the plaintiffs' right to the payment of the lump freight? It was, as I construe the document, the right delivery of the cargo. What is, under this charterparty, meant by 'the cargo'? To ascertain this, we must look at the charterparty, and, so looking, we find that what the shipowner has to deliver is not in all circumstances the quantity of cargo shipped, but all which was shipped and of which delivery was not prevented by any of the excepted perils. This is the law as enunciated in the judgments both of Lord Coleridge CJ and Bramwell B in the case of *Merchant Shipping Co v Armitage* (1873) LR 9 QB 99, in which the charterparty under the consideration of the Exchequer Chamber was in its terms, as to payment of a lump sum freight, excepted perils, and right delivery of cargo, like the charterparty in the present case, and in which, as in the present case, part of the cargo had been lost by excepted perils, and therefore the cargo owner had got only a partial delivery…

. . . In a comparatively recent case in the House of Lords the law has been laid down in the same way by Lord Lindley. The case was *Williams & Co v Canton Insurance* [above]. A lump sum freight, said his Lordship:

> is a definite sum agreed to be paid for the hire of a ship for a specified voyage; and although only payable on the right and true delivery of the cargo, those words are not taken literally, but are understood to mean right and true delivery, having regard to and excluding excepted perils. In other words, the cargo in this clause of the charterparty does not mean the cargo shipped, but the cargo which the shipowner undertakes to deliver. The non-delivery of some of that [namely, the cargo shipped] affords no defence to a claim for a lump sum freight, although such non-delivery, if wrongful, will give rise to a cross-action. This was settled by the Court of Exchequer Chamber in *Merchant Shipping Co v Armitage*, which followed a decision to the same effect by the Privy Council in *The Norway*.

These authoritative pronouncements of the law . . . constitute, in my judgment, a sufficient answer to the defendants' second contention. It is common ground that the goods not delivered in the

present case were not delivered because they had been lost by excepted perils. The defendants' counsel asked in the course of the argument what, as to the right to freight, ought to be the legal consequence of the chartered ship arriving without any of the cargo on board, so that nothing was delivered, and they further asked whether, if the loss had been caused not by excepted perils, but by the wrongful act or negligence of the shipowner, the lump freight would nevertheless be payable. It is, I think, sufficient to say that it is quite unnecessary for the purpose of our judgment in the present case to decide either of these points which are not involved. But it is clear from his judgment in *Merchant Shipping Co v Armitage* that Bramwell B, for the reason that the delivery of cargo is a condition precedent to payment, would have answered the first of the appellants' questions in favour of the owner of cargo, as he there states; and that in regard to the second question he would have concurred in the opinion expressed by Lord Lindley in the concluding sentence of the passage in his judgment in *Williams & Co v Canton Insurance*, which I have already quoted, that, even if the non-delivery of part of the cargo is due to wrongful conduct or negligence on the part of the shipowner, the proper remedy of the cargo owner is by cross-action. It is, however, in my judgment, as I have already intimated, useless, for the purpose of deciding the present case, to consider how these questions ought to be decided, the relevancy of which is excluded by the facts of the case under consideration.

Notes

1 In *Skibs A/S Trolla v United Enterprises, The Tarva* [1983] 2 Lloyd's Rep 385 in the Singapore High Court, Chua J held that where the balance of lump sum freight was payable under a voyage charter on 'right and true delivery' the balance became payable when the cargo which had arrived at the ports of discharge had been completely delivered. The shipowners did not have to prove right and true delivery of the whole cargo originally shipped to earn the freight and the charterers had no right to retain the balance against possible cargo claims by consignees.

2 In *Steamship Heathfield Co v Rodenacher* (1896) 2 Com Cas 55, CA, the *Heathfield* was chartered 'guaranteed by owners to carry 2,600 tons dead weight'. It was also provided she would load 'a full and complete cargo of sugar' to be delivered at a stated freight rate 'all per ton dead weight capacity as above'. The ship was given a lien, *inter alia*, for dead freight. The charterer loaded 2,673 tons of sugar, but refused to load the vessel to her actual capacity of 2,950 tons. At first instance (1 Com Cas 446) Mathew J rejected the argument that this was a lump sum freight and held that: (1) the owners' guarantee meant only that the vessel could carry 2,600 tons at least, not that she could not carry more; (2) that a 'full and complete cargo' meant what it said and was not restricted to 2,600 tons; and (3) that the freight rate was to be computed on the basis of a 'full and complete cargo' (2,950 tons), not on the basis of the guaranteed dead weight (2,600 tons). This judgment was upheld on appeal. TE Scrutton was counsel for the successful plaintiffs.

3 In *Rotherfield v Tweedy* (1897) 2 Com Cas 84 the *Rotherfield* was described in the contract (a 'Danube berth note') as 'of the capacity of 4,250 tons'; the owners also guaranteed that the vessel could carry 4,250 tons dead weight. It was agreed that a full cargo would be loaded. Freight was made payable per ton 'on the guaranteed d-w capacity of 4,250 tons'. The vessel loaded a full cargo of only 3,947 tons; her stated deadweight capacity included bunkers. The plaintiffs sought freight on 4,250 tons. The court rejected Scrutton's argument as counsel for the unsuccessful plaintiffs that the contract was for a lump sum freight and held freight was payable only on the quantity of cargo actually shipped. Successive editions of *Scrutton on Charterparties*, from the 4th edn, 1899 have stated with justification that both the *Heathfield* and *Rotherfield* decisions seem to strike out of the charters part of their provisions. In *Rotherfield*, the court seems to have been particularly influenced by

the fact that, if the parties had intended a lump sum, they could have said so in a simpler way.

4 *Shell v Seabridge*. The *Metula*, a supertanker, was chartered on the Exxonvoy 1969 form to carry a full cargo of petroleum. Freight was to be computed on intake quantity and paid without discount on delivery of cargo at destination. Over 190,000 long tons were loaded at Ras Tanura for carriage to Chile. The vessel stranded in the Magellan Strait and about a third of the cargo was lost; the rest was transhipped and carried to destination. It was held that the owners were entitled to freight on the full amount loaded. The court does not seem to have been impressed by the idea that 'intake quantity' clauses are not intended to deal with accidental losses in known circumstances, but only to avoid disputes where there is, as often occurs, a discrepancy between intake and outturn measurements of bulk cargo because of differences in weighing methods or in the physical circumstances (such as ambient temperature in which the measurements were made); or the normal gains or losses which occur with certain commodities in transit because of, for example, evaporation, sedimentation in ship's tanks or absorption of moisture.

3 *PRO RATA* FREIGHT AND THE RIGHT TO FORWARD

Where freight is to be earned by delivering the agreed goods at the port of discharge, the carrier does not acquire a right to a proportion of the agreed sum by moving the cargo over part of the agreed route unless the parties agree to this, either expressly or by implication. The two cases in this section outline the very limited circumstances in which an agreement to pay a proportionate sum as freight may be implied from the conduct of the parties.

Hunter v Prinsep (1808) 10 East 378

Facts

The *Young Nicholas* was chartered to carry a cargo of timber from Honduras Bay to London. Freight was payable at agreed rates on or after a right and true delivery of the cargo. The ship and cargo were captured by a French privateer, recaptured by an English sloop but then wrecked at St Kitt's, where the Vice-Admiralty Court (on the master's application) ordered a sale of the cargo. The shipowner claimed to be entitled to freight *pro rata itineris*.

Held

Lord Ellenborough: The principles which appear to govern the present action are these: the ship owners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas, or other unavoidable casualties: and the freighter undertakes that if the goods be delivered at the place of their destination he will pay the stipulated freight: but it was only in that event, viz, of their delivery at the place of destination, that he, the freighter, engages to pay anything. If the ship be disabled from completing her voyage, the shipowner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded; unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject. If the shipowner will not forward them, the freighter is entitled to them without paying anything. One party, therefore, if he forward them, or be prevented or discharged from so doing, is entitled to his whole freight; and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all. The general property in the goods is in the freighter; the shipowner has no right to withhold the possession from him, unless he has either earned his freight, or is going on to

earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has a right to possession. The captain's conduct in obtaining an order for selling the goods, and selling them accordingly, which was unnecessary, and which disabled him from forwarding the goods, was in effect declining to proceed to earn any freight, and therefore entitled the plaintiff to the entire produce of his goods, without any allowance for freight . . .

St Enoch Shipping v Phosphate Mining [1916] 2 KB 624

Held

Rowlatt J (at p 627): There can be no freight *pro rata* unless there is a new contract express or implied to substitute the carriage which has been effected for the carriage originally contracted for. In *Hopper v Burness* (1876) 1 CPD 137, 140, Brett J said:

> What, then, is the principle governing the question whether such freight is payable? It is only payable when there is a mutual agreement between the charterer or shipper and the captain or shipowner, whereby the latter being able and willing to carry on the cargo to the port of destination, but the former desiring to have the goods delivered to him at some intermediate port, it is agreed that they shall be so delivered, and the law then implies a contract to pay freight *pro rata itineris*.

That is a rule clearly stated of what is not only shipping law, but general law, where there is an agreement between two parties that a thing shall be done but no agreement as to the price to be paid for doing it. Park B in *Vlierboom v Chapman* (1844) 3 M & W 230, 238, laid down the law to the same effect:

> To justify a claim for *pro rata* freight, there must be a voluntary acceptance of the goods at an intermediate port, in such a mode as to raise a fair inference, that the further carriage of goods was intentionally dispensed with.
>
> The consignee must accept the goods in such a way as to imply that he and the shipowner agree that the goods have been carried far enough and that the shorter transit shall be substituted for that named in the original contract . . . In the present case the defendants, who were consignees, merely took their own goods when they were landed. No agreement to modify the contract of carriage can be inferred from that act.

Note

Lord Ellenborough refers in *Hunter* to the possibility of the shipowner earning freight under a 'new bargain'. Such an agreement may be express or implied. But as Lord Ellenborough's judgment also illustrates, the respective rights of the parties under their original agreement are such that there is little room for the implication of a new contract. It follows from the above decisions that *pro rata* freight will not be payable merely because the owner of the cargo receives it at a place other than the contractual port of discharge. The master is not 'able' to carry or forward cargo if, for example, the cargo has been lost, destroyed or justifiably sold by the master without the cargo owner's consent (*Vlierboom v Chapman*; *Hopper v Burness*, above).

'Unwillingness' can be demonstrated simply by a wrongful refusal at an intermediate port to carry the cargo to its destination (*Metcalfe v Britannia Ironworks* (1877) 2 QBD 423); it might also be shown if, for example, the crew justifiably abandon the ship and its cargo in a storm, when the cargo owner can treat the contract of carriage as having ended: *The Cito* (1881) 7 PD 5.

The Law Commission provisionally concluded in 1975 (*Pecuniary Restitution on Breach of Contract*, Working Paper No 65) that the rules as to payment of *pro rata* freight were so firmly established in the business practice of shipowners and insurers that any interference with them (for instance by introducing a general obligation to make a payment in return for any benefit received) would be undesirable. This suggestion was generally approved (Law Commission, *Privity of Contract: Contracts for the Benefit of*

Third Parties, Report No 121, 1983, London: HMSO). Compare the approach advocated in (1941) 57 LQR 385 (Glanville Williams) and by Goff and Jones, *Restitution*, 6th edn, 2002, London: Sweet & Maxwell, para 20-006.

4 ADVANCE FREIGHT

Instead of agreeing that freight is to be earned by making delivery at an agreed place it is common for bills of lading to provide that freight shall be earned and paid at a much earlier stage, typically on or around the date of commencement of the voyage, although there are variations in the precise event on which freight becomes due. For example, 'freight due and payable (or alternatively: freight to be considered earned) on shipment/on receipt of goods by carrier/on signing bills of lading/on sailing and non-returnable, ship and/or cargo lost or not lost'. Some clauses make a distinction between the date on which freight is 'earned' (on which the freight risk passes from the shipowner) and a later date on which the freight is actually payable. The decision of the House of Lords in *Allison v Bristol Marine Insurance* settled the effect of an agreement to pay advance freight.

***Allison v Bristol Marine Insurance* (1876) 1 App Cas 209, HL**

Facts

The *Merchant Prince* was chartered to carry coal from Greenock to Bombay. The freight rate was 42 shillings a ton, such freight to be paid 'one half in cash on signing bills of lading ... less five per cent for insurance ... and the remainder on right delivery of the cargo'. Half of the freight was paid in London. The shipowner insured the freight which he expected to receive on the delivery of the full cargo. The cargo owner insured his cargo for a sum inclusive of the value of the freight he had prepaid. The ship was wrecked on a reef about eight miles from Bombay. Half the cargo was saved and landed but no further freight was paid. The shipowner claimed on his insurance policies alleging that he had suffered a total loss of half of the freight not paid in advance.

The judges were summoned to assist the House of Lords.

Held

After an extensive review of earlier cases Brett J said (at 226):

> I have drawn attention to all the cases, in order to shew how uniform the view has been as to what construction is to be put upon shipping documents in the form of the present charter-party, and as to the uniform, though perhaps anomalous rule, that the money to be paid in advance of freight must be paid, though the goods are before payment lost by perils of the sea, and cannot be recovered back after, if paid before the goods are lost by perils of the sea. Although I have said that this course of business may in theory be anomalous, I think its origin and existence are capable of a reasonable explanation. It arose in the case of the long Indian voyages. The length of voyage would keep the shipowner for too long a time out of money; and freight is much more difficult to pledge, as a security to third persons, than goods represented by a bill of lading. Therefore the shipper agreed to make the advance on what he would ultimately have to pay, and, for a consideration, took the risk in order to obviate a repayment, which disarranges business transactions.

(Of the other judges who attended, Baron Pollock agreed with Brett J; Lord Chief Baron Kelly and Grove J also thought the plaintiff shipowner was entitled to succeed. Blackburn and Mellor JJ thought he was not. The House of Lords unanimously found in favour of the shipowner.)

Notes

1 Freight clauses often include an express statement that freight paid in advance is not repayable if the ship and/or cargo are later lost. This is strictly unnecessary under English law (many other legal systems require repayment); but it has a commercial advantage. It is easier to resolve a dispute with a shipper by referring him to a clause in a form which he has used than to attempt to demonstrate a general legal principle.

2 Where advance freight is paid and the goods are subsequently lost in circumstances in which the shipowner is liable in an action for damages for non-delivery (that is, the loss is not covered by an exclusion clause) then the advance freight paid forms part of the value of the goods at their intended destination and is recoverable as part of their value: *Great Indian Peninsula Rly v Turnbull* (1885) 53 LT 325.

3 'Final sailing': the *General Chasse* was chartered for a voyage from Cardiff to San Francisco, with a portion of freight payable on final sailing from the port of loading. The ship cleared customs, passed the dock gates, but whilst under tow, she grounded in the ship canal which connected the dock with the open sea. The vessel subsequently became a wreck. It was held that 'sailing' meant the time the vessel is fully fit for sea and breaks ground; but 'final sailing' meant departure from the port and being at sea. The advance freight was not payable: *Roelandts v Harrison* (1854) 9 Ex 447.

4 'On signing bills of lading': one-third of freight was payable on signing bills of lading. The cargo was loaded but the vessel sank before reaching the dock gates and before the bills of lading had been signed. It was held that the charterers had an implied duty to present the bills of lading for signature within a reasonable time and that this obligation did not cease when the ship was lost. The charterers were found to have broken this implied contract and the measure of damages was the amount of the advance freight: *Oriental Steamship v Tylor* [1893] 2 QB 518, CA.

5 'If required': in *Oriental Steamship* (above), the earlier case of *Smith v Pyman* [1891] 1 QB 742 was distinguished. In that case advance freight was payable 'if required' and it was held too late to require it after the ship was lost, because the charterer could then no longer insure it.

6 The *Lorna I* was nominated under a freight contract to lift ore from an Albanian port. The contract provided 'freight non-returnable cargo and/or vessel lost or not lost to be paid . . . as follows: 75 per cent . . . within five . . . days after master signed Bills of lading and the balance after right and true delivery'. Bills of lading were signed but the vessel was lost with all hands, within five days, in a gale in the Black Sea. It was held that freight was not payable because the charterers had been under no obligation to pay any freight until the end of the five-day period and before that time the cargo and the vessel had been lost. Robert Goff J at first instance pointed out that the result would have been different if the parties had chosen to provide that freight was earned on shipment, but was not payable for five days thereafter: *Compania Naviera General v Kerametal* [1983] 1 Lloyd's Rep 373, CA.

7 Plaintiff owners let the *Karin Vatis* for a voyage from Liverpool to India with a cargo of scrap. The charter provided:

> Freight deemed earned as cargo loaded . . . 95 per cent of freight to be paid within three banking days after completion of loading and surrender of signed bills of lading . . . vessel and/or cargo lost or not lost . . . Balance of freight to be settled within 20 days after completion of discharge . . .

The initial payment was made, the vessel sailed and sank shortly after passing Suez. The charterers denied that the remaining 5% of freight was due on the grounds that no cargo had been discharged. The Court of Appeal held that the entire freight was earned as soon as cargo was loaded. Completion of discharge was not a condition precedent to the recovery of the outstanding amount, which was payable within a reasonable time: *The Karin Vatis* [1988] 2 Lloyd's Rep 330, CA.

8 In *Colonial Bank v European Grain & Shipping Ltd, The Dominique*, shipowners assigned to the plaintiff bank all the earnings of the *Dominique* including all freight. The vessel was chartered to load agricultural produce in bulk at Kakinada, India, for carriage to European ports. The charterparty provided that:

> Freight shall be prepaid within five days of signing and surrender of final bills of lading, full freight deemed to be earned on signing bills of lading, discountless and non-returnable, vessel and/or cargo lost or not lost and to be paid to [a named bank in Piraeus].

Cargo was loaded and bills of lading signed. At Colombo the vessel was arrested by suppliers and detained. The charterers justifiably elected to treat the owners' conduct as repudiating the charter. The bills of lading were subsequently surrendered to shippers. The plaintiff bank sued to recover the advance freight from the charterers. The charterers argued that, if the right to freight was held to have accrued before the charterparty was brought to an end, they were nevertheless entitled to set off the damage suffered by them as a result of the owners' repudiation. The House of Lords held that:

(i) the proper interpretation of the charterparty was that the owners' right to freight accrued on completion of signing of all the bills of lading, with payment being postponed until five days after the signed bills of lading had been delivered to shippers. In the result, the right to freight accrued before the termination of the charter;

(ii) the right to freight was unconditionally acquired before termination of the charter and survived that termination and was not divested or discharged by termination;

(iii) a repudiatory breach of a voyage charter, like the non-repudiatory breach considered in *The Aries* (above), was not capable of giving rise to a defence by way of equitable set off to a claim for accrued freight.

9 In *Krall v Burnett* (1877) 25 W R 305, QB Div Ct, the plaintiff shipped goods in London for carriage to Rouen in the defendant's ship. The ship was lost. The bill of lading stated 'freight payable in London'. It was held that the words meant only that freight was payable in London and not elsewhere, and had no reference to time of payment. The clause was not ambiguous and no evidence of an alleged custom that it meant freight was payable in advance could be given.

5 BACK FREIGHT

Back freight is compensation payable to the carrier for extraordinary acts done in cases of 'accident and emergency' for the benefit of the owners of the cargo.

Cargo Ex Argos (1873) LR 5 PC 134

Facts

The defendant shipped petroleum on the plaintiff's vessel for carriage from London to Le Havre. The bill of lading provided that the petroleum was to be taken out by the

defendant within 24 hours of arrival. The vessel arrived at Le Havre, but was ordered to leave the following day by the authorities because of the presence of munitions in the port. The master attempted to land the goods at other local ports but failed. He returned to Le Havre and obtained permission to discharge the petroleum temporarily into a lighter in the outer harbour where it remained under his control. Four days later, the *Argos* had discharged the rest of her cargo at the quay and was ready to sail. No request for delivery having been made, the master reshipped the petroleum and brought it back to London. It was held that the shipowner had earned the outward freight. But the case is best known for the decision on the shipowner's claim for freight on the return voyage and for expenses.

Held

Sir Montague E Smith: . . . The next question to be considered is, whether the plaintiff is entitled to compensation in the shape of homeward freight for bringing the petroleum back to England. It seems to be a reasonable inference from the facts, that after the four days during which the petroleum had been lying in the harbour had expired, the authorities would not have allowed it to remain there. It was still in the master's possession, and the question is, whether he should have destroyed or saved it. If he was justified in trying to save it, their Lordships think he did the best for the interest of the defendant in bringing it back to England. Whether he was so justified is the question to be considered.

As pointed out by the judge of the Admiralty Court, the same kind of question arose in *Christy v Rowe* (1808) 1 Taunt 300. In that case Sir James Mansfield says:

> Where a ship is chartered upon one voyage outwards only, with no reference to her return, and no contemplation of a disappointment happening, no decision, which I have been able to find, determines what shall be done in case the voyage is defeated: the books throw no light on the subject. The natural justice of the matter seems obvious: that a master should do that which a wise and prudent man would think most conducive to the benefit of all concerned. But it appears to be wholly voluntary; I do not know that he is bound to do it; and yet, if it were a cargo of cloth or other valuable merchandise, it would be a great hardship that he might be at liberty to cast it overboard. It is singular that such a question should at this day remain undecided.

The precise point does not seem to have been subsequently decided; but several cases have since arisen in which the nature and scope of the duty of the master, as agent of the merchant, have been examined and defined. (Amongst others *Tronson v Dent* (1853) 8 Moo PC 419; *Notara v Henderson* (1872) LR 7 QB 225; *Australasian Navigation Company v Morse* (1872) LR 4 PC 222.) It results from them that not merely is a power given, but a duty is cast on the master in many cases of accident and emergency to act for the safety of the cargo, in such manner as may be best under the circumstances in which it may be placed; and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing.

Most of the decisions have related to cases where the accident happened before the completion of the voyage; but their Lordships think it ought not to be laid down that all obligation on the part of the master to act for the merchant ceases after a reasonable time for the latter to take delivery of the cargo has expired. It is well established that, if the ship has waited a reasonable time to deliver goods from her side, the master may land and warehouse them at the charge of the merchant; and it cannot be doubted that it would be his duty to do so rather than to throw them overboard. In a case like the present, where the goods could neither be landed nor remain where they were, it seems to be a legitimate extension of the implied agency of the master to hold that, in the absence of all advices, he had authority to carry or send them on to such other place as in his judgment, prudently exercised, appeared to be most convenient for their owner; and if so, it will follow from established principles that the expenses properly incurred may be charged to him.

Their Lordships have no doubt that bringing the goods back to England was in fact the best and cheapest way of making them available to the defendant, and that they were brought back at less charge in the *Argos* than if they had been sent in another ship.

If the goods had been of a nature which ought to have led the master to know that on their arrival they would not have been worth the expenses incurred in bringing them back, a different question would arise. But, in the present case, their value, of which the defendant has taken the benefit by asking for and obtaining the goods, far exceeded the cost.

The authority of the master being founded on necessity would not have arisen, if he could have obtained instructions from the defendant or his assignees. But under the circumstances this was not possible. Indeed this point was not relied on at the bar.

Their Lordships, for the above reasons, are of opinion that the plaintiff has made out a case for compensation for bringing back the goods to England. But they think the plaintiff is not entitled to recover the amount claimed for demurrage and expenses in attempting to enter the ports of Honfleur and Trouville. These efforts may have been made by him in the interest of the cargo as well as the ship; but they were made before the ship was ready to deliver at all in the port of Havre, and the expenses of this deviation and of the return to Havre, after permission had been obtained to discharge there, must be treated as expenses of the voyage, and not as incurred for the benefit of the defendant.

The charges for the hire of the vessel and of storing the petroleum in her at Havre, after permission had been obtained for its discharge there, stand on different ground. If the ship had then waited in the outer harbour with the petroleum on board, the defendant would have been liable to pay demurrage at £10.10s a day. It was obviously, therefore, to his advantage under the circumstances for the master to hire the vessel, and thus relieve him from the heavy demurrage payable for the detention of the ship. The whole expense of this operation appears to be about £15 only.

In the result their Lordships think the plaintiff is entitled to recover the outward freight, and the charge made for the carriage back to England . . . and also the £15 for the above expenses at Havre . . .

6 SHIPPER'S LIABILITY FOR FREIGHT

In the case of liner shipping, the shipper named in the bill of lading is normally the person who has entered into the contract for carriage with the carrier and is normally the person who is liable to pay the freight. But this is not always the case, as Hobhouse LJ explains below.

Cho Yang Shipping Co Ltd v Coral (UK) Ltd [1997] 2 Lloyd's Rep 641, CA

Facts

Coral contracted with B who agreed to carry containers from Germany to Gulf ports at an agreed rate to be paid to B. B contracted on similar terms with A who contracted with Cho Yang who carried the containers. Coral paid B who paid A, but A failed to pay Cho Yang, who had issued bills of lading marked 'Freight Prepaid' which named Coral as the shipper. It was held that there was no agreement by Coral to pay freight to the shipowners.

Held

Hobhouse LJ: … In the absence of some other consideration, the shipper is contractually liable to the carrier for the freight: *Scrutton*, 20th ed, art 172. This is because the carriage is for reward and the personal liability to pay the reward is a contractual liability (whether the carriage was as a common carrier or pursuant to a 'special' contract). The personal liability is that of the person with whom the performing carrier has contracted to carry the goods. This person is normally the

shipper: *Domett v Beckford* (1883) 5 B & Ad 521. But the shipper may be shipping as the agent of the consignee in which case the contract will be with the consignee: eg *Fragano v Long* (1825) 4 B & C 219, *Dickenson v Lano* (1860) 2 F & F 188. A contract to pay the freight will not always be implied from the fact of shipment and the issue of a bill of lading: *Smidt v Tiden* (1874) LR 9 QB 446. It is possible for there to be more complex contractual schemes; the performing carrier may be in contractual relations with others as well, as, for example, where there is a voyage or time charter; this can affect the position.

In English law the bill of lading is not the contract between the original parties but is simply evidence of it: eg *The Ardennes* (1950) 84 LIL Rep 340; [1951] 1 KB 55. Indeed, though contractual in form, it may in the hands of a person already in contractual relations with the carrier (eg a charterer) be no more than a receipt: *Rodoconachi v Milburn* (1886) 18 QBD 67. Therefore, as between shipper and carrier, it may be necessary to inquire what the actual contract between them was; merely to look at the bill of lading may not in all cases suffice. It remains necessary to look at and take into account the other evidence bearing upon the relationship between the shipper and the carrier and the terms of the contract between them: *Scrutton*, art 33. The terms upon which the goods have been shipped may not be in all respects the same as those actually set out in the bill of lading. It does not necessarily follow in any given case that the named shipper is to be under a personal liability for the payment of the freight.

As will be readily appreciated, the inclusion of the words 'freight prepaid' in the bill of lading does not of itself show that the shipper is not to be under any liability for the freight if it has not in fact been paid: eg *The Nanfri* [1979] 1 Lloyd's Rep 201; [1979] AC 757. Such words are not, in English law, words of contract (eg *Compania Naviera Vasconzada v Churchill* [1906] 1 KB 237) and their insertion in the bill of lading does not without more serve to negative a pre-existing, undischarged, contractual liability to pay the freight. Indeed, a request to the carrier that he issue a freight pre-paid bill of lading before the freight has in fact been paid would normally imply a personal undertaking by the person making the request that it would be paid . . . Thus, in the present case, the mere inclusion of those words in the bill of lading does not preclude a liability of Coral for the freight but it is part of the evidence to be taken into account when considering whether or not Coral were under a contractual liability to the plaintiffs for the freight . . .

(On the facts, it was held that the correct inference was that there was no agreement by Coral to pay freight to the plaintiffs.)

Notes

1 Delivery of cargo to consignees with no attempt to collect freight will not itself relieve a charterer or shipper from liability to pay: *Domett v Beckford* (1833) 5 B & Ad 321.

2 *Liens*. At common law, the shipowner is entitled to a possessory lien on cargo for freight payable on delivery. The shipowner is similarly entitled to a lien for general average contributions and for extraordinary expenses which have been justifiably incurred for the protection of cargo: *Hingston v Wendt* (1876) 1 QB 367. These common law liens are all possessory in nature so that the shipowner's right is to retain possession of the goods until the freight due is offered to him. Since the common law lien for freight is only possessory, it can be waived or lost by delivering the goods to the person entitled, without insisting on payment. There is no common law or implied lien in respect of freight which is contractually payable in advance of or after delivery:

> The decision is, that where the agreed time for payment of freight is not contemporaneous with the time of delivery of the cargo, there is no implied right of lien [*per* Brett J, *Allison v Bristol Marine* (above) referring to *Kirchner v Venus* (1859) 12 Moo P C 361].

Nor is there any lien at common law for dead freight or for demurrage or damages for detention. But liens for advance freight, demurrage, dead freight and other items ('all other charges') can be and frequently are created by agreement.

7 CESSER CLAUSES

It is not unusual for a charterparty to provide that, in some circumstances, the charterer shall escape all liability for freight, for example:

> Charterer's liability to cease on steamer being loaded provided the cargo is worth the freight, the owners having an absolute lien on the cargo for all freight, dead freight, demurrage and average.

This example is taken from Thornton, RN's evocative *British Shipping* (1945, Cambridge: CUP). Thornton rightly describes the cesser clause as a commercial instrument of real ingenuity and flexibility. He points out that it enables the charterer with a cargo to avoid borrowing and paying interest to finance advance freight charges, and possibly also gives him additional time to sell the cargo; although naturally the cargo must be sold on the basis that the buyer pays the freight. The shipowner for his part is protected by his lien on the cargo. But this is the factor which limits the use of the device: the shipowner is only protected to the extent that the lien is a valid and effective means of securing payment from the receiver in the jurisdiction in which the port of discharge is located. The *Aegis Britannic,* although not a case dealing directly with freight, reviews the traditional approach to the construction of cesser clauses.

Action SA v Britannic Shipping, The Aegis Britannic
[1987] 1 Lloyd's Rep 119, CA

Facts

The vessel was chartered to carry rice from a United State Gulf port to Basra in Iraq. During discharge by the stevedores, the cargo was damaged and the owners were held liable to the cargo receivers by an Iraqi court in Basra in respect of that damage. The owners claimed damages and/or an indemnity from the charterers in respect of that liability. The charter contained three relevant clauses. Clause 5 imposed liability on the charterers:

> 5 Cargo to be brought to, loaded, and stowed, respectively discharged at the expense and risk of Shippers/Charterers respectively Receivers/ Charterers.

Clause 20 created a lien:

> 20 Owners shall have a lien on the cargo for freight, dead freight and demurrage. Charterers shall remain responsible for dead freight and demurrage incurred at loading port. Charterers shall also remain responsible for freight and demurrage incurred at discharge port.

Clause 35 was the cesser clause:

> 35 Charterers' liability under this charterparty to cease upon cargo being shipped except as regards payment of freight, dead freight and demurrage incurred at both ends.

Held

> **Dillon LJ:** . . . Here the lien clause and the cesser clause fit in together, as the judge pointed out, with no difficulty. The owners are to have a lien under the lien clause for freight, dead freight and demurrage. Notwithstanding that lien, the charterers are to remain responsible for freight, dead freight and demurrage. The cesser clause expressly excludes from its scope payment of freight, dead freight and demurrage incurred at both ends. So the lien clause creates no problem as I see it, but the difficulty lies in reconciling the cesser clause with the other provisions of the charterparty, particularly cl 5 which I have read, because if the cesser clause is to be read literally, the liability of the charterers under cl 5, at any rate in respect of discharge, is at once removed by cl 35 of the same document. The same happens with a number of the other additional clauses in the charterparty . . .

The courts have long since considered cesser clauses. The leading authority is the decision of this court in *Clink v Radford & Co* [1891] 1 QB 625. There it so happened that the difficulty of construction was concerned with how the lien clause and the cesser clause were to be read together. Lord Esher, it seems to me, put things on a more general basis. He said the following at p 627:

> It seems to me, without going through the cases that have been referred to, that certain rules have been laid down in them which will enable us to decide this particular case. In my opinion, the main rule to be derived from the cases as to the interpretation of the cesser clause in a charterparty, is that the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion. In other words, it cannot be assumed that the shipowner without any mercantile reason would give up by the cesser clause rights which he had stipulated for in another part of the contract. If that be true, then the question in this particular case, as in every other case, will depend upon this, whether if we apply the cesser clause to the particular breach complained of, and so hold the charterer to be free, the shipowner has any remedy for his loss. If he has, we should construe the cesser clause in its fullest possible meaning, and say that the charterer is released; but if we find that, by so construing it, the shipowner would be left without any remedy whatever for the breach, then we should say that it could not have been the meaning of the parties that the cesser clause should apply to such a breach.

That language seems to me to be directly applicable to treating the liability of the charterers under cl 5 as immediately discharged by the cesser clause, cl 35. Bowen LJ puts the matter similarly. He says, at p 629, the following:

> There is no doubt that the parties may, if they choose, so frame the clause as to emancipate the charterer from any specified liability without providing for any terms of compensation – to the shipowner; but such a contract would not be one we should expect to see in a commercial transaction. The cesser clauses as they generally come before the courts are clauses which couple or link the provisions for the cesser of the charterer's liability with a corresponding creation of a lien.

I interject that here the lien and the cesser clauses are separate from each other. I now continue the citation:

> . . . There is a principle of reason which is obvious to commercial minds, and which should be borne in mind in considering a cesser clause so framed, namely, that reasonable persons would regard the lien given as an equivalent for the release of responsibility which the cesser clause in its earlier part creates, and one would expect to find the lien commensurate with the release of liability. That is a sound principle of commercial reasoning which has been sanctioned by the courts in the cases cited to us, and which has been recognised in the chain of important and valuable judgments of the present Master of the Rolls. That being the principle of construction to apply, one would not expect to find a shipowner placing his ship and himself at the mercy of a charterer without some equivalent, or contracting on a given event to release the charterer from all liability unless there were some other mode of protecting himself against the act of the charterer.

Again, the wording is general and is not limited to finding that the other remedy is given by the lien clause. This, as I see it, is all part of the normal process of construction in which all the various relevant clauses of the contract have to be read together, without taking the wording of one standing on its own and looking no further. The appellant's construction of the cesser clause in effect involves striking out the word 'charterers' wherever it appears in the passage from cl 5 which I have read, at any rate in relation to discharge.

It is submitted, very probably rightly by Mr Priday for the charterers, that the references in that passage in cl 5 to shippers and receivers, envisages that by adoption of clauses of the charterparty into the bills of lading, the owners will have protection against any claims of the receivers of the

cargo for damage in discharge. In the present case, the clauses of the charterparty were, we are told, adopted into the bills of lading, but the court in Iraq refused to give effect to those clauses and the arbitrator in his award has said that that is generally the case in Iraq. Hence the liability as held by the Iraqi court of the owners to the receivers of the cargo. But where the question has arisen in a context of reconciling a cesser clause and a lien clause, the court has held that the reconciliation is to be effected by holding that the cesser clause only applies in so far as the lien is effective. This was held first in *Hansen v Harrold Brothers* [1894] 1 QB 612. In that case the charterparty permitted the charterers to recharter the ship. The effect of that was that the owners had a lien on the freight under the recharter, but for various reasons that came out as less than the freight payable under the charterparty and therefore it was not an adequate remedy.

Lord Esher, at p 618, cited from the judgments of the Court in *Clink v Radford & Co*. He said the following:

> . . . It seems to me that this reasoning has not been and cannot be answered. Therefore the proposition is true that, where the provision for cesser liability is accompanied by the stipulation as to lien, then the cesser of liability is not to apply in so far as the lien, which by the charterparty the charterers are enabled to create, is not equivalent to the liability of the charterers. Where, in such a case, the provisions of the charterparty enable the charterers to make such terms with the shippers that the lien which is created is not commensurate with the liability of the charterers under the charterparty, then the cesser clause will only apply so far as the lien which can be exercised by the shipowner is commensurate with such liability.

Similarly, in the case of *The Sinoe* [1971] 1 Lloyd's Rep 514 – a decision of Donaldson J which was upheld by this court in [1972] 1 Lloyd's Rep 201 – it was held that the cesser clause did not avail charterers where the owners had a lien on cargo which they could not enforce owing to local conditions. I find that reasoning directly applicable in the present case. If the owners had no alternative remedy against the receivers of the cargo or, for that matter anyone else, the cesser clause cannot be construed as immediately cutting out and extinguishing the charterers' primary liability under cl 5 . . .

(Lloyd and Nicholls LJJ delivered concurring judgments.)

CHAPTER 15

TIME CHARTERS

The extract in Chapter 1 from the UNCTAD (United Nations Conference on Trade and Development) report *Charter Parties* describes the central features of time charters and the chartering process. Modern time charters are complex contracts but in essence, in return for payment of hire, the shipowner agrees to operate the ship but to allow the charterer to undertake her commercial exploitation during an agreed period. There are no statutory requirements as to the form of a time charter in English law. Standard forms are in wide use, but in practice are often subject to amendment on matters of detail. Among other things, a time charter will contain promises by the owner about the vessel and its maintenance; the contract will also deal with the length of the charter (delivery, period and redelivery), the uses to which the ship may be put and the places to which it can be sent (safe ports, ice and war clauses and trading limits) and with the payment by the charterer of hire and the variable operating expenses such as fuel, port and canal dues which flow from the charterer's decisions.

This chapter begins with an extract which explains how the language used in standard forms came to be adopted and then moves to the central feature of this type of contract: the owner's undertaking to follow the charterer's instructions, which carries with it a right to an indemnity.

1 TERMINOLOGY

Modern forms use terms such as *delivery, redelivery, withdrawal* and *let* and *hire*, which suggest that a time charter is an agreement under which possession of the vessel passes from the owner to the charterer. This is not the case, as MacKinnon LJ explains.

Sea & Land Securities Ltd v William Dickinson & Co Ltd
[1942] 2 KB 65, CA

Held

MacKinnon LJ: The rights and obligations of the parties to a time charterparty must depend on its written terms, for there is no special law applicable to this form of contract as such. A time charterparty is, in fact, a misleading document, because the real nature of what is undertaken by the shipowner is disguised by the use of language dating from a century or more ago, which was appropriate to a contract of a different character then in use. At that time a time charterparty (now known as a demise charterparty) was an agreement under which possession of the ship was handed by the shipowner to the charterer for the latter to put his servants and crew in her and sail her for his own benefit . . . The modern form of time charterparty is, in essence, one by which the shipowner agrees with the time charterer that during a certain named period he will render services by his servants and crew to carry the goods which are put on board his ship by the time charterer. But certain phrases which survive in the printed form now used are only pertinent to the older form of demise charterparty. Such phrases, in the charterparty now before the court, are: 'the owners agree to let', and 'the charterers agree to hire' the steamer. There was no 'letting' or 'hiring' of this steamer. Then it is in terms provided that at the end of the period the vessel shall be 'redelivered' by the time charterers to the shipowners. 'Redelivery' is only a pertinent expression if there has been any delivery or handing over of the ship by the shipowner to the

charterer. There never had been any such delivery here. The ship at all times was in the possession of the shipowners and they simply undertook to do services with their crew in carrying the goods of the charterers. As I ventured to suggest quite early in the argument, between the old and the modern form of contract there is all the difference between the contract which a man makes when he hires a boat in which to row himself about and the contract he makes with a boatman that he shall take him for a row . . .

2 THE CHARTERER'S RIGHT TO GIVE ORDERS

Time charters are contracts under which the shipowner agrees to carry out the charterer's instructions. Some forms express this obligation by providing that the master (although he remains the employee of the owner) will be under the orders of the charterer as regards the employment of the ship for the purposes for which the charterer wishes to use her. But the charterer's right to give orders is limited. An impermissible order can be declined. If, on the other hand, the charterer is entitled to give a particular order, then the shipowner has a contractual duty to obey and usually (see next section) a right to be indemnified against loss or damage sustained in direct consequence of following the order. The scope of the charterer's right to give orders is therefore important. The ambit of the power was reviewed by the House of Lords in the following case.

2.1 Legitimate instructions

***Whistler International Ltd v Kawasaki Kisen Kaisha Ltd, The Hill Harmony* [2001] 1 AC 638**

Facts

The bulk carrier *Hill Harmony* was chartered for seven/nine months' worldwide trading within Institute Warranty Limits, as ordered by charterers, with an obligation to proceed with the utmost despatch. The ship was ordered to make two laden voyages from Vancouver to Japan, in the months of January and April, by the shortest route (the Great Circle route), which was the route recommended as the most favourable by an independent weather routing agency Ocean Routes. In the period March to May 1994 Ocean Routes provided advice to 360 vessels moving from the Pacific north west to northerly China, Korea or Japan. There was no evidence of any particular difficulties encountered by the vessels that had taken the northern route. By that route the voyages would have taken about 16 and 13 days. But the *Hill Harmony* followed a longer and more southerly line (the rhumb line route) the master hoping that on this track the weather conditions would be better. As a result, on one voyage she took six days longer to get to her destination and consumed some 130 tons more fuel and on the other she took three days longer and consumed some 69 tons more. The loss to the charterers was about US$89,800. The owners denied liability for the charterers' loss, arguing that the choice of route did not relate to the employment of the vessel but to its navigation and all matters of navigation were within the sole province of the master to decide and, if he was in any way at fault, their liability was excluded under the contract as an error of navigation.

Held

Lord Hobhouse: . . . The question raised by this dispute is not a new one. It reflects the conflict of interest between owners and charterers under a time charter. Under a voyage charter the

owner or disponent owner is using the vessel to trade for his own account. He decides and controls how he will exploit the earning capacity of the vessel, what trades he will compete in, what cargoes he will carry. He bears the full commercial risk and expense and enjoys the full benefit of the earnings of the vessel. A time charter is different. The owner still has to bear the expense of maintaining the ship and the crew. He still carries the risk of marine accidents and has to insure his interest in the vessel appropriately. But, in return for the payment of hire, he transfers the right to exploit the earning capacity of the vessel to the time charterer. The time charterer also agrees to provide and pay for the fuel consumed and to bear the disbursements which arise from the trading of the vessel. The owner of a time chartered vessel does not normally have any interest in saving time . . .

What might be described as the scheduling of the vessel is of critical importance to the charterer so that obligations to others can be fulfilled, employment opportunities not missed and flexibility maintained. The 'utmost dispatch' clause is, as Lord Sumner said in *Suzuki and Co Ltd v J Benyon and Co Ltd* (1926) 42 TLR 269, 274, a merchants' clause with the object of giving effect to the mercantile policy of saving time. As a matter of this mercantile policy and, indeed, as a matter of the use of English a voyage will not have been prosecuted with the utmost dispatch if the owners or the master unnecessarily chooses a longer route which will cause the vessel's arrival at her destination to be delayed. If the charterer has sub-voyage-chartered the vessel to another or has caused bills of lading to be issued, the charterer will be under a legal obligation to ensure that the voyage be prosecuted without undue delay and without unjustifiable deviation. The charterer is entitled to look to the owner of the carrying vessel to perform this obligation and that is one of the reasons why the 'utmost dispatch' clause is included in the usual forms of time charter.

Suppose that the charterer does no more than order the vessel to load at Vancouver and proceed to a port on the east coast of Japan, that order would give rise to an obligation under the clause to proceed from one port to the other with the utmost dispatch and is inconsistent with a liberty to delay the vessel by going by a longer than necessary route. To proceed by an unnecessarily long route delays the vessel just as surely as if the vessel had sailed at something less than full speed. There may of course be countervailing factors such as adverse currents or headwinds which may make an apparently longer route in fact the more expeditious route but, on the arbitrators' findings, none of those factors justified taking the longer route in the present case.

Another difficulty for the owners' argument is the fact that the owners have already agreed in the charterparty what are to be the limits within which the charterers can order the vessel to sail, for present purposes the Institute Warranty Limits, and have undertaken that, barring unforeseen matters, the vessel will be fit to sail in those waters. It is not open to the owners to say that the vessel is not fit to sail from Vancouver to Japan by the shortest route within IWL . . . In fact, upon the findings of the arbitrators, the vessel was fit to sail by the shorter northern route and the master did not have any good reason for preferring the longer southern route. It was not a good reason that he preferred to sail through calm waters or that he wanted to avoid heavy weather. Vessels are designed and built to be able to sail safely in heavy weather. The classification society rules require, as does clause 1 of the NYPE Form, the maintenance of these safety standards. It is no excuse for the owners to say that the shortest route would (even if it be the case) take the vessel through the heavy weather which she is designed to be able to encounter.

The courts below discussed the question of deviation under bill of lading contracts or voyage charterparties. This was not directly material to a time charter where the contract is not a contract of carriage but a contract for the provision of the services of a crewed vessel. However there is a relationship between prosecuting a voyage with the utmost dispatch and doing so without unjustifiable deviation . . .

Under the time charter the obligation is not simply to proceed by a usual route but to proceed with the utmost dispatch. Further, where the vessel should take on bunkers is, subject to emergencies, undoubtedly a matter for the charterers. The provision of bunkers is the charterers' responsibility and the charterers can give orders as to the bunkering ports to be visited; no

question of what is usual arises . . . The argument of the owners, from which they did not resile, was that in this situation the choice between the usual routes was entirely a matter for the master and the charterers could not give orders as to which was to be chosen, say, via the Cape of Good Hope or via the Suez Canal, even though the charterers would have to pay the canal and port dues and pay for the fuel consumed. (See also Mr Davenport QC (1998) LMCLQ 502.) The significance of such choices are commercial and relate to the exploitation of the earning capacity of the vessel. They are within the ambit of the employment of the vessel and are matters about which time charterers can give orders. A time charterer can give an order because he wants the vessel to be well positioned for a commercial opportunity or other commercial reason. A time charterer can order the chartered vessel to proceed at an economical speed; the time charterer may be waiting for a cargo to become available or the laydays at a loading port may not begin until after a certain date.

But even if the courts below should have got involved, which they have not, in a discussion of what was the usual route across the Pacific from Vancouver to the east coast of Japan, the arbitrators' reasons were clear. The northerly route was the shortest route. There was no evidence that any other route was a usual route. There was evidence that the northerly route was the usual route to follow as it had been by 360 vessels over a three month period. It was also incorrect to treat the case as if it left open the possibility that there had been a rational justification for refusing to proceed by the northerly route. The arbitrators found that the master did not have any rational justification for what he did. My Lords, it follows from what I have already said that, on the findings of the arbitrators, the charterers were, by ordering the vessel to proceed by the shortest and most direct route, requiring nothing more than was in any event the contractual obligation of the owners. Therefore the question whether the order was an order as regards the employment of the vessel is academic. But it was in truth such an order. The choice of ocean route was, in the absence of some overriding factor, a matter of the employment of the vessel, her scheduling, her trading so as to exploit her earning capacity. The courts below, by contrast, accepted the owners' argument that it was necessarily a matter of the navigation of the vessel.

In support of this argument, the charterers primarily relied upon *Larrinaga Steamship Co Ltd v The King* [1945] AC 246 . . .

The meaning of any language is affected by its context. This is true of the words 'employment' in a time charter and of the exception for negligence in the 'navigation' of the ship in a charterparty or contract of carriage. They reflect different aspects of the operation of the vessel. 'Employment' embraces the economic aspect – the exploitation of the earning potential of the vessel. 'Navigation' embraces matters of seamanship. Mr Donald Davies [(1999) LMCLQ 461] suggests that the words 'strategy' and 'tactics' give a useful indication. What is clear is that to use the word 'navigation' in this context as if it includes everything which involves the vessel proceeding through the water is both mistaken and unhelpful. As Lord Sumner pointed out [*Suzuki v Beynon*, above], where seamanship is in question, choices as to the speed or steering of the vessel are matters of navigation, as will be the exercise of laying off a course on a chart. But it is erroneous to reason, as did Clarke J, from the fact that the master must choose how much of a safety margin he should leave between his course and a hazard or how and at what speed to proceed up a hazardous channel to the conclusion that all questions of what route to follow are questions of navigation.

The master remains responsible for the safety of the vessel, her crew and cargo. If an order is given compliance with which exposes the vessel to a risk which the owners have not agreed to bear, the master is entitled to refuse to obey it: indeed, as the safe port cases show, in extreme situations the master is under an obligation not to obey the order. The charterers' submissions in the present case and the arbitrators' reasons and decision did not contravert this.

In the present case, the exception did not provide a defence. First, the breach of contract was the breach of both aspects of the owners' obligations under clause 8 of the time charter – to prosecute the voyage with the utmost dispatch and to comply with the orders and directions of the charterers as regards the employment of the vessel. As a matter of construction, the exception

> does not apply to the choice not to perform these obligations … Secondly, any error which the master made in this connection was not an error in the navigation or management of the vessel; it did not concern any matter of seamanship. Thirdly, the owners failed to discharge the burden of proof which lay upon them to bring themselves within the exception. This was clearest with regard to the second of the two relevant voyages where the arbitrators could only guess at, 'suspect', why it was that the master acted as he did …

Note

In *The Hill Harmony* the charterers' order seems to have been treated as legitimate because it had commercial implications (or affected profitability) and did not fall within the master's exclusive sphere of competence and responsibility. On this basis, for example, a decision to sail from a given port is one for the charterer if there are no safety or other good reasons to remain (*The Renee Hyaffil* (1916) 32 TLR 83, p 660; *The SS Lord* [1920] 1 KB 846). But wind, current, tide, visibility, traffic, conditions on board and weather forecasts may make the decision about when to sail a navigational matter for the master, as *The Ramon de Larrinaga* [1945] AC 246 shows. See further Davenport, B, 'The Hill Harmony' (1998) LMCLQ 502; Davies, D, 'The Hill Harmony' (1999) LMCLQ 461.

2.2 Time for compliance

In the last case, *The Hill Harmony*, the House of Lords held that the shipowner was in breach of contract in failing to comply with a legitimate order with reasonable despatch. But the shipowner's promise is not an absolute and unconditional undertaking to respond immediately to instructions. The existence of a right and perhaps sometimes a duty to delay was confirmed in *The Houda*: compliance with commercial instructions may have to wait for favourable circumstances.

Kuwait Petroleum Corp v I & D Oil Carriers Ltd, The Houda
[1994] 2 Lloyd's Rep 541, CA

Facts

Shipowners let their vessel *Houda* on the Shelltime 4 form. On 2 August 1990 when Iraq invaded Kuwait, *Houda* was loading a cargo of crude oil at Mina Al Ahmadi. She sailed with a part cargo, leaving behind blank bills of lading which had been signed by the master. After the invasion the management of the charterers was moved to London and it was from the London offices that the charterers gave sailing and survey orders to the vessel. The vessel remained at anchor off Fujairah until 27 September. The charterers alleged that the shipowners had refused to comply with orders which were lawfully given.

Held

> **Neill LJ:** … It was argued on behalf of the charterers … that subject to three exceptions, the owners and the master were obliged to obey the charterers' orders immediately, or at any rate as soon as practicable. Counsel for the charterers identified these exceptions as follows: (1) where obedience to an order might involve a significant risk of endangering the vessel or its cargo or crew; (2) where it was necessary to seek clarification of an ambiguous order; and (3) where the owners had knowledge of circumstances which were not known to the charterers but which might, if known, affect their orders, and the owners needed confirmation that the orders were to stand. It was submitted that there was no room for the implication of a general term whereby the owners were allowed a reasonable time in which to seek confirmation of the authority of those giving the orders or of the lawfulness of the orders. Furthermore, it was submitted that on the

facts of this case the owners' conduct amounted not to delayed compliance but to a refusal to comply with the charterers' orders.

It is clear therefore that it is common ground between the parties that a master is entitled to delay in executing an order if to comply would threaten to expose the ship and cargo to a potential peril or if the circumstances otherwise fall within one of these three exceptions. We were referred to four authorities in support of that proposition. I propose to consider these authorities to see whether one can detect any wider principle on which a right to pause before complying with an order can be founded.

In *Pole v Cetcovitch* (1860) 9 CBNS 430 the master of an Austrian vessel declined to comply immediately with an order to sail from Falmouth to Copenhagen. He relied on the fact that war had broken out between France and Austria and therefore the voyage might expose his vessel to capture by a French cruiser. The Court of Common Pleas upheld a direction to the jury that if they considered that in the circumstances the master was justified in pausing before complying with the order they should find that he was not in breach.

The next case to which we were referred was the decision of the Privy Council in *The Teutonia* (1872) LR 4 PC 171. In giving judgment Mellish LJ said at p 179:

> It seems obvious that, if a Master receives credible information that, if he continues in the direct course of his voyage, his ship will be exposed to some imminent peril, as, for instance, that there are pirates in his course, or icebergs or other dangers of navigation, he must be justified in pausing and deviating from the direct course, and taking any step which a prudent man would take for the purpose of avoiding the danger.

The reference to 'credible information' is of importance because the information which the master had received was premature in the sense that war between France and Prussia was not formally declared until three days later. Counsel for the charterers treated this case as one where the master had some additional information and where there was a risk of danger to the ship or cargo.

A year later the Privy Council gave judgment in a similar case: *The San Roman* (1873) LR 5 PC 301. In the course of a voyage to Europe *San Roman* put in to Valparaiso for repairs. The repairs were completed on or about 23 September 1870 but the vessel delayed sailing until 23 December because war had broken out between France and Prussia and it was believed that if the vessel sailed there was a risk of capture by the French Navy. In the course of the judgment Sir Montague Smith said at p 306:

> . . . the question their Lordships have to determine is entirely a question of fact, namely, whether the German master had during that time such an apprehension of capture founded on circumstances calculated to affect his mind – he being a man of ordinary courage, judgment, and experience – as would justify delay; and their Lordships agree with the judge in the court below that there was a sufficient risk of capture to justify this delay.
>
> This is not a case where the master has refused to perform the contract at all. No doubt, if the voyage had been abandoned, then it would have been necessary to show that he had been actually prevented from performing it; but this is merely a question of whether there was a reasonable cause for delay.

It was held that the fact that the cargo was an English cargo made no difference. Sir Montague Smith continued at p 307:

> If their Lordships were to look upon this case as a case in which the cargo was German as well as the ship, or a case in which both ship and cargo belonged to the same person, and then were to ask the question: Would a man of reasonable prudence, under such circumstances, have set sail or waited? It appears to their Lordships most clearly that a man of reasonable prudence would have waited.

The fourth case in this quartet was the decision of Donaldson J in *Midwest Shipping Co v DI Henry (Jute) Ltd* [1971] 1 Lloyd's Rep 375. In that case the master under a time charter received orders

from the charterers to put back to port. The master did not comply at once because, on the charterers' instructions, he had lied to the port authorities about his destination and he was also concerned as to whether there would be sufficient water to cross the bar at the port. The judge held that the master's actions were justified, but at one point in his judgment he expressed the duty of the master in a way which might suggest that the right to pause may arise in a number of different circumstances including those where there is no threat to expose the ship and cargo to potential peril. Thus at p 379 Donaldson J put the matter in this way:

> . . . It is important to remember that the master of a merchant ship occupies a civilian post. He is not the captain of a naval vessel who might well be expected to comply instantly with an order and seek verification or reconsideration afterwards. Furthermore, he is not receiving the instruction from somebody who is his professional superior, as would be the case in the services. He is the representative of his owners and also to some extent of the charterers. He occupies a post of very great responsibility, and he occupies that post by virtue of long training and experience. If he was the type of man who would immediately act upon any order from charterers without further consideration, he would probably be unfitted for that post. It seems to me that against that background it must be the duty of the master to act reasonably upon receipt of orders. Some orders are of their nature such that they would, if the master were to act reasonably, require immediate compliance. Others would require a great deal of thought and consideration before a reasonable master would comply with them.

. . . In the course of the argument in this court counsel for the charterers introduced what might be regarded as a fourth category of exception. Thus he accepted that the owners and a master might pause and seek further information if they knew or had reasonable cause to suspect that the instructions had not been given by the charterers. It was not enough, however, it was said, to justify delay if the owners and the master had merely a vague apprehension.

I am unable to accept that the right, or indeed the duty, to pause can safely be confined to specific categories of cases. I consider that it is necessary to take a broad and comprehensive view of the duties and responsibilities of the owners and the master and to ask, as was suggested in *The San Roman*, above: How would a man of reasonable prudence have acted in the circumstances? Thus, for example, the delivery of a cargo pursuant to an order given by the agent of an invading army may pose just as much a threat to cargo and those who have legitimate rights to it as an iceberg or a foreign frigate. It will depend on the circumstances.

. . . It is not of course for this court to decide whether on the facts the owners had reasonable grounds to pause, but I am satisfied that in a war situation there may well be circumstances where the right, and indeed the duty, to pause in order to seek further information about the source of and the validity of any orders which may be received is capable of arising even if there may be no immediate physical threat to the cargo or the ship.

. . . it seems to me that it is at least possible that where a country has been invaded prudent owners may be entitled to guard against the risk that their orders may have come from the 'wrong' side . . .

Leggatt LJ: … It is obvious that lawful orders have to be obeyed, unless to do so would imperil the safety of ship, crew or cargo. It is not obvious that they have to be obeyed unthinkingly. 'Theirs not to reason why' is a creed that neither characterises nor befits masters of chartered vessels. In my judgment when a master receives an order relating to the cargo his duty, which is probably owed to the owners of the cargo as well as the owners of the vessel, is to act reasonably. Orders ordinarily require immediate compliance. But the circumstances in which an order is received or the nature of it may make it unreasonable for the master to comply without further consideration or enquiry. When an order is reasonably regarded as ambiguous, it must be clarified. When the lawfulness of an order is reasonably called in question, it must be established. When the authenticity of an order is reasonably doubted, it must be verified. The delay introduced by any of these processes will usually be brief . . .

> **Millett LJ:** . . . In my judgment the authorities establish two propositions of general application: (1) the master's obligation on receipt of an order is not one of instant obedience but of reasonable conduct; and (2) not every delay constitutes a refusal to obey an order; only an unreasonable delay does so . . .

3 SHIPOWNER'S RIGHT TO AN INDEMNITY

To protect the shipowner who agrees to carry out the time charterer's orders, it is common to provide expressly that the charterer will indemnify the shipowner against the consequences of complying with such orders. A right to an indemnity may be implied in some circumstances if not expressed: *The Island Archon* [1994] 2 Lloyd's Rep 227, noted below. In the leading case in this area, *The Ramon de Larrinaga,* it was found that the order which led to the loss was not given under the charter.

Larrinaga Steamship Co Ltd v The King [1945] AC 246

Facts

In 1939 at the start of the Second World War, the *Ramon de Larrinaga* was requisitioned by the Crown on the terms of the government form time charter T 99A (incorporating T 773) which provided in cl 9 that:

> The master . . . although appointed by the owners . . . shall be under the orders and direction of the charterer as regards employment, agency, or other arrangements: and the charterer hereby agrees to indemnify the owners for all consequences or liabilities that may arise from the master or officers . . . complying with such orders . . .

She was ordered to St Nazaire and notified that after discharge there she would return to South Wales for survey, as she was being released from government service. At St Nazaire written orders were given to her by the Naval Sea Transport Officer that she was to proceed that night to Quiberon Bay and join a convoy to be escorted to the Bristol Channel. The order was repeated orally the same day despite the ship's protest against sailing at night in dangerous navigation conditions and at a time when the weather was worsening. The ship sailed as ordered. Approximately five hours after sailing, during a gale, she anchored on the advice of the pilot. The anchor cable broke and the ship drifted onto a sand bank and was damaged. The appellants claimed that the cost of repair should be borne by the Crown on the grounds, amongst others, that the repair costs were the result of complying with the charterers' orders.

Held

> **Lord Porter:** My Lords, this appeal calls for a . . . consideration of a well known clause in time charterparties by the terms of which the master is placed under the orders and direction of the charterers, as regards employment, agency or other arrangements, and the charterers give the owners an indemnity against the consequences of complying with those orders . . .
>
> The argument . . . was that the order to leave St Nazaire and to proceed to Cardiff was an order as regards employment, and that though generally a marine loss following on such an order would not be its consequence, yet where, as here, the order was to proceed in the face of the danger of a storm and against the protests of the master, the damage which the ship suffered was a consequence of the order. Had he not been compelled to leave port the master would not have sailed, and it was, it is said, the natural and a contemplated result of obeying that order that the ship might suffer marine damage; the respondent was therefore under a duty to indemnify the appellants for their loss.

. . . My Lords, I cannot but think that the word employment in cl 9 does include at any rate certain employments of the ship . . . In its natural sense it includes orders to proceed from one port to another or to undertake a voyage or series of voyages, and therefore the original notification of 7 October and the written order of 13 October in so far as it reiterated and confirmed that order, were authorised and covered by the clause. But this order did not in a legal sense, and I doubt if such an order ever could, cause such a loss. Even the order of 13 October specified no exact moment of departure, except that the ship was to sail after the discharge was complete. This wording left it to the master's discretion to sail at a reasonable time thereafter, and in determining what is a reasonable time all such matters as the state of the weather and the exhaustion of the crew would properly be taken into consideration. In these circumstances it cannot be said that either of these orders caused the damage which the ship suffered. A loss is not, under English law, caused by orders to make or by making a voyage because it occurs in the course of it. Such a loss is merely the fortuitous result of the ship being at a particular place at a particular time, and in no legal sense caused by the charterers' choice of port to which the ship is directed or their instructions to her master to proceed to it. But it was said that the ship sailed not by reason of the written order to proceed, but by the subsequent oral order, and that such an order did cause the loss, since it was the probable and contemplated result of sailing in unfavourable weather that the ship might suffer damage which, had the master been free to choose his own time, would probably have been avoided.

Three answers to this argument have been made by the respondent.

(1) That though an order specifying the voyage to be performed is an order as to employment, yet an order as to the time of sailing is not. That order, it is contended, is one as to navigation, or, at any rate, not as to employment. My Lords, this distinction seems to me to be justified: an order to sail from port A to port B is in common parlance an order as to employment, but an order that a ship shall sail at a particular time is not an order as to employment because its object is not to direct how the ship shall be employed, but how she shall act in the course of that employment. If the word were held to include every order which affected not the employment itself but any incident arising in the course of it almost every other liability undertaken by the charterer would be otiose, since the owners would be indemnified against almost all losses which the ship would incur in prosecuting her voyages. In particular war and marine risk insurance would be unnecessary …

(2) The second answer of the respondents was that even if it were conceded that orders to sail in a storm were orders in respect of which an indemnity is due, they must still be orders of the charterers as charterers and such as under this charterparty they are entitled to give. The mere instruction to sail may be such an order, but such an instruction leaves it to the discretion of the master who is responsible for the safety of his ship to choose the time and opportunity for starting on his voyage. I know of no right on the part of a charterer to insist that the safety of the ship should be endangered by sailing at a time when seamanship requires her to stay in port. The naval authorities however have this power … The written order to sail, which did not specify any time for compliance except the finish of discharge, left it to the master to choose his time and opportunity but did not cause the loss: the oral order which followed it was not a charterer's but a naval order and therefore not one for which the charterers are responsible.

(3) Finally it was urged that neither the order nor sailing in obedience to it caused the loss. In *Portsmouth Steamship Co Ltd v Liverpool and Glasgow Salvage Association* (1929) 34 LIL Rep 459, 462, Lord Roche (then Roche J) points out that the clause, where it applies, covers only losses arising directly from charterer's instructions, because, as he says:

> if some act of negligence intervenes or some marine casualty intervenes then the chain of causation is broken and the indemnity does not operate.

I do not think your Lordships are called on to determine the soundness of this argument in the present case. It might be urged that a loss following upon an order to sail into danger which is

complied with and results in damage due to the contemplated risk is a consequence of that order, but to decide it in this case is unnecessary and I prefer to express no opinion upon it either in favour or against. For the reasons given above, however, I would dismiss the appeal . . .

Notes

1 *Implied indemnity.* An implied right to an indemnity has been recognised in some circumstances: *The Nogar Marin* [1988] 1 Lloyd's Rep 412, p 422; *The Berge Sund* [1993] 2 Lloyd's Rep 453, p 462; *Deutsche Ost-Afrika Linie v Legent* [1998] 2 Lloyd's Rep 71. In *The Island Archon*, the vessel was chartered for 36 months on the New York Produce Exchange (NYPE) form. She was ordered to Basrah where unjustified cargo claims were asserted by the receivers of the cargo under bills of lading. The owners had to provide security before the vessel was allowed to depart. There was no express agreement for an indemnity applicable in the circumstances. An implied agreement to indemnify was claimed against the consequences of the charterer's order to proceed to Basrah. The charterers argued that no promise to indemnify could be implied since the order to carry to Basrah was one which they had a contractual right to give. The Court of Appeal held that a right to an indemnity would be implied in the charter.

> . . . the implication is justified . . . first by 'business efficacy' in the sense that if the charterer requires to have the vessel at his disposal, and to be free to choose voyages and cargoes and bill of lading terms also, then the owner must be expected to grant such freedom only if he is entitled to be indemnified against loss and liability resulting from it, subject always to the express terms of the charterparty contract; and secondly by the legal principle underlying the 'lawful request' cases such as *Sheffield Corp v Barclay*; in other words, an implication of law [*Triad Shipping Co v Stellar Chartering & Brokerage Inc, The Island Archon, per* Evans LJ].

The rule applied in *Sheffield Corp v Barclay* [1905] AC 392 was that: 'when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done.'

2 *Indemnity and fault.* The right to an indemnity does not depend on the charterer being at fault. But there is no right to an indemnity for matters which are the fault of the shipowner: *The Aquacharm* [1982] 1 Lloyd's Rep 7.

3 *Risks accepted by the shipowner.* The owner is not entitled to be indemnified against all losses and expenses that arise whilst engaged in carrying out the charterers' orders. In *Weir v Union Steamship* [1900] AC 525 it was held that the cost of ballasting was not recoverable, even though the ballast was needed to make the voyage which the charterers selected. There are also many statements in decided cases and texts indicating that, in the absence of special and unusual contract terms, the charterer is not obliged to indemnify the shipowner against losses incurred as a result of maritime perils encountered in the course of a voyage on which the charterer has properly sent the ship. But these statements do not explain the reason for this rule of thumb in identical terms, probably because, as Lord Porter's judgment makes clear, there is not one but a number of overlapping reasons why charterers are not normally liable for navigational or weather risks. However, the decision in *The Hill Harmony*, above, makes one of the reasons given in *Ramon de Larrinaga* more difficult to sustain in some circumstances: if a charterer is entitled to and does dictate the route and speed, it becomes more difficult to say with conviction, when a casualty occurs in the course of the voyage, that 'Such a loss is merely the fortuitous result of the ship being at a particular place at a particular time' and that it is not in any sense caused by the charterers'

instructions. It remains, of course, perfectly possible to say that *as a matter of law,* the loss is not to be treated as the responsibility of the charterer, that it is too remote (*The Aquacharm* [1980] 2 Lloyd's Rep 237) or to say that the right to indemnity does not extend to the risk that the shipowner has agreed to run, 'hence the exclusion of navigation risks': *The Island Archon*, *per* Evans LJ.

4 *Indemnity for orders that are obviously impermissible?* See *The Sagona* and *The Goodpal,* noted after *The White Rose,* below.

3.1 Need for an unbroken chain of causation

The right to indemnity only arises if an unbroken chain of causation can be shown. *The White Rose* contains a valuable review of earlier decisions as well as a clear articulation of the governing principle.

AB Helsingfors Steamship v Rederiaktiebolaget Rex, The White Rose
[1969] 1 WLR 1098

Facts

The vessel was trip chartered on the Baltime form and ordered to load grain at Duluth, Minnesota. Clause 9 of the charter provided that: '. . . The master shall be under the orders of the charterers as regards employment, agency or other arrangements. The charterers to indemnify the owners against all consequences or liabilities arising from the master . . . complying with such orders . . .' The charterers, who were obliged to pay for loading, trimming and stowing of cargo, employed independent contractors to carry out those tasks. During loading, one of the agent's employees fell through an unfenced 'tween deck hatch and was injured. The shipowners settled a claim by the injured man for $3,000 and claimed to recover that sum from the charterers.

Held

Donaldson J: . . . Counsel for the shipowners . . . submits that the authorities establish that if the shipowner, having complied with an instruction from the charterer, thereby incurs a liability to a third party . . . from which he would be protected had the charterer alone been concerned, he is entitled to an indemnity. He says that the basis of the bargain between the parties was summarised by Devlin J in *Royal Greek Government v Minister of Transport* (1950) 83 LIL Rep 228, when he said at p 234:

> If [the shipowner] is to surrender his freedom of choice and put his master under the orders of the charterer, there is nothing unreasonable in his stipulating for a complete indemnity in return.

As applied to a claim by a stevedore for personal injuries, the shipowner, submits counsel, makes good his claim to an indemnity by the following stages: (i) the shipowner established an order to go to a particular port to load a particular cargo; (ii) the terms of the charterparty expressly place the duty of arranging and paying for loading on the charterer, who, in fulfilment of that obligation, engages independent stevedores whom the shipowner is impliedly obliged to accept; (iii) under the terms of the relevant law, that is the local law, a potential liability on the part of the shipowner towards the stevedore is thereby established; (iv) the charterer fails to clothe the shipowners with the protection against the stevedore's claims which, under cl 13, he would have against similar claims by the charterers. That clause, after dealing with delay in delivery of the vessel, delay during the currency of the charter and loss or damage to goods on board, provides that 'The owners not to be responsible in any other case nor for damage or delay whatsoever and howsoever caused even if caused by the neglect or default of their servants'; (v) as the shipowner has, as a result of complying with the charterers' orders, been placed in a less attractive position than he would have been if the charterers had personally loaded the vessel, he is entitled to an indemnity.

Counsel for the shipowners further submits that this is consistent with the cases in which shipowners have been indemnified against their liability to holders of bills of lading, whose terms were less favourable to the shipowners than were the terms of the time charterparty. (See, for example, *Milburn & Co v Jamaica Fruit Importing & Trading Co of London* [1900] 2 QB 540, where the loss arose from an inability to claim general average contribution from cargo; *Kruger & Co Ltd v Moel Tryvan Ship Co Ltd* [1907] AC 272, where the shipowners became liable for loss of cargo; *Elder Dempster & Co v Dunn & Co* (1909) 15 Com Cas 49, where the cargo was wrongly marked and by the terms of the bills of lading and/or the provisions of the law of the place of discharge the shipowners could not require the receivers to take delivery of the mismarked goods and were liable as if they had lost them; *The Brabant* [1967] 1 QB 588 and *Bosma v Larsen* [1966] 1 Lloyd's Rep 22, further damage to cargo cases.)

He also submits that it is consistent with the decisions in *Lensen Shipping Co Ltd v Anglo-Soviet Shipping Co Ltd* (1935) 40 Com Cas 320, in which a vessel sustained damage as a result of being ordered to load at an unsafe berth; in *Strathlorne Steamship Co Ltd v Andrew Weir & Co* (1934) 40 Com Cas 168, in which the shipowners incurred a liability to the bill of lading holders as a result of their having delivered the cargo on the instructions of the time charterers to persons who could not produce the bills of lading and were not in fact entitled to receive the goods, and in *Portsmouth Steamship Co Ltd v Liverpool & Glasgow Salvage Association* (1929) 34 LIL Rep 459, in which the shipowners recovered an indemnity in respect of damage to the vessel caused by the cargo which they loaded on the time charterers' instructions.

Counsel for the charterers accepts much of the submission of counsel for the shipowners, but he says that one vital element has been omitted, namely, that the right to indemnity only arises if and insofar as the loss suffered by the shipowners can be proved to have been caused by the shipowners' compliance with the charterers' instructions. He says that in the bill of lading cases causation is relevant, but it is rarely, if ever, a live issue, because commonly the shipowner is for practical purposes under no liability whatsoever in respect of cargo under the terms of the charterparty and if he is liable under the bills of lading which he has signed under instructions from the charterers, his liability must be caused by his compliance with those instructions. When, however, one looks at the unsafe port cases or cases of damage to the ship resulting from the nature or condition of the cargo (*Portsmouth Steamship Co Ltd v Liverpool & Glasgow Salvage Association*, above, and *Royal Greek Government v Minister of Transport*, above) the element of causation is all important as it is in the present case.

In my judgment the submission of counsel for the charterers is correct, and it is necessary in every case to establish an unbroken chain of causation, although I would not accept as a generalisation that:

> if some act of negligence intervenes or some marine casualty intervenes, then the chain of causation is broken and the indemnity does not operate (*per* Roche J, in *Portsmouth Steamship Co Ltd v Liverpool & Glasgow Salvage Association*, 34 LIL Rep 459, 462).

A loss may well arise in the course of compliance with the charterers' orders, but this fact does not, without more, establish that it was caused by and is in law a consequence of such compliance and, in the absence of proof of such causation there is no right to indemnity.

The shipowners in the present case have undoubtedly established that their 'potential liability' to Mr de Chambeau [the injured employee] and their actual loss of £2,935.5s.5d. were incidents of and occurred in the course of complying with the charterers' orders to load grain at Duluth; but were they caused by such compliance? The judge of fact, the learned umpire, has found that the accident itself was caused partly by the absence of fencing, but it is clear from his conclusion that the charterers themselves were at no time guilty of any improper or negligent act and that they were not responsible for the lack of fencing. He has found that the shipowners were in breach of Finnish law, but I do not think that that is material. What connected the accident with, and gave rise to, a potential liability and an actual loss was the provisions of Minnesota law. Unless it can be said that this law was so unusual as to constitute Duluth a legally unsafe port to which the vessel

should not have been ordered – and no such contention was advanced – or that the charterers engaged stevedores who were incompetent by local standards, which is negatived by the findings of fact, I do not consider that it can be said that there is the necessary causal connection between the order to load and the loss. This view is strengthened by, although not dependent on, the finding that at the time of the accident Mr de Chambeau had 'Left his position at No 2 'tween deck hatch, and for his own private purposes unconnected with his employment made his way aft into No 3 'tween deck'. It is also strengthened, and it may be that I am really precluded from reaching any other conclusion, although I have assumed that this is not the case, by the learned umpire's conclusion that 'the accident was not caused by the [shipowners'] complying with orders of the [charterers]', it not being suggested that in reaching this conclusion he misdirected himself in fact or in law. Accordingly in my judgment the claim under cl 9 fails . . .

Notes

1 *Order to deliver cargo without production of bill of lading.* The *Sagona* was time chartered for a period of 38 months during which she was ordered to carry a cargo of gasoil from Sicily to a port on the river Weser. On arrival the vessel was instructed by the charterers to deliver the cargo to receivers without requiring the production of the bill of lading. The cargo was delivered. The vessel was arrested and detained at the suit of the unpaid shippers. The shippers were later reimbursed by one of the string purchasers of the gasoil, but the shipowner sought to recover from the charterers their loss of earnings while the vessel was under arrest and the expenses of defending the proceedings. It was held that: (a) the charterers' order was not one which the shipowners were obliged to obey; (b) nevertheless, the order was not manifestly illegal or such as ought to have caused the master to refuse to act or likely to excite suspicion in the special circumstances of the oil trade; (c) the master had followed the normal practice and his conduct did not sever the causal connection between the order and the loss: *A/S Hansen-Tangen Rederi III v Total Transport Group, The Sagona* [1984] 1 Lloyd's Rep 194.

2 *Compliance with obviously impermissible orders.* Partly on the basis of the decision in *The Sagona,* in *The Goodpal* [2000] 1 Lloyd's Rep 638 Colman J said that if owners obey an order where it is or ought to be obvious that the instruction is impermissible, the owners will not be entitled to an indemnity 'if obedience to the order as distinct from the giving of it, is the proximate cause of the loss'. But not every acceptance of an obviously impermissible order with full knowledge of the facts will necessarily break the causal link between the instruction and the loss: see Lord Goff's judgment in *The Kanchenjunga* [1990] Lloyd's Rep 391, HL in the next section of this chapter.

4 SAFE PORTS

It is common for time charters (and voyage charters in some circumstances) to provide that the vessel shall only be employed between safe ports. An order to go to an unsafe port is not one that the charterer is entitled to give. If such an order is given, the owner is entitled to decline to carry it out. At one time it might have been possible to argue that this was the only consequence of such an order. But this approach was decisively rejected in *The Stork* [1955] 2 QB 68 by the Court of Appeal: it was held that nominating an unsafe port was a breach of contract and that when damage followed, the ordinary principles of causation and remoteness of damage would apply. Physical damage to the ship (ranging from total loss, loss of a piece of equipment such as an anchor down to the cost of replacing a damaged aerial or repainting scratches) and expenses such as the cost of tugs and lighters have been held to be recoverable.

In the absence of an express clause, it is not clear whether every charterer has an equivalent implied duty in contract. Opinion is divided. Some charters resolve the issue by expressly excluding the possibility: 'The charterers do not warrant the safety of any place to which they order the vessel' (Shelltime 4). It seems clear, however, that in at least some circumstances a charterer may owe a shipowner a duty of care in tort not to direct a ship to a place known to the charterer to be unsafe.

In *The Eastern City* [1958] 2 Lloyd's Rep 127, Sellers LJ said:

> A port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship …

On the basis of the ideas contained in this passage, ports and loading places have been held to be unsafe because of ice, shoals, sandbanks, wrecks, obstructions, lack of holding ground, war, wind, unsafe mooring systems and liability to confiscation, among other things. On the same basis, for a time, one strand of legal opinion regarded charterers as making an absolute continuing promise of safety from all events save 'abnormal occurrences'. This approach was rightly criticised. It turned charterers into insurers against damage and detention in ports and rivers. Further movement of the law in this direction was halted by the decision of the House of Lords in *The Evia.*

Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes, The Evia (No 2) [1983] 1 AC 736

Facts

The vessel was time chartered on terms that she was to be employed between safe ports and was ordered to carry cement from Cuba to Basrah. She became trapped in the Shatt-al-Arab waterway on the outbreak of hostilities between Iran and Iraq in September 1980. An arbitrator held that the charter was frustrated in October 1980 and that the charterers were not in breach of the safe port obligation so as to debar themselves from relying on frustration.

Held

> **Lord Roskill:** … 'The vessel to be employed . . . between . . . safe ports'.
>
> … [T]he first question is whether, apart from authority, these words are to be construed in the manner suggested. In order to consider the scope of the contractual promise which these eight words impose upon a charterer, it must be determined how a charterer would exercise his undoubted right to require the shipowner to perform his contractual obligations to render services with his ship, his master, officers and crew, the consideration for the performance of their obligation being the charterer's regular payment of time charter hire. The answer must be that a charterer will exercise that undoubted contractual right by giving the shipowner orders to go to a particular port or place of loading or discharge. It is clearly at that point of time when that order is given that that contractual promise to the charterer regarding the safety of that intended port or place must be fulfilled. But that contractual promise cannot mean that that port or place must be safe when that order is given, for were that so, a charterer could not legitimately give orders to go to an ice-bound port which he and the owner both knew in all human probability would be ice-free by the time that vessel reached it. Nor, were that the nature of the promise, could a charterer order the ship to a port or place the approaches to which were at the time of the order blocked as a result of a collision or by some submerged wreck or other obstacles even though such obstacles would in all human probability be out of the way before the ship required to enter. The charterer's contractual promise must, I think, relate to the characteristics of the port or place in question and in my view means that when the order is given that port or place is prospectively

safe for the ship to get to, stay at, so far as necessary, and in due course, leave. But if those characteristics are such as to make that port or place prospectively safe in this way, I cannot think that if, in spite of them, some unexpected and abnormal event thereafter suddenly occurs which creates conditions of unsafety where conditions of safety had previously existed and as a result the ship is delayed, damaged or destroyed, that contractual promise extends to making the charterer liable for any resulting loss or damage, physical or financial. So to hold would make the charterer the insurer of such unexpected and abnormal risks which in my view should properly fall upon the ship's insurers under the policies of insurance the effecting of which is the owner's responsibility under clause 3 unless, of course, the owner chooses to be his own insurer in these respects . . .

My Lords, on the view of the law which I take, since Basrah was prospectively safe at the time of nomination, and since the unsafety arose after the *Evia*'s arrival and was due to an unexpected and abnormal event, there was at the former time no breach of clause 2 by the respondents, and that is the first ground upon which I would dismiss this appeal.

But, my Lords, since the Court of Appeal gave leave to appeal in order that this branch of the law should be fully explored, I think your Lordships may wish further to consider whether . . . there is a residual obligation upon a charterer, whether for time or voyage, given that he has fully complied with his obligation at the time of nomination. My Lords, unless there is something unusual in the relevant express language used in a particular charterparty, the charterer's obligation at the time of nomination which I have been discussing must, I think, apply equally to a voyage charterer as to a time charterer. But in considering whether there is any residual or remaining obligation after nomination it is necessary to have in mind one fundamental distinction between a time charterer and a voyage charterer. In the former case, the time charterer is in complete control of the employment of the ship. It is in his power by appropriate orders timeously given to change the ship's employment so as to prevent her proceeding to or remaining at a port initially safe which has since it was nominated become unsafe. But a voyage charterer may not have the same power. If there is a single loading or discharging port named in the voyage charterparty then, unless the charterparty specifically otherwise provides, a voyage charterer may not be able to order that ship elsewhere. If there is a range of loading or discharging ports named, once the voyage charterer has selected the contractual port or ports of loading or discharge, the voyage charterparty usually operates as if that port or those ports had originally been written into the charterparty, and the charterer then has no further right of nomination or renomination. What, then, is the contractual obligation of such charterers whether for time or voyage if the nominated port becomes unsafe after it was nominated?

My Lords, in the case of a time charterer, I cannot bring myself to think that he has no further obligation to the owner even though for the reasons I have given earlier he is not the insurer of the risks arising from the unsafety of the nominated port. Suppose some event has occurred after nomination which has made or will or may make the nominated port unsafe. Is a time charterer obliged to do anything further? What is a voyage charterer to do in similar circumstances? My Lords, this problem seems never to have been judicially considered in any detail . . .

In my opinion, while the primary obligation of a time charterer under clause 2 of this charterparty is that which I have already stated, namely, to order the ship to go only to a port which, at the time when the order is given, is prospectively safe for her, there may be circumstances in which, by reason of a port, which was prospectively safe when the order to go to it was given, subsequently becoming unsafe, clause 2, on its true construction, imposes a further and secondary obligation on the charterer.

In this connection two possible situations require to be considered. The first situation is where, after the time charterer has performed his primary obligation by ordering the ship to go to a port which, at the time of such order, was prospectively safe for her, and while she is still proceeding towards such port in compliance with such order, new circumstances arise which render the port unsafe. The second situation is where, after the time charterer has performed his primary obligation by ordering the ship to go to a port which was, at the time of such order, prospectively

safe for her, and she has proceeded to and entered such port in compliance with such order, new circumstances arise which render the port unsafe.

In the first situation it is my opinion that clause 2, on its true construction (unless the cause of the new unsafety be purely temporary in character), imposes on the time charterer a further and secondary obligation to cancel his original order and, assuming that he wishes to continue to trade the ship, to order her to go to another port which, at the time when such fresh order is given, is prospectively safe for her. This is because clause 2 should be construed as requiring the time charterer to do all that he can effectively do to protect the ship from the new danger in the port which has arisen since his original order for her to go to it was given.

In the second situation the question whether clause 2, on its true construction, imposes a further and secondary obligation on the time charterer will depend on whether, having regard to the nature and consequences of the new danger in the port which has arisen, it is possible for the ship to avoid such danger by leaving the port. If, on the one hand, it is not possible for the ship so to leave, then no further and secondary obligation is imposed on the time charterer. This is because clause 2 should not be construed as requiring the time charterer to give orders with which it is not possible for the ship to comply, and which would for that reason be ineffective. If, on the other hand, it is possible for the ship to avoid the new danger in the port which has arisen by leaving, then a further and secondary obligation is imposed on the time charterer to order the ship to leave the port forthwith, whether she has completed loading or discharging or not, and, assuming that he wishes to continue to trade the ship, to order her to go to another port which, at the time when such fresh order is given, is prospectively safe for her. This is again because clause 2 should be construed as requiring the time charterer to do all that he can effectively do to protect the ship from the new danger in the port which has arisen since his original order for her to go to it was given.

My Lords, what I have said with regard to these further and secondary obligations under clause 2 of this charterparty will apply to any other similarly worded 'safe port' clauses.

My Lords, for the reasons I have given I find it much more difficult to say what are the comparable obligations under a voyage charterparty at any rate where there is no express right to renominate . . . I think, therefore, in a case where only a time charterparty is involved, that it would be unwise for your Lordships to give further consideration to the problems which might arise in the case of a voyage charterparty, and for my part, I would leave those problems for later consideration if and when they arise.

My Lords, on the basis that time charterers were potentially under the further and secondary obligations which I have held that clause 2 may impose on them, it cannot avail the appellants against the respondents since the events giving rise to the unsafety did not occur until after the *Evia* had entered Basrah, and an order to leave the port and proceed to another port could not have been effective . . .

Notes

1 Lord Roskill went on to conclude that: (a) in any event, cl 21 (war clause) of the charterparty freed the charterers from any liability to which they might otherwise be subject; (b) the war clause did not exclude the application of the doctrine of frustration; and (c) the arbitrator's conclusion as to the date on which the charterparty had become frustrated should be upheld.

2 The *Saga Cob* was time chartered for six months' employment in the Red Sea, Gulf of Aden and East Africa. The charterparty provided that the charterers would 'exercise due diligence to ensure that the vessel is only employed between and at safe ports'. She was ordered to Massawa, Ethiopia, with a cargo of aviation fuel. While at anchor she was attacked by Eritrean guerillas; the master was wounded and the ship suffered substantial damage. The Court of Appeal held that 'prospective safety' did not mean 'absolute safety' and that a port should not be

regarded as unsafe unless a 'political' risk is sufficient for a reasonable shipowner or master to decline to send or sail his vessel there: *K/S Penta Shipping A/S v Ethiopian Shipping Lines Corp, The Saga Cob* [1992] 2 Lloyd's Rep 545, CA. For analysis of the decision, see Davenport, B, 'The Saga Cob' (1993) LMCLQ 150.

The decision in *The Evia* dealt with the position where neither owner nor charterer is aware of the danger. In the next case the owners undertook the voyage knowing of the circumstances at the port to which they had been ordered.

Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India, The Kanchenjunga [1990] Lloyd's Rep 391, HL

Facts

In 1978, the *Kanchenjunga* was chartered under a consecutive voyage charter on the Exxonvoy form, with loading at '1/2 safe ports Arabian Gulf'. On 21 November 1980 the charterers ordered the vessel to proceed to the Iranian port of Kharg Island to load a cargo of crude oil. Arbitrators held that on that date, Kharg Island was not a prospectively safe port by reason of the Iran/Iraq war. Nevertheless, the vessel undertook the voyage. She arrived and the master gave notice of readiness on 23 November. Before she could berth and load, an Iraqi air attack on 1 December on oil installations on Kharg Island caused the master to sail for a place of safety. Thereafter, the owners called for alternative loading instructions, while the charterers pressed for a return to Kharg; neither side altered its position and both eventually alleged that the other had repudiated the agreement.

Held

Lord Goff: . . . Here the crucial question is whether, before the vessel sailed away, the owners had, by their words or conduct, precluded themselves from rejecting the charterers' nomination as not complying with the contract. Hence the reliance by the charterers on the principles of waiver and estoppel, unsuccessful before the arbitrators, but successful, so far as waiver is concerned, before the judge and the Court of Appeal. The question whether the courts below were correct in their conclusion depends, in my opinion, upon an analysis of these principles, and their proper application to the facts of the present case.

It is a commonplace that the expression 'waiver' is one which may, in law, bear different meanings. In particular, it may refer to a forbearance from exercising a right or to an abandonment of a right. Here we are concerned with waiver in the sense of abandonment of a right which arises by virtue of a party making an election. Election itself is a concept which may be relevant in more than one context. In the present case, we are concerned with an election which may arise in the context of a binding contract, when a state of affairs comes into existence in which one party becomes entitled, either under the terms of the contract or by the general law, to exercise a right, and he has to decide whether or not to do so. His decision, being a matter of choice for him, is called in law an election . . . In all cases, he has in the end to make his election, not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it . . . Once an election is made, however, it is final and binding (see *Scarf v Jardine* (1882) 7 App Cas 345, *per* Lord Blackburn, at p 360). Moreover it does not require consideration to support it, and so it is to be distinguished from an express or implied agreement, such as a variation of the relevant contract, which traditionally requires consideration to render it binding in English law.

Generally, however, it is a prerequisite of election that the party making the election must be aware of the facts which have given rise to the existence of his new right . . . I add in parenthesis that, for present purposes, it is not necessary for me to consider certain cases in which it has been

held that, as a prerequisite of election, the party must be aware not only of the facts giving rise to his rights but also of the rights themselves, because it is not in dispute here that the owners were aware both of the relevant facts and of their relevant rights …

The present case is concerned … with an uncontractual tender of performance. Even so, the same principles apply. The other party is entitled to reject the tender of performance as uncontractual; and, subject to the terms of the contract, he can then, if he wishes, call for a fresh tender of performance in its place. But if, with knowledge of the facts giving rise to his right to reject, he nevertheless unequivocally elects not to do so, his election will be final and binding upon him and he will have waived his right to reject the tender as uncontractual.

. . . Election is to be contrasted with equitable estoppel, a principle associated with the leading case of *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439. Equitable estoppel occurs where a person, having legal rights against another, unequivocally represents (by words or conduct) that he does not intend to enforce those legal rights; if in such circumstances the other party acts, or desists from acting, in reliance upon that representation, with the effect that it would be inequitable for the representor thereafter to enforce his legal rights inconsistently with his representation, he will to that extent be precluded from doing so.

There is an important similarity between the two principles, election and equitable estoppel, in that each requires an unequivocal representation . . .

These are the principles which fall to be considered in the present case. Here, as I have already indicated, the situation in which the owners found themselves was one in which they could either reject the charterers' nomination of Kharg Island as uncontractual, or could nevertheless elect to accept the order and load at Kharg Island, thereby waiving or abandoning their right to reject the nomination but retaining their right to claim damages from the charterers for breach of contract. Since the owners were in this situation, it is logical first to consider the question of election before considering (if necessary) equitable estoppel.

The arbitrators addressed themselves to the possibility of election, but unfortunately their rejection of it was founded upon a mistaken appreciation of the law. The judge and the Court of Appeal, however, both held that the owners had elected to waive their right to reject the nomination. In my opinion they were right to reach this conclusion.

Because the arbitrators did not approach the issue of election correctly, they failed to consider the correct questions. In particular, they did not ask themselves whether there had been the necessary unequivocal representation by the owners. It is true that they did ask themselves whether there had been the necessary 'clear and unequivocal promise' when considering the alternative principle of equitable estoppel; they held that there was not, on the basis that the mere acceptance of orders without protest does not amount to such a promise. As a general proposition, this is no doubt correct; and it would equally be true if made with reference to the question whether there had been an unequivocal representation by the owners that they were waiving their right to reject the nomination as uncontractual. Moreover, if the relevant evidence had related only to the communications passing between the parties before the vessel arrived at Kharg Island, the question would have arisen whether, on these communications (set of course in their factual context), there had been such an unequivocal representation. But the matter does not stop there, because on arrival at Kharg Island the master proceeded to serve notice of readiness. Thereafter, as the judge pointed out, the owners were asserting that the vessel was available to load; they were also calling upon the charterers to arrange priority berthing, and referring to the fact that laytime was running. In these circumstances, the owners were asserting a right inconsistent with their right to reject the charterers' orders. The right which they were asserting was that laytime had started to run against the charterers at Kharg Island, with the effect that the charterers had become bound to load the cargo there within the laytime fixed by the charter and, if they failed to do so, to pay demurrage to the owners at the contractual rate. In these circumstances, on the principle stated by Lord Diplock in the

Kammins Ballrooms case [1971] AC 850, at pp 882–83, the owners must be taken in law to have thereby elected not to reject the charterers' nomination, and so to have waived their right to do so or to call for another nomination …

No doubt the master was entitled to refuse to endanger his ship and crew in the circumstances in which he found himself; but that did not excuse the owners from their breach of contract, after they had elected not to reject the charterers' nomination of Kharg Island in the knowledge of the facts rendering it prospectively unsafe. Furthermore this is not a case in which a new situation had developed at Kharg Island, or some other danger already existed there. If the known danger had become significantly different; or if a new and different danger had developed; or if some other danger, hitherto unknown, already existed at the port – in such circumstances as these, other questions might have arisen. But your Lordships are not troubled with any such questions in the present case. The arbitrators found as a fact that the safety or unsafety of Kharg Island was not changed in any way by the attack on December 1. This was a finding which they were fully entitled to make, and which cannot be challenged.

For these reasons, I would dismiss the owners' cross-appeal on this issue. It follows that it is unnecessary for the purposes of the cross-appeal to consider the alternative question of equitable estoppel.

I turn then to the charterers' appeal which related to the effect of cl 20(vi) of the charter. Clause 20 (vi) reads, so far as relevant, as follows:

> WAR RISKS (a) If any port of loading or of discharge named in this charterparty or to which the vessel may properly be ordered pursuant to the terms of the bills of lading be blockaded, or (b) if owing to any war, hostilities, warlike operations … entry to any such port of loading or of discharge or the loading or discharge of cargo at any such port be considered by the master or owners in his or their discretion dangerous or prohibited … the charterers shall have the right to order the cargo or such part of it as may be affected to be loaded or discharged at any other safe port of loading or of discharge within the range of loading or discharging ports respectively established under the provisions of the charterparty (provided such other port is not blockaded or that entry thereto or loading or discharge of cargo thereat is not in the master's or owner's discretion dangerous or prohibited) …

Both the judge and the Court of Appeal held that this clause was effective to protect the owners from liability in damages, though it did not render the charterers liable in damages in the events which had happened. With this conclusion I agree …

5 HIRE AND WITHDRAWAL

Hire is the consideration agreed to be paid to the shipowner for the use and service of the ship and crew. It is usual for charters to deal expressly with the time, place, amount, currency and manner of payment, as well as the moment from which hire accrues and the moment to which it runs. A shipowner may and commonly will reserve the right to withdraw the vessel and terminate the charter if the charterer fails to pay hire in the way agreed. This right must normally be reserved expressly: in the absence of a withdrawal clause, a late payment of hire would not usually be regarded at common law as a repudiatory breach entitling the owner to treat the contract as at an end: *The Georgios C* [1971] 1 Lloyd's Rep 7. But a right to withdraw cannot normally be exercised until the charterer has failed to make a payment, as the House of Lords held in the *Tankexpress* case: withdrawal follows default.

5.1 Default

***Tankexpress A/S v Compagnie Financière Belge des Petroles SA, The Petrofina* [1949] AC 76**

Facts

The charter stipulated for payment of hire in cash in London on the 27th of each month. The charterers were located in Brussels, the owners in Oslo and their brokers in Paris. The charterers paid by sending a cheque on the 25th of each month without objection. In September 1939, war delayed arrival of the cheque. The shipowners claimed that the charterers had failed to pay on the due date and that they had a right to withdraw the vessel.

Held

> **Lord Porter:** … The respondents … say, first, that the right of withdrawal only arises if they are in default, and, having paid in the usual and recognised way, they are not in default, though in fact their cheque did not reach Hambro's Bank on the twenty-seventh of the month …
>
> …I think that the respondents are entitled to succeed in their first contention.
>
> … I think the true inference to be drawn is that the method of performance of the contract was varied by an arrangement for payment to Hambro's Bank by cheque posted at such time as would in the ordinary course of post reach London on the twenty-seventh of the month … No doubt the appellants could at any time have insisted upon a strict performance of the contract after due notice, but they were not, in my view, entitled suddenly to vary the accepted method of performance without first notifying the respondents in time to enable them to perform the contract in strict conformity with the terms of the charterparty. I think, therefore, that payment was duly made in accordance with the practice adopted and accepted between the parties and in the way and at the time stipulated …

Notes

1 In *Afovos Shipping Co SA v Pagnan* [1983] 1 WLR 195, the House of Lords held where a payment was due on or before a particular day, the charterer has the whole of that day to make the payment and is not in default until midnight. It was also held that where the owner agrees to give notice of default before withdrawing (sometimes called an anti-technicality clause) a valid notice cannot be given until the charterer is in default. It is of course possible to vary either of these rules by agreement. It is also possible that the right to withdraw in respect of a particular breach may be lost if that breach is waived.

2 A right to withdraw and notice of withdrawal must be given promptly, or the right will be lost. In *The Northern Pioneer* [2002] EWCA Civ 1878; [2003] 1 Lloyd's Rep 212, the Court of Appeal suggested that this rule was better explained as the result of an implied term, although noting that application of principles of election, waiver and estoppel may produce the same result.

5.2 Waiver

Owners may be held to have waived and be unable to rely on a particular default if, for example, they accept a late payment when tendered or if they do not give notice that they reject it within a reasonable time.

Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia [1977] AC 850

Facts

The *Laconia* was chartered on the NYPE form. The charter provided that the hire was to be paid in cash in US currency semi-monthly in advance into a designated account at a specified branch of the owners' bank and that 'failing the punctual and regular payment of the hire' the owners should be at liberty to withdraw the vessel. The final payment of hire became due on a Sunday. It was conceded by the charterers that, as London banks were closed on Sunday and Saturday, the due date for payment of this instalment was the previous Friday. It was not paid but was tendered or paid to the owners' bank about 3 pm on the following Monday. At 6.55 pm on that day the owners withdrew the vessel.

Held

Lord Wilberforce: … My Lords, I cannot find any difficulty or ambiguity in this clause. It must mean that once a punctual payment of any instalment has not been made, a right of withdrawal accrues to the owners. Conversely, it is incapable of meaning that a charterer who has failed to make a punctual payment can (unless the owners have waived the default) avoid the consequences of his failure by later tendering an unpunctual payment. He would still have failed to make a punctual payment, and it is on this failure and by reason of it that the owners get the right to withdraw …

This leaves the second question, which is whether the right of withdrawal was waived by the owners. The submission of the charterers was that on Monday, 13 April 1970, before the owners purported to withdraw the ship, they accepted the charterers' late payment of the instalment and so affirmed the contract. The arbitrators found that there had not been any waiver, so that the charterers must undertake the task of showing that, upon the facts found, the only possible conclusion must have been there had.

In order to understand the argument, it is necessary to go into the facts in some detail. At about 3 pm, at which time London banks closed for the day, a messenger from the Midland Bank, acting for the charterers, delivered to the owners' bank, the First National City Bank, 34, Moorgate, London (FNCB), a 'payment order' for the amount of the seventh instalment. A payment order is a document issued by one bank to another under a scheme (LCSS) by which banks maintain dollar suspense accounts in which they credit or debit each other with sums in dollars and make periodical settlements. As between banks, a payment order is the equivalent of cash, but a customer cannot draw upon it. The amount must first be credited to his account, but he can, of course, make special arrangements for earlier drawing. At about 3.10 or 3.15 pm the payment order was received and stamped in the sorting office of FNCB. It was then taken to the transfer department. There an official called an editor wrote on the face of the order the formula CR ADV & TT Lausanne, an instruction (to be carried out elsewhere in the bank) meaning 'credit advice and telegraphic transfer Lausanne'. Not perhaps quite simultaneously, but at about the same time, another official telephoned to the owners' agents and said that the bank had received a payment order for the amount of the hire: this was in accordance with instructions received by the bank earlier in the day from the owners' agents. This official was immediately told to refuse the money and to return it. Thereupon the editor deleted the annotation he had made on the payment order and wrote on it: 'Beneficiary has refused payment. Advise remitter by phone.' There was no direct evidence that this was done but such may be presumed. The next day FNCB sent to the Midland Bank a payment order for the same amount as that which the Midland Bank had sent the previous day.

My Lords, much ingenuity and effort was used in order to show that this series of actions, or some part of it, constituted acceptance and waiver by the owners of the right to withdraw. But in my opinion it did not approach success. Although the word 'waiver', like 'estoppel', covers a variety of

situations different in their legal nature, and tends to be indiscriminately used by the courts as a means of relieving parties from bargains or the consequences of bargains which are thought to be harsh or deserving of relief, in the present context what is relied on is clear enough. The charterers had failed to make a punctual payment but it was open to the owners to accept a late payment as if it were punctual, with the consequence that they could not thereafter rely on the default as entitling them to withdraw. All that is needed to establish waiver, in this sense, of the committed breach of contract, is evidence, clear and unequivocal, that such acceptance has taken place, or, after the late payment has been tendered, such a delay in refusing it as might reasonably cause the charterers to believe that it has been accepted.

My Lords, if this is, as I believe, what would have to be proved in order to establish a waiver in the situation under review, it must be obvious that the facts in the present case do not amount to it. Looked at untechnically, the facts were that the money was sent to the bank, taken into the banking process or machinery, put in course of transmission to the owners, but rejected by the latter as soon as they were informed of its arrival and as soon as they were called upon, or able, to define their position. Put more technically, the bank, though agents of the owners, had a limited authority. It is not necessary to decide whether, in general, and in the absence of specific instructions, bankers in such situations as these have authority to accept late payments . . . here it is clear that the bankers had no such authority and still less any authority to make business decisions as to the continuance or otherwise of the charterparty but that *per contra* they had express instructions to refer the matter to the owners' agents. On this basis they receive the order (they clearly had no right to reject it out of hand), and, while provisionally starting to process it into the owners' possession, at the same time seek the owners' directions in accordance with the owners' previous instructions. On those directions, they arrest the process and return the money. The acts of the editors – the annotation on the payment order – were internal acts (Brandon J, of a similar situation in *The Brimnes* [1973] 1 WLR 386, 411 called them 'ministerial', ie acts done without any intention or capacity to affect legal relations with third parties), not irrevocable, but provisional and reversible acts, consistent with an alternative decision of the customer which might be to accept or reject. The customer chose to reject, he did so as rapidly as the circumstances permitted, and he could have given no ground to the charterer for supposing that the payment had been accepted. The charterer did not act upon any such supposition.

The pattern of action is to me so clear that I do not find it necessary to decide the rather technical question whether, as regards the owners, there was payment 'in cash' as required by the charterparty, or not. Whatever it was it was not punctual payment, and not accepted in waiver of the unpunctuality. I think then that there is no basis on which the arbitrators' finding against waiver can be attacked.

The result of my conclusions on these two points leaves the matter as follows:

1 Under the withdrawal clause, as under similar clauses, including the Baltime clause properly interpreted, a right of withdrawal arises as soon as default is made in punctual payment of an instalment of hire. Whether or not this rule is subject to qualification in a case of punctual but insufficient payment as some authorities appear to hold, is not an issue which now arises and I express no opinion upon it.

2 The owners must within a reasonable time after the default give notice of withdrawal to the charterers. What is a reasonable time – essentially a matter for arbitrators to find – depends on the circumstances. In some, indeed many cases, it will be a short time – *viz*, the shortest time reasonably necessary to enable the shipowner to hear of the default and issue instructions. If, of course, the charterparty contains an express provision regarding notice to the charterers, that provision must be applied.

3 The owners may be held to have waived the default, *inter alia*, if when a late payment is tendered, they choose to accept it as if it were timeous, or if they do not within a reasonable time give notice that they have rejected it . . .

5.3 Relief from forfeiture

The consequence of withdrawal of a vessel may of course be serious for the charterer. Loss of the ship may seem particularly hard where the failure to pay was accidental and the charter market has risen substantially. In some areas of law – the law of mortgages and landlord and tenant – English courts claim power to grant relief on reasonable terms to parties who are in breach and who are threatened with loss of their interest in a property. The courts were urged in *The Scaptrade* to claim analogous powers.

***Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1983] 2 AC 694**

Facts

The tanker *Scaptrade* was time chartered for three years. The charterers, through a slip in their own office, failed to make a payment at a time when the charter still had a year to run. The owners gave notice to the charterers withdrawing the vessel. Tender of the overdue hire was made on the following day but was refused. After negotiations had taken place, the vessel was rechartered by the owners to the charterers on a 'without prejudice' agreement with the rate of hire (that is, charter rate or market rate) to abide the result of litigation.

Held

Lord Diplock: … In this appeal … your Lordships have heard argument upon one question only: 'Has the High Court any jurisdiction to grant relief against the exercise by a shipowner of his contractual right, under the withdrawal clause in a time charter, to withdraw the vessel from the service of the charterer upon the latter's failure to make payment of an instalment of the hire in the manner and at a time that is not later than that for which the withdrawal clause provides?'

… A time charter, unless it is a charter by demise, with which your Lordships are not here concerned, transfers to the charterer no interest in or right to possession of the vessel; it is a contract for services to be rendered to the charterer by the shipowner through the use of the vessel by the shipowner's own servants, the master and the crew, acting in accordance with such directions as to the cargoes to be loaded and the voyages to be undertaken as by the terms of the charterparty the charterer is entitled to give to them. Being a contract for services it is thus the very prototype of a contract of which before the fusion of law and equity a court would never grant specific performance: *Clarke v Price* (1819) 2 Wils 157; *Lumley v Wagner* (1852) 1 De GM & G 604. In the event of failure to render the promised services, the party to whom they were to be rendered would be left to pursue such remedies in damages for breach of contract as he might have at law. But as an unbroken line of uniform authority in this House, from *Tankexpress* [1949] AC 76 to *The Chikuma* [1981] 1 WLR 314, has held, if the withdrawal clause so provides, the shipowner is entitled to withdraw the services of the vessel from the charterer if the latter fails to pay an instalment of hire in precise compliance with the provisions of the charter. So the shipowner commits no breach of contract if he does so; and the charterer has no remedy in damages against him.

To grant an injunction restraining the shipowner from exercising his right of withdrawal of the vessel from the service of the charterer, though negative in form, is pregnant with an affirmative order to the shipowner to perform the contract; juristically it is indistinguishable from a decree for specific performance of a contract to render services; and in respect of that category of contracts, even in the event of breach, this is a remedy that English courts have always disclaimed any jurisdiction to grant. This is, in my view, sufficient reason in itself to compel rejection of the suggestion that the equitable principle of relief from forfeiture is juristically capable of extension so as to grant to the court a discretion to prevent a shipowner from exercising his strict contractual rights under a withdrawal clause in a time charter which is not a charter by demise.

. . . All the analogies that ingenuity has suggested may be discovered between a withdrawal clause in a time charter and other classes of contractual provisions in which courts have relieved parties from the rigour of contractual terms into which they have entered can in my view be shown upon juristic analysis to be false. *Prima facie* parties to a commercial contract bargaining on equal terms can make 'time to be of the essence' of the performance of any primary obligation under the contract that they please, whether the obligation be to pay a sum of money or to do something else. When time is made of the essence of a primary obligation, failure to perform it punctually is a breach of a condition of the contract which entitles the party not in breach to elect to treat the breach as putting an end to all primary obligations under the contract that have not already been performed. In *Tankexpress A/S v Compagnie Financière Belge des Petroles SA* [1949] AC 76 this House held that time was of the essence of the very clause with which your Lordships are now concerned where it appeared in what was the then current predecessor of the Shelltime 3 charter. As is well known, there are available on the market a number of so-(mis)called 'anti-technicality clauses', such as that considered in *The Afovos*, which require the shipowner to give a specified period of notice to the charterer in order to make time of the essence of payment of advance hire; but at the expiry of such notice, provided it is validly given, time does become of the essence of the payment.

My Lords, quite apart from the juristic difficulties in the way of recognising a jurisdiction in the court to grant relief against the operation of a withdrawal clause in a time charter there are practical reasons of legal policy for declining to create any such new jurisdiction out of sympathy for charterers. The freight market is notoriously volatile. If it rises rapidly during the period of a time charter, the charterer is the beneficiary of the windfall which he can realise if he wants to by subchartering at the then market rates. What withdrawal of the vessel does is to transfer the benefit of the windfall from charterer to shipowner.

The practical objections to any extension to withdrawal clauses in time charters of an equitable jurisdiction to grant relief against their exercise are so convincingly expressed by Robert Goff LJ in the judgment of the Court of Appeal [1983] QB 529, 540–41 in the instant case that I can do no better than to incorporate them in my own speech for ease of reference:

> Parties to such contracts should be capable of looking after themselves: at the very least, they are capable of taking advice, and the services of brokers are available, and are frequently used, when negotiating terms. The possibility that shipowners may snatch at the opportunity to withdraw ships from the service of time charterers for non-payment of hire must be very well known in the world of shipping: it must also be very well known that anti-technicality clauses are available which are effective to prevent any such occurrence. If a prospective time charterer wishes to have any such clause included in the charter, he can bargain for it. If he finds it necessary or desirable to agree to a charter which contains no such clause, he can warn the relevant section of his office, and his bank, of the importance of securing timeous payment. But the matter does not stop there. It is of the utmost importance in commercial transactions that, if any particular event occurs which may affect the parties' respective rights under a commercial contract, they should know where they stand. The court should so far as possible desist from placing obstacles in the way of either party ascertaining his legal position, if necessary with the aid of advice from a qualified lawyer, because it may be commercially desirable for action to be taken without delay, action which may be irrevocable and which may have far-reaching consequences. It is for this reason, of course, that the English courts have time and again asserted the need for certainty in commercial transactions – for the simple reason that the parties to such transactions are entitled to know where they stand, and to act accordingly. In particular, when a shipowner becomes entitled, under the terms of his contract, to withdraw a ship from the service of a time charterer, he may well wish to act swiftly and irrevocably. True, his problem may, in any particular case, prove to be capable of solution by entering into a without prejudice agreement with the original time charterer, under which the rate of hire payable in future will be made to depend upon a decision, by arbitrators or by a court, whether he was in law entitled to determine the charter. But this is not always possible.

> He may wish to refix his ship elsewhere as soon as possible, to take advantage of a favourable market. It is no answer to this difficulty that the ship may have cargo aboard at the time, so that her services cannot immediately be made available to another charterer . . . For one thing, the ship may not have cargo on board, and for another she can be refixed immediately under a charter to commence at the end of her laden voyage. Nor is it an answer that the parties can immediately apply to arbitrators, or to a court, for a decision, and that both maritime arbitrators and the Commercial Court in this country are prepared to act very quickly at very short notice. For, quite apart from the fact that some delay is inherent in any legal process, if the question to be decided is whether the tribunal is to grant equitable relief, investigation of the relevant circumstances, and the collection of evidence for that purpose, cannot ordinarily be carried out in a very short period of time.

> For all these reasons I would dismiss this appeal. I do so with the reminder that the reasoning in my speech has been directed exclusively to time charters that are not by demise. Identical considerations would not be applicable to bareboat charters and it would in my view be unwise for your Lordships to express any views about them.

5.4 Withdrawal for any other breach

A charter may, as in the case of the NYPE form, provide for withdrawal on non-payment of hire 'or on any breach of this charter'. The proper interpretation of these words was considered in *The Antaios*.

Antaios Compania Naviera SA v Salen Rederierna AB,
***The Antaios* [1985] AC 191**

Facts

Shipowners purported to withdraw the vessel on the grounds of breach of an innominate term in the charterparty relating to the charterers' right to issue bills of lading on behalf of the master, arguing that this breach fell within the words 'any breach of this charterparty' in the NYPE withdrawal clause.

Held

> **Lord Diplock:** . . . The arbitrators decided this issue against the shipowners. The 78 pages in which they expressed their reasons for doing so contained an interesting, learned and detailed dissertation on the law, so lengthy as to be, in my view, inappropriate for inclusion in the reasons given by arbitrators for an award. Their reasons can be adequately summarised as being . . . that 'any other breach of this charter party' in the withdrawal clause means a repudiatory breach – that is to say: a fundamental breach of an innominate term or breach of a term expressly stated to be a condition, such as would entitle the shipowners to elect to treat the contract as wrongfully repudiated by the charterers, a category into which in the arbitrators' opinion the breaches complained of did not fall . . .
>
> To the semantic analysis, buttressed by generous citation of judicial authority, which led the arbitrators to the conclusions as to the interpretation of the wording of the withdrawal clause that I have summarised, the arbitrators added an uncomplicated reason based simply upon business common sense:
>
> > We always return to the point that the owners' construction is wholly unreasonable, totally uncommercial and in total contradiction to the whole purpose of the NYPE time charter form. The owners relied on what they said was 'the literal meaning of the words in the clause'. We would say that if necessary, in a situation such as this, a purposive construction should be given to the clause so as not to defeat the commercial purpose of the contract.
>
> . . . your Lordships would not be trespassing on the field of a discretion that a judge upon whom it was conferred had in fact exercised if you were to take this opportunity of stating . . . that the

arbitrators in the passage in their award that I have cited earlier were not obviously wrong but were obviously right in their decision on the 'repudiatory breach' question . . .

5.5 Deductions from hire

Deductions are often permitted by express agreement, for example, for advances made by charterers for payments on behalf of the ship. It has also been held in a series of cases, of which *The Nanfri*, below, is the best known, that a charterer may deduct and set off against hire a claim for damages in limited circumstances, that is, where in breach of contract the owners have deprived the charterer of the use of the whole or part of the ship. This principle and the way deductions should be quantified are considered in *The Nanfri.*

Federal Commerce & Navigation Co Ltd v Molena Alpha Inc, The Nanfri [1978] QB 927, CA

Facts

Charterers deducted sums from hire and explained their reasons. The owners argued that charterers were not entitled to make any deduction from hire by way of off-hire or set off (even if the same was in fact due to the charterers) unless prior to such deduction either the owners had accepted the validity thereof or it was supported by vouchers signed by the master or a proper tribunal had pronounced on its validity.

Held

Lord Denning MR: . . . This contention was founded on the proposition that hire payable under a time charterparty is in the same position as freight payable under a voyage charterparty: and that under a settled rule of law freight is payable in full without deduction. Even if cargo is short-delivered, or delivered damaged, there can be no deduction on that account. Any cross-claim must be left to be decided later by the courts or by arbitration. That is well established now for 'freight' in such cases as *Henriksens Rederi A/S v T H Z Rolimpex (The Brede)* [1974] QB 233 and *Aries Tanker Corporation v Total Transport Ltd, The Aries* [1977] 1 WLR 185.

At one time it was common to describe the sums payable under a time charterparty as 'freight'. Such description is to be found used by judges and textbook writers of great distinction. But in modern times a change has come about. The payments due under a time charter are usually now described as 'hire' and those under a voyage charter as 'freight'. This change of language corresponds, I believe, to a recognition that the two things are different. 'Freight' is payable for carrying a quantity of cargo from one place to another. 'Hire' is payable for the right to use a vessel for a specified period of time, irrespective of whether the charterer chooses to use it for carrying cargo or lays it up, out of use. Every time charter contains clauses which are quite inappropriate to a voyage charter, such as the off-hire clause and the withdrawal clause. So different are the two concepts that I do not think the law as to 'freight' can be applied indiscriminately to 'hire'. In particular the special rule of English law whereby 'freight' must be paid in full (without deductions for short delivery or cargo damage) cannot be applied automatically to time charter 'hire'. Nor is there any authority which says that it must. It would be a mistake to suppose that the House of Lords had time charter hire and so forth in mind when they decided *The Aries* [1977] 1 WLR 185 or the *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 WLR 713, or that anything said in those cases can bind this court. Many of us, I know, in the past have assumed that the rule as to 'freight' does apply: and some judges have said so. But now, after full argument, I am satisfied that the 'freight' rule does not apply automatically to 'time charter' hire: and we have to consider the position on principle.

Equitable set off in general

. . . one thing is quite clear: it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims

which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim . . .

Equitable set off in this case

So I turn to the problem here. A shipowner has contracted to give a charterer the right to use the vessel for a period of time – six years in fact. In return the charterer has agreed to pay a stated sum of hire monthly in advance. Then let us suppose that, after the charterer has paid his month's hire in advance, the shipowner wrongly declines to allow the charterer to have the use of the vessel for some days during the ensuing month. He may put the vessel perhaps to some more profitable use. He, by his conduct, deprives the charterer of part of the consideration for which the hire was paid. I should have thought it plain that the charterer should in fairness be able to recoup himself by making a deduction from the next month's hire – so as to compensate him for the loss of use for those days – equivalent to the hire of those lost days. Likewise if the shipowner has been guilty of some other wrongful conduct which has deprived the charterer of the use of the ship during some days – or prejudiced the charterer in the use of the ship – then the charterer should in fairness be able to recoup himself by making a deduction from the next month's hire. If the charterer quantifies his loss by a reasonable assessment made in good faith – and deducts the sum quantified – then he is not in default. The shipowner cannot withdraw his vessel on account of non-payment of hire nor hold him guilty at that point of any breach of contract. If it subsequently turns out that he has deducted too much, the shipowner can of course recover the balance. But that is all. This point of view is supported by a score of judges versed in commercial matters over the last 30 to 40 years . . .

. . . I would hold that, when the shipowner is guilty of a breach of contract which deprives the time charterer of part of the consideration for which the hire has been paid in advance, the charterer can deduct an equivalent amount out of the hire falling due for the next month.

I would as at present advised limit the right to deduct to cases when the shipowner has wrongly deprived the charterer of the use of the vessel or has prejudiced him in the use of it. I would not extend it to other breaches or default of the shipowner, such as damage to cargo arising from the negligence of the crew . . .

The special clauses

Thus far I have considered only cases where the shipowner has himself been guilty of a breach of contract in depriving the charterer of the use of the vessel. Now I come to cases where the shipowner has not been guilty of any breach of contract, or is protected by exceptions clauses. In such cases the charterer is often given a right of deduction by express clauses such as the off-hire clause or a clause allowing deductions for disbursements. There is no doubt that the charterer can make the deduction, but the question is when? Have they to be agreed or established before he can make the deduction? There is no authority that I know of to that effect. It seems to me that he is entitled to quantify his loss by a reasonable assessment made in good faith – and deduct the sum so quantified from the hire. Then the actual figures can be ascertained later: either by agreement between the parties: or, failing agreement, by arbitration. That was what the parties did in the present case for the first three years of the charters. The right to deduct would be useless to the charterer if he had to wait until a figure was agreed or established – for then it might be postponed indefinitely . . .

Note

Shipowners let the *Aditya Vaibhav* to charterers on the Shelltime 3 form. The charterers alleged that a failure by the owners to clean the holds properly in breach of the charterparty had resulted in a delay to the vessel of 14 days when the vessel was not available for the service required and had caused them consequential loss and expense which they claimed to deduct from hire due to the owners. Saville J held that the maximum amount which could be deducted by the charterers, applying *The Nanfri,*

was the amount of hire payable for the period during which the vessel was off-hire: *Century Textiles and Industry Ltd v Tomoe Shipping Co (Singapore) Pte Ltd, The Aditya Vaibhav* [1991] 1 Lloyd's Rep 573.

6 OFF-HIRE

As the introductory material in Chapter 1 explained, the general loss-of-time risk under a time charter is allocated to the charterer. In other words, under this type of contract, the charterer loses if the vessel is delayed or is unproductive and the shipowner is not at fault. Another way to put the same point is to say that in general time charters impose an obligation to pay hire continuously. However, it is common to agree that payment is not due for time lost to the charterer in consequence of circumstances 'attributable to the owner or the vessel' (UNCTAD, *Charter Parties,* 1974, Centreville, Maryland: Cornell Maritime Press) and, sometimes, in wider circumstances. Since off-hire clauses operate as exceptions which cut down the owner's right to hire, it is for the charterer to show that those circumstances have arisen. For the same reason, if the meaning of a clause is uncertain, it has been said that the words must be read in favour of the owner: *Royal Greek Govt v Minister of Transport, The Ann Stathatos* (1948) 82 LlL Rep 196, p 199, *per* Bucknill LJ. However, off-hire clauses are not identical and the standard forms are in any event frequently amended by the parties. For these reasons it has been said that the only general rule that can be laid down is that one must consider the wording of the off-hire clause in every case: *The Berge Sund* [1993] 2 Lloyd's Rep 453, p 459, *per* Staughton LJ. The issues commonly are: (1) did an off-hire event, as defined in the contract, actually occur?; (2) was there in consequence a loss of time to the charterer?; and (3) on what event did the hire become payable again? All three issues arose in *The Westfalia.*

Hogarth v Miller, The Westfalia [1891] AC 48

Facts

While the vessel was on a voyage from West Africa to Harburg and Antwerp, under charter, her high pressure engine broke down and it was necessary to put back about 100 miles to Las Palmas, which she reached with the aid of a low pressure engine assisted by her sails. As repairs could not be effected in that port, the appellants and respondents agreed that a tug should be employed to tow the ship to Harburg, and that the expense, £1,100, should be treated as general average on cargo, ship, and freight. As their proportion of this expense the respondents eventually paid £867. The ship left Las Palmas on 18 October 1887, towed by the tug and assisted by her own low pressure engine. She arrived at Harburg on 31 October and discharged the cargo with her own power. Repairs to her main engine were completed on 10 November. The charterparty provided that:

> In the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than 48 consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service.

The shipowner admitted that the vessel was off-hire while at Las Palmas, but claimed payment of hire for the whole period of the voyage from Las Palmas to Harburg; the charterer denied liability to pay anything for the period before completion of repairs.

Held

Lord Halsbury LC: . . . My Lords, the whole of this case, as it appears to me, turns upon the true construction of the contract which regulates the relations between the parties . . .

What the parties to this contract contemplated was this: the hirer of the vessel wants to use the vessel for the purpose of his adventure, and he is contemplating the possibility that by some of the causes indicated in the clause itself . . . the efficient working of the vessel may be stopped, and so loss of time may be incurred; and he protects himself by saying, that during such period as the working of the vessel is stopped for more than 48 consecutive hours, payment shall cease; and now come the words upon which such reliance is placed: 'until she be again in an efficient state to resume her service.' If the contention which has been put forward at your Lordships' Bar were well founded one might have expected that the parties in contemplating what upon that view was said to be the intention of the parties if they had intended that the test should be the efficient state of the vessel as it originally was might very readily have used the words, 'until such time as the deficiency of men or stores has been removed, or the breakdown of the machinery has been set to rights, or the want of repairs has been supplied, or the damage has been remedied', and so forth; or the terms might have been inserted that the resumption of the payment shall be dependent upon the vessel being restored to full efficiency in all respects, as to seaworthiness and otherwise, as she was at the time when she was originally handed over. But the parties have not used such language. On the contrary, the test by which the payment for the hire is to be resumed is the efficient state of the vessel to resume her service; so that each of those words, as it appears to me, has relation to that which both of the parties must be taken to have well understood, namely, the purpose for which the vessel was hired, the nature of the service to be performed by the vessel, and the efficiency of the vessel to perform such service as should be required of her in the course of the voyage.

As to the first part of the claim which has been insisted upon here, I confess that I entertain no doubt whatever that the vessel was not efficient in any sense for the prosecution of her voyage from Las Palmas to Harburg . . . As a matter of fact, this vessel did not and could not pursue her voyage as a vessel from Las Palmas to Harburg. That another vessel took her in tow, that another vessel accomplished the voyage and brought this vessel, not as an efficient steamer, but as a floating barge, whereby the goods were brought to Harburg, seems to me to be nothing to the purpose. I use that phrase because, although I am aware that it is suggested that the low pressure engine was used for the purpose of easing the work of the tug, that appears to me to be entirely irrelevant when one is ascertaining whether this vessel of its own independent power was efficient for the purpose of prosecuting the voyage. All that is suggested is that the tug was assisted by the use of the low pressure engine. I find, as a matter of evidence, as each court I think has found, that the vessel was not seaworthy for the purpose of accomplishing her voyage without the assistance of a tug; she did not accomplish her voyage without the assistance of a tug; and in truth, as it appears to me, upon these facts it is clear that the voyage which was accomplished, and the service which it was contemplated this hired vessel was to perform, was performed by another vessel, and that the auxiliary assistance which she gave to that other vessel was not making the vessel herself an efficient vessel for the working of which the hirer was to pay.

. . . That is conclusive upon the first part of the case, and therefore no payment for the hire was due during the period that she was passing from Las Palmas to Harburg.

With reference to the second question which has been argued it appears to me that one has again to refer to each of these clauses of the contract to see what the parties were bargaining for. I should read the contract as meaning . . . that she should be efficient to do what she was required to do when she was called upon to do it; and accordingly, at each period, if what was required of her was to lie at anchor, if it was to lie alongside the wharf, upon each of those occasions, if she was efficient to do it at that time she would then become, in the language of the contract, to my mind 'efficient', reading with it the other words, 'for the working of the vessel'. How does a vessel work when she is lying alongside a wharf to discharge her cargo? She has machinery there for the

purpose. It is not only that she has the goods in the hold, but she has machinery there for the purpose of discharging the cargo. It is not denied that during the period that she was lying at Harburg there was that machinery at work enabling the hirer to do quickly all that this particular portion of her employment required to be done. It appears to me, therefore, that at that period there was a right in the shipowner to demand payment of the hire, because at that time his vessel was efficiently working; the working of the vessel was proceeding as efficiently as it could with reference to the particular employment demanded of her at the time.

Under these circumstances, it appears to me that the pursuer here was entitled to payment for the hire of the vessel during the period of discharge . . .

My Lords, I wish to say one word as to the other view which has been presented, that the shipowner was not entitled to anything in respect of the period during which she was discharging. It has been put in various forms by the learned counsel. What reason or good sense would there be in construing a mercantile contract so that all right for payment should cease when the other party to the contract was getting everything he could out of the use of the vessel if the vessel was in an efficient state? I can see none. And what was put this morning seems to me conclusive: if some other part of the steam-gearing not used for the purpose of navigation had gone out of working in mid-ocean, and there had been no longer any use for that particular thing, the reason why such a breakdown of the machinery in mid-ocean would not have created a cesser of payment under the contract would, I suppose, have been this – it would have been argued, and argued justly, 'It is very true that there has been a breakdown of machinery; but that breakdown of machinery is not the only event contemplated; it does not of itself entitle you to a cesser of payment. There must be to entitle you to a cesser of payment a loss of time arising from a breakdown of machinery. Not even then does the cesser of payment arise; but there must be a loss of time by the breakdown of the machinery whereby the working of the vessel is stopped for the contracted time'. That appears to me to reflect great light upon the other question – What was the breakdown of the machinery which was contemplated by both the parties? It appears to me that the resumption of the right of payment is correlative with that; and inasmuch as when the vessel got to Harburg the vessel became 'efficient' for the purpose for which alone she was wanted at that time, it appears to me that the right of payment arose . . .

Notes

1 In the period between Las Palmas and Harburg the cargo was being moved and time was not being lost. The important point here is that the charterer was contributing to the towage expenses, so that he was not receiving from the owner the service required during that period under the charter.

2 The other members of the court approached the case in different ways. Lord Watson held that: (a) the vessel was not in an efficient state to resume her service when she started from Las Palmas under tow and that she remained off-hire until she reached port; (b) that a quantum meruit might be payable in some cases while a vessel is off-hire where the charterer was benefiting from the use of the vessel, although not in the present case because of the arrangement made to pay for the tow; (c) hire was payable again when the vessel berthed at Harburg because the vessel was then in an efficient state for the service then required. Lord Herschell agreed with the Lord Chancellor and Lord Watson. Lord Morris thought that the vessel was off-hire at Las Palmas and the hire only became payable again when she had been repaired. Lord Bramwell thought that the vessel was efficient at Las Palmas; the charterers had had the benefit of their cargo being taken to Harburg and ought to pay for it.

3 In some circumstances an off-hire event will be the natural result of following charterers' orders, as when it is necessary for a ship to spend time bunkering, ballasting, lightening or cleaning the vessel. In these circumstances the ship will

not go off-hire unless the contract clearly so provides: *The Berge Sund* [1993] 2 Lloyd's Rep 453, p 460.

6.1 Loss of time

One aspect of the agreement in *The Westfalia* – that the occurrence of an off-hire event is not in itself enough to put the ship off-hire, there must also be a loss of time – features in many modern charters. The impact of this form of agreement is illustrated by *The Ira.*

***Forestships International Ltd v Armonia Shipping and Finance Corp, The Ira* [1995] 1 Lloyd's Rep 103**

Facts

The *Ira* was time chartered on the NYPE form. The parties agreed that after discharging cargo at Ravenna, the vessel would drydock in Greece. The vessel proceeded to Piraeus where it was drydocked. When the vessel was ready to resume chartered service, the charterers fixed the vessel to load a cargo at Novorossiysk in the Black Sea. The charterers contended that the vessel was off-hire from dropping the outward pilot at Ravenna; the owners argued that almost none of the duration of the voyage from Ravenna to Piraeus was lost since Piraeus is, with a very slight deviation, on the route from Ravenna to the Black Sea. The off-hire clause provided that 'In the event of loss of time from drydocking preventing the full working of the vessel the payment of hire shall cease for the time thereby lost'. The drydocking did not cause the charterers to lose the whole of the time occupied by the voyage from Ravenna to Piraeus and the vessel was not therefore off-hire for the whole of that period.

Held

Tuckey J: … A net time clause, such as this clause is, requires the charterer to prove the happening and the duration of the off-hire event, and that time has been lost to him thereby. So it is a two-stage operation and it does not follow merely by proof of the off-hire event and its duration that he is able to establish a loss of time to him. That must depend on the circumstances of the particular case.

6.2 Partial inefficiency

Can a ship be off-hire where she is partly working? The answer, bearing in mind Staughton LJ's warning in *The Berge Sund,* must depend on the terms of the off-hire clause as the next two cases seem to demonstrate.

***Tynedale Steam Shipping Co Ltd v Anglo-Soviet Shipping Co Ltd, The Hordern* [1936] 1 All ER 389**

Facts

The *Hordern* was chartered on the Baltime 1920 form. In the course of a voyage from Archangel to Liverpool with a deckload of timber, she was struck by a heavy squall; part of the deck cargo fell overboard carrying away the foremast to which the forward winches were attached. Discharge took six days longer than it would normally have taken. The shipowners claimed hire for the period during which the vessel was delayed. Baltime 1920 provided:

Clause 10 – In the event of loss of time caused by dry-docking or by other necessary measures to maintain the efficiency of steamer, or by deficiency of men or owners' stores, breakdown of

machinery, damage to hull or other accident preventing the working of the steamer and lasting more than 24 consecutive hours, hire to cease from commencement of such loss of time until steamer is again in efficient state to resume service. Should steamer be driven into port, or to anchorage by stress of weather, or in the event of steamer trading to shallow harbours, rivers or ports with bars, or in case of accident to cargo, causing detention to steamer, time so lost and expenses incurred shall be for charterers' account even if caused through fault or want of due diligence by owners' servants.

The shipowners argued that the ship was partly efficient and that the clause only put the ship off-hire in the event of complete or total prevention from working the ship, not if there was a mere interference with working.

Held

Lord Roche: . . . There is one fatal objection to that argument, and that is that it has come about 45 years too late. In the year 1890 a clause which I am unable in any way to distinguish from the present clause came up for decision in . . . *Hogarth v Miller, Brother & Co* [above]. I say that the language of that clause cannot in my view be distinguished from the language of the clause in this case. The only difference was that the word 'stopped' occurred in that case instead of the word 'preventing' in this case.

. . . Here, the mast being damaged did not prevent or hinder the ship steaming, but it did hinder or prevent her discharging in the sense that prevention was construed in the House of Lords in *Hogarth v Miller* as preventing discharge or the working of the ship happening in accordance with the contract. That is the full point, it seems to me, between the parties in this case, as it was between the majority of the House in the case of *Hogarth v Miller* and the dissenting Lord Bramwell.

Let me go a little further into the judgments in order to make good my point. I recognise that the facts in *Hogarth v Miller* were in a sense different to those in this case. It was held there that the ship could not have got to a port without a tug. Mr Le Quesne says in this case that they could have discharged slowly and did discharge slowly, but that they did discharge. I am afraid that the answer to that part of the case is that it is a finding of fact. There is a finding of fact here that discharge of the forward part of the ship was impossible by the ship herself by means of her winches and derricks . . .

. . . It seems to me that it follows from [the reasoning in *Hogarth v Miller*] that the vessel was not fit or able to work for the services required and stipulated for by the initial words of the charterparty, and in those circumstances two results follow. Under clause 2 it was the duty of the owners then to put her back into an efficient state in hull and machinery for that purpose. Under clause 10 events had happened which put into operation the cesser of hire clause . . .

Now it is really sufficient to dispose of this case to indicate the reasons why I think on this part of the case the learned judge was right and why the appeal fails. There are two matters to be added. We must only answer the questions put by the arbitrators, and it is important in answering them not to be ambiguous. The first question is: 'Whether upon the true construction of the charter and upon the facts as herein found the shipowners are entitled to hire for the vessel in respect of the time occupied in discharge.'

. . . The answer that I give is this: that upon the true construction of the charter and upon the facts as here found – that is to say, found in the case – the ship-owners' right to be paid hire ceased in respect of the time occupied in discharge; that is to say, they should get no further than that during the continuance of that period.

That answer is really sufficient to dispose of the argument which was developed by Mr Le Quesne in reply: namely, that there should be a sort of assessment of the amount of time lost by reason of the inefficiency, and that for that net loss of time so ascertained hire should be deemed to cease. With respect to that argument, it is sufficient to say that I regard every word which I have read

from the judgments of Lord Halsbury and the other noble Lords who formed the majority [in *Hogarth v Miller*] as negativing that argument, which in my view is opposed to the proper construction of the clause, that construction being a stipulation that, if certain events happen, then *ipso facto* hire is to cease and is not to begin again until that state of affairs has ceased to exist. The ascertainment of the net loss is something foreign to the clause as drawn . . .

Scott LJ: I agree with the whole of the judgment delivered by Lord Roche and with a little hesitation only add one or two observations . . .

Mr Le Quesne submitted to us that in [*Hogarth v Miller*] . . . the House accepted as a principle that hire had ceased by reason of prevention within the meaning of the charter before the vessel reached the port of refuge at Las Palmas and before the voyage home with a tug assisting began. He said, therefore, that the House was not considering what caused the charter hire to cease, but what entitled the shipowner to say that the right to charter hire had re-attached. That argument had at first its attractions, but on further reflection, apart from the *obiter dicta* – to which we have to pay the very greatest possible attention in this court – which fell from their Lordships in the House of Lords, I do feel this very strongly: that from a commercial point of view the distinction between what causes the charter hire to go off and what causes it to come on again is, to the commercial man, a distinction which is rather apt to worry him; and I am very loath to construe an ordinary commercial clause in a way that is not simple to the commercial mind if the clause can properly be interpreted in a simple way. And this clause, I think, can be interpreted simply, for this reason: the clause provides that in the event of loss of time caused by damage to hull or other accident preventing the working of the steamer, then hire for a minimum length of time is to cease until the steamer is again in an efficient state to resume the service. As Lord Roche has said, the word 'again' indicates the former state of the ship and the latter state of the ship. The state before she went off-hire and the state to which she must have returned before she goes on hire again are intended to be the same . . .

Canadian Pacific (Bermuda) Ltd v Canadian Transport Co Ltd, The HR Macmillan [1974] 1 Lloyd's Rep 311, CA

Facts

By a time charterparty in the New York Produce Exchange form, the owners of the *HR Macmillan*, which was fitted with three Munck gantry cranes, chartered her to the charterers for eight years from the date of delivery. In April 1968 the trolley of the No 1 crane fell overboard and the crane was not operational for nearly three and a half months. The charter contained a special clause to cover a breakdown of the Munck cranes. But in the course of his judgment, Lord Denning also referred to the off-hire clause which provided:

That in the event of the loss of time from deficiency and/or default of men or deficiency of stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost . . .

Held

Lord Denning MR: . . . Taking that clause by itself, it would mean that, if one crane broke down, there would have to be an inquiry as to the time lost thereby. That would be a most difficult inquiry to undertake. For instance, if one broke down and the other two cranes were able to do, and did do, all the work that was required, there would be no 'time lost thereby'; and there would be no cessation of hire. But if there was work for three cranes, and there was some loss of time owing to the one crane breaking down, there would have to be an assessment of the amount of time lost. In that event, as the judge pointed out, the question would have to be asked: 'How much earlier would the vessel have been away from her port of loading or discharge if three Munck

cranes, instead of two, had been available throughout?' The judge called that a 'net loss of time' clause . . .

6.3 Inefficiency and external causes

In the cases considered above, the off-hire event occurred on board the ship. None of the vessels were in perfect working order. Can a ship be off-hire if she is efficient in herself; can a cause which is wholly external to the ship be an off-hire event? A line of cases, which started with *Court Line Ltd v Dant and Russell Inc, The Errington Court* (1939) 44 Com Cas 345, have considered these two connected questions. The effect of the line of decisions was reviewed in *The Laconian Confidence.* And see Weale, J, 'Can an efficient vessel be placed off-hire?' (2002) Jo Mar L & Com 133.

Andre & Cie SA v Orient Shipping Rotterdam BV, The Laconian Confidence [1997] 1 Lloyd's Rep 139

Facts

The *Laconian Confidence* was chartered on the NYPE form for one time charter trip from Yangon to Bangladesh. Authorities at Chittagong refused to allow the vessel to proceed to her next business following discharge of her cargo of 10,000 metric tons of rice in bags because of the presence remaining on board of 15 tonnes of residue sweepings. As a result the vessel was delayed for nearly 18 days until she was allowed to dump these residues and thereafter to sail. Charterers argued that the vessel was off-hire during this period.

Held

Rix J: This is, for the present, the latest in a line of cases arising out of the New York Produce Exchange's off-hire clause and the problem created by the interference of authorities. As a result of such interference, the vessel, although entirely sound and efficient in herself, is prevented from working, that is to say from performing the next task required of her. Is the vessel off-hire, on the ground that she has been prevented from working by some 'other cause', ie by some cause other than the named causes in the clause? Or does she remain on hire, because the vessel remains entirely efficient in herself, and/or because the *ejusdem generis* principle curtails 'any other cause' to causes similar to the named causes?

My reader will recall that the NYPE's off-hire clause (clause 15) provides as follows:

> That in the event of the loss of time from deficiency of [*and/or default*] men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost . . .

The words in italics 'and/or default' were added to the standard clause in the instant case, as they often are. (They were in error slightly misplaced: the obvious intent is that the clause should read 'deficiency and/or default of men'; but nothing turns on that.) The word 'whatsoever' is sometimes added to the phrase 'or by any other cause', but not in the instant case. It is established that the phrase 'preventing the full working of the vessel' qualifies not only the phrase 'any other cause' but also all the named causes: *The Mareva AS* [1977] 1 Lloyd's Rep 368 at 382. It has therefore been said that the first question to be answered in any dispute under the clause is whether the full working of the vessel has been prevented; for if it has not, there is no need to go on to ask whether the vessel has suffered from the operation of any named cause or whether the phrase 'any other cause [whatsoever]' is or is not limited in any way: *The Aquacharm* [1982] 1 Lloyd's Rep 7 at 9; *The Roachbank* [1987] 2 Lloyd's Rep 498 at 507.

The Mareva AS is also cited for the proposition that the qualifying condition 'preventing the full working of the vessel' is not met if 'the vessel in herself remains fully efficient in all respects'.

Ten years later, by time of *The Roachbank*, this had become:

> a judicial gloss . . . so that the question which has to be asked, according to the authorities, is whether the vessel is fully efficient and capable in herself of performing the service immediately required by the charterers . . .

Nevertheless, this judicial gloss has caused problems in cases where the cause of delay is the interference of authorities operating on a vessel which is herself fully efficient. Four cases in particular illustrate this problem. In *The Apollo* [1978] 1 Lloyd's Rep 200 the vessel was denied free pratique and thus prevented from berthing and discharging while the suspicion of typhus in two of her crew members was investigated and, as it turned out, eliminated. In *The Aquacharm* [1980] 2 Lloyd's Rep 237, Lloyd J [1982] 1 Lloyd's Rep 7, CA, the vessel was delayed by the authorities at the entrance to the Panama Canal until she had lightened part of her cargo. In *The Mastro Giorgis* [1983] 2 Lloyd's Rep 66 the vessel was arrested by receivers as a result of alleged cargo damage on the voyage. In *The Roachbank* the vessel was delayed in being permitted to enter port because of the presence on board her of 293 Vietnamese refugees. In the first and third of those cases the vessel was held to be off-hire, in the second and fourth on hire. The word 'whatsoever' lies on both sides of that divide for, although it was absent in *The Aquacharm*, it was present in the other cases . . .

The authorities

. . . I would . . . observe at the outset of my discussion of those authorities that there appear to be two interrelated concepts which run here and there through them. One is that the typical off-hire clause does not cover an 'extraneous' cause, by which is, I think, meant a cause extraneous to the vessel itself. This concept I suppose relates to the meaning or possible width of meanings of 'cause' in the expression 'any other cause' or 'any other cause whatsoever'. The other concept is that a vessel cannot be off-hire unless there is some defect or incapacity of or in the vessel itself which affects her working. This concept relates of course to the phrase 'preventing the full working of the vessel'.

Both concepts may be said to go back to what in a sense is for these purposes the leading case of *Court Line Limited v Dant and Russell Incorporated* (1939) 44 Com Cas 345. That concerned a vessel, the *Errington Court*, which got caught by a boom placed in the Yangtze River by Chinese forces. For a leading case the relevant part of the judgment is brief. At pp 352–53 Branson J merely opined that the words 'any other cause preventing the full working of the vessel':

> are not apt to cover a case where the ship is in every way sound and well found, but is prevented from continuing her voyage by such a cause as this.

. . . The concept of an extraneous cause was not . . . in issue in *The Mareva AS*, nor was that expression used in the *Court Line* case. But in *The Apollo* counsel for shipowners based a submission upon *Court Line* and *The Mareva AS* to the effect that:

> the off-hire clause applied to matters internal to the ship and her crew and not to external interferences or delays (at p 205).

However, Mocatta J rejected that submission. He said (*ibid*):

> I find it very difficult to lay down criteria of this kind. For example if a surveyor from a classification society required tests to be made to the machinery, would the delay consequent upon this bring the off-hire clause into play?

So far the concept of extraneous or external cause had not perhaps got very far: but in *The Aquacharm* [1980] 2 Lloyd's Rep 237 at 240 Lloyd J relied expressly on *Court Line* to eliminate 'some external cause, such as the boom' as a possible off-hire cause at any rate when the vessel remained 'fully efficient in herself'. Those decisions were in turn relied on by the Court of Appeal

in *Harmony Shipping Co SA v Saudi-Europe Line Ltd, The Good Helmsman* [1981] 1 Lloyd's Rep 377 at 422.

Then in *The Mastro Giorgis* Lloyd J held that a distinction should be made, in deciding whether a cause prevents the full working of a vessel:

> between causes which are totally extraneous, such as the boom in *Court Line Ltd v Dant & Russell Inc*, and causes which are attributable to the condition of the ship itself, such as engine breakdown (at p 69).

Lloyd J then went on to decide that a vessel's susceptibility to arrest by reason of an allegation of cargo damage was sufficient to prevent the arrest itself being totally extraneous . . .

. . . It follows that in *The Mastro Giorgis* Lloyd J was not giving to the words 'preventing the full working of the vessel' a meaning that required the vessel to be inefficient in herself. Her full working was only prevented inasmuch as she was under arrest . . .

. . . *The Mastro Giorgis* is therefore a decision to the effect that a vessel's inability to perform the service immediately required of her by reason of the interference of authorities fulfils the requirements of the words 'preventing the full working of the vessel', at any rate if the authorities' interference is not totally extraneous. A vessel may of course be susceptible to the interference of authorities for a whole variety of reasons: the arrest jurisdiction is one such reason, but in truth any vessel visiting a port becomes immediately subject to the law of the country in which the port is situated and to the requirements and directives of the local authorities.

The off-hire clause in *The Mastro Giorgis* contained the word 'whatsoever'. That meant, said Lloyd J at p 92, that any cause may suffice to put the vessel off-hire, whether physical or legal. Lloyd J's reasoning thereafter appears to be concerned with the qualification of 'preventing the full working of the vessel'. The effect of his reasoning, however, appears to be that under a 'whatsoever' clause outside interference which prevents the vessel performing her service, provided that it is not 'totally extraneous', will put the vessel off-hire.

I would comment that, if Lloyd J was wrong in his conclusion that an efficient vessel may be prevented from working by the action of the authorities, then it would be odd if the addition of the word 'whatsoever' could make any difference. If a vessel efficient in herself cannot be within the words 'preventing the full working of the vessel', then it does not seem to me that the nature of the cause which operates on such a vessel can alter the fact that the vessel is efficient in herself. In such a case, widening the ambit of 'cause' by adding the word 'whatsoever' ought not in logic to affect the position.

In *The Roachbank*, however, Lloyd J's conclusion in *The Mastro Giorgis* was not applied. In that case the vessel was prevented for a while from entering port by the authorities because of the presence on board of Vietnamese refugees who had been rescued in pitiful condition at sea during the vessel's voyage. The off-hire clause contained the word 'whatsoever' . . . Webster J felt required by previous authorities to place upon the words 'preventing the full working of the vessel' a judicial gloss:

> so that the question which has to be asked, according to the authorities, is whether the vessel is fully efficient and capable in herself of performing the service immediately required by the charterers (at p 507).

In the circumstances it was inevitable that he should uphold the award, for he was bound by the arbitrators' finding on that question. Equally, it would be irrelevant for him that the vessel could not work in the different sense that she was prevented from entering port and discharging by the action of the port authorities. In the circumstances, having been asked by counsel (see at p 502) to differ from the conclusions of Lloyd J in *The Mastro Giorgis,* he expressed his diffident disagreement with that decision in these terms (at p 507):

> . . . for two reasons; first, because it seems to me to give undue emphasis to the cause of the prevention of the full working, as distinct from the fact that full working is prevented; and,

> secondly because, for the reasons that I have already expressed, in the case of an amended clause in my view it is probably unnecessary to consider the nature of the cause at all, something which Lloyd J himself acknowledged in the way in which he stated his second reason: 'any cause may suffice'. Moreover, for my own part, I do not think it either necessary or helpful to attempt to categorise causes with a view to distinguishing between totally extraneous and other causes.

I feel bound to say, however, with equal diffidence, that in my judgment the real point of difference between Lloyd J and Webster J (and perhaps both of them, reading this, would disagree with me) was that Lloyd J was willing to say that a vessel wholly efficient in herself might nevertheless, under certain circumstances, come within the words 'preventing the full working of the vessel', whereas Webster J was of the view, based upon his reading of the authorities, that such a reading was not possible where the vessel was fully efficient and capable in herself . . .

So, as it seems to me, the critical question may well be whether Webster J was right to say that a judicial gloss had been put upon the phrase so as to require, for a vessel to be off-hire, that she should not be efficient in herself to perform the next service required. The authorities considered by Webster J were *Court Line*, *The Mareva AS*, *The Apollo*, and *The Aquacharm*.

I have already considered *Court Line* and *The Mareva AS*. In my opinion there is nothing in those cases to require the judicial gloss which Webster J found to exist. *Court Line* differed perhaps from all other cases in that the boom there was a totally extraneous matter – I know of no other way in which to point up that idiosyncrasy. Although it was man-made, it was akin to a geographical impediment. A vessel is not off-hire just because she cannot proceed upon her voyage because of some physical impediment, like a sand bar, or insufficiency of water, blocking her path. While remarking that the vessel was 'in every way sound and well found' Branson J ultimately founded his reasoning, it seems to me, on the fact that 'such a cause as this' was not within the clause. As for *The Mareva AS,* I have already made the point that that case was not concerned at all with the interference of authorities. The language of a vessel's inherent efficiency is there found, but in circumstances where there was no interference with the vessel's service, and the distinction that had to be made was between the efficiency of the vessel herself and the increased time involved in the discharge of a damaged cargo. In such circumstances it comes as no surprise that Kerr J used the language which he did, nor that he found that the cargo damage had not prevented the full working of the vessel. The vessel, after all, was working fully.

Similarly I do not think that *The Apollo* supports the judicial gloss determined by Webster J, nor did he found any reliance on it. On the contrary, Mocatta J said (at 205):

> In my judgment the action taken by the port health authorities did prevent the full working of the vessel and did bring the off-hire clause into play.

It seems to me that in saying this Mocatta J was recognising that a vessel could be prevented from working by an outside bar on her working. That is not consistent with glossing the critical phrase as requiring some failure of the vessel's efficiency in herself. Of course I bear in mind that in that case there was suspected typhus of the crew.

The last case considered by Webster J was *The Aquacharm*. It was Lloyd J himself who, at first instance, introduced the judicial test of whether:

> the vessel is fully efficient in herself, that is to say, whether she is fully capable of performing the service immediately required of her (at p 240).

I would comment in passing first that the test of 'fully efficient in herself' is not necessarily the same as the test of 'fully capable of performing the service immediately required of her' as Lloyd J was himself to recognise in *The Mastro Giorgis*; and secondly, that on the facts of that case, once the vessel had to be lightened to transit the Panama Canal, there could have been no difference between the service required by the charterers and that required by the canal authorities, *viz*, the lightening of the vessel.

In the Court of Appeal in *The Aquacharm*, Lord Denning MR did not adopt the gloss of 'fully efficient in herself'. He merely said (at 9):

> I do not think the lightening of the vessel does 'prevent the full working of the vessel'. Often enough cargo has to be unloaded into a lighter – for one reason or another – to get her off a sandbank – or into a basin. The vessel is still working fully, but she is delayed by the need to unload part of the cargo.

Griffiths LJ did, however, adopt the judicial gloss. For instance he said (at p 11):

> *Aquacharm* remained at all times in herself fully efficient in all respects. She could not pass through the canal because the canal authorities decided she was carrying too much cargo, but that decision [in] no way reflected upon the *Aquacharm*'s efficiency as a ship. By contrast, in *The Apollo* . . . A ship suspected of carrying typhus is prevented from working fully until it is cleared, for no responsible person would use it in such a condition. The incapacity of the ship to work in such a case is directly attributable to the suspected condition of the ship itself . . .

Shaw LJ said that he agreed entirely with the judgments of Lord Denning and of Lloyd J and would dismiss the appeal for the reasons stated in the judgment of Lord Denning (at p 12).

The judgment of Griffiths LJ and his explanation of *The Apollo* have been influential; but the reasoning of the majority in the Court of Appeal is that contained in the judgment of Lord Denning, and that in my view does not support, and *a fortiori* does not require, the judicial gloss found by Webster J. Of course, *The Aquacharm* was fully efficient in herself, that was one of the facts of the case. Equally, it was a fact of the case that the vessel was fully working when she was waiting to lighten and actually lightening. That, however, may be contrasted with the situation in *The Apollo*, where the vessel was not working at all during the period when free pratique was refused; and could also be contrasted perhaps with a hypothetical situation where the Panama Canal authorities perversely refused entrance to the canal on grounds of draught, even though the vessel plainly was not overladen, a problem with which the Court of Appeal did not have to contend . . .

In these circumstances I would for my part respectfully differ from Webster J's conclusion that he was bound by authority to impose the judicial gloss he adopted upon the phrase 'preventing the full working of the vessel'. I would prefer myself to accept that it could be legitimate to find that the full working of a vessel had been prevented by the action of authorities in preventing her working . . .

Two further decisions cited to me but not mentioned by Webster J are *The Manhatton Prince* [1985] 1 Lloyd's Rep 140 and *The Bridgestone Maru No 3* [1985] 2 Lloyd's Rep 62. It may be that they were not cited to Webster J, or if cited not mentioned in his judgment, because they are both decisions on the Shelltime 3 clause with its slightly different language 'preventing the *efficient* working of the vessel' (emphasis added). The efficiency of the vessel is mentioned twice in the clause, thus:

> In the event of loss of time . . . due to deficiency of . . . or any other cause preventing the efficient working of the vessel . . . hire shall cease to be payable from the commencement of such loss of time until the vessel is again ready and in an efficient state to resume her service . . .

In *The Manhatton Prince* the vessel was arrested by the ITF on the ground that her owners were in breach of their agreement with the ITF to employ crew in accordance with ITF rates for worldwide trading. Leggatt J considered the authorities down to *The Mastro Giorgis* and held that the vessel remained on hire. He said (at p 146):

> It is plain that what the charterers have to show is that the efficient working of the vessel was indeed prevented by the ITF. One starts then by asking: what is the natural meaning of the words in that context? One may take account of the *ejusdem generis* principle in the sense that the causes of loss of time which are specified may indeed throw light upon the proper meaning to be ascribed to the phrase 'efficient working of the vessel'.

> It seems to me that the true interpretation of the phrase in its context demands that it should apply, and apply only, to the physical condition of the vessel, with the result that, as Mr Phillips contends, the phrase 'efficient working' must enjoy the connotation of efficient physical working. In my judgment the vessel worked, even though she was prevented from working in the way the charterers would have wished by the action of the ITF. She was indeed fully operational and as such was not within the scope of the off-hire clause.

In *The Bridgestone Maru No 3* it will be recalled that the vessel was unable to remain and discharge at Livorno because her booster pump was not a fixed installation as required by local RINA regulations. She was nevertheless in every way an efficient vessel. Hirst J considered the same authorities and held that the vessel was off-hire on the ground that the delay was attributable to the suspected condition of the ship . . .

I find nothing in these two cases, or in their examination of the NYPE authorities, to alter the view I have formed of those authorities. On the contrary, it seems to me that the Shelltime 3's emphasis upon the efficiency of the vessel is a real difference from the language of the NYPE, fully justifying Leggatt J's conclusion that the former's off-hire clause applies only to the physical condition of the vessel or at any rate to her efficiency as a vessel (including, I would readily accept, her suspected efficiency). It seems to me that Leggatt J pointed up the difference in the language of the two forms when he said:

> the vessel worked, even though she was prevented from working in the way the charterers would have wished . . .

In my judgment therefore, the qualifying phrase 'preventing the full working of the vessel' does not require the vessel to be inefficient in herself. A vessel's working may be prevented by legal as well as physical means, and by outside as well as internal causes. An otherwise totally efficient ship may be prevented from working. That is the natural meaning of those words, and I do not think that there is any authority binding on me that prevents me from saying so. The question remains, of course, whether a ship has been prevented from working by a cause within the clause. Moreover, it will generally be relevant to find whether the ship is efficient in herself: either, as in *The Mareva AS,* because, even on the assumption of the operation of a named cause, it may be relevant to point out that the vessel's working had not been prevented; or, as in *Court Line*, because, in considering whether an alleged cause of off-hire is a cause within the clause, it may be very pertinent to point out that the vessel was otherwise efficient in herself.

Those comments bring me back to consider the phrase 'any other cause' in the light of the authorities. In my judgment it is well established that those words, in the absence of 'whatsoever', should be construed either *ejusdem generis* or at any rate in some limited way reflecting the general context of the charter and clause: see *The Apollo* at p 205, *The Aquacharm* at p 239 (Lloyd J), *The Mastro Giorgis* at p 68, *The Manhatton Prince* at p 146, *The Roachbank* at p 507. A consideration of the named causes indicates that they all relate to the physical condition or efficiency of either vessel (including its crew) or, in one instance, cargo. There is, moreover, the general context, emphasised for instance by Kerr J in *The Mareva AS* (at p 382), that it is for the owners to provide an efficient ship and crew. In such circumstances it is to my mind natural to conclude that the unamended words 'any other cause' do not cover an entirely extraneous cause, like the boom in *Court Line*, or the interference of authorities unjustified by the condition (or reasonably suspected condition) of ship or cargo. *Prima facie* it does not seem to me that it can be intended by a standard off-hire clause that an owner takes the risk of delay due to the interference of authorities, at any rate where that interference is something beyond the natural or reasonably foreseeable consequence of some named cause. Where, however, the clause is amended to include the word 'whatsoever', I do not see why the interference of authorities which prevents the vessel performing its intended service should not be regarded as falling within the clause, and I would be inclined to say that remains so whether or not that interference can be related to some underlying cause internal to the ship, or is merely capricious. That last thought may be controversial, but it

seems to me that if an owner wishes to limit the scope of causes of off-hire under a clause which is deliberately amended to include the word 'whatsoever', then he should be cautious to do so.

The decision

It follows in my judgment that, although I would for my part accept Mr Kendrick's submission that the full working of a vessel may be prevented for legal as well as physical reasons, this appeal must nevertheless fail. In the absence of the word 'whatsoever', the unexpected and unforeseeable interference by the authorities at Chittagong at the conclusion of what was found to be a normal discharge was a totally extraneous cause, (save in a 'but for' sense) unconnected with, because too remote from, the merely background circumstance of the cargo residues of 15.75 tonnes. There was no accident to cargo, and there was nothing about the vessel herself, her condition or efficiency, nor even anything about the cargo, which led naturally or in the normal course of events to any delay. If the authorities had not prevented the vessel from working, she would have been perfectly capable of discharging the residues or of sailing and dumping them without any abnormal delay. In such circumstances I reject Mr Kendrick's submission that the action of the authorities was in any sense *ejusdem generis* any of the named causes within the clause. There is no finding that they suspected an average accident to cargo, or, to pick up the award's reference to a certificate for non-radioactivity, that there was any suspected problem in regard to radioactive contamination. I would be extremely doubtful in any event that a capricious suspicion could bring their action within the clause. As it is we do not know why on this occasion the authorities delayed the vessel for so long, other than the arbitrators' finding that their procedures were remarkably bureaucratic.

Having decided the issue before me, I should perhaps go no further. But out of deference to the submissions made to me, I would venture the following thoughts, but emphasising their *obiter* nature.

I would suggest that if the clause had been amended to contain the word 'whatsoever', then the position would probably have been otherwise. The vessel would have been prevented from working, albeit in unexpected circumstances. The cause would not have been *ejusdem generis*, but with the addition of the word 'whatsoever' would not have to be. It would not seem to me to matter that the authorities' actions may have been capricious.

The authorities suggest, moreover, that where the authorities act properly or reasonably pursuant to the (suspected) inefficiency or incapacity of the vessel, any time lost may well be off-hire even in the absence of the word 'whatsoever'. Thus in *The Apollo* (albeit the presence of 'whatsoever' may have facilitated the decision) Mocatta J stressed that there was good cause for the careful testing and disinfection that was carried out before free pratique was granted (at p 205); and Griffiths LJ pointed out (in *The Aquacharm* at p 11) that no responsible person would use a ship suspected of carrying typhus. Moreover in *The Bridgestone Maru No 3* Hirst J held that the vessel was off-hire even in the absence of the word 'whatsoever' on the basis that the regulations had been properly applied and that the failure of the pump to comply with the regulations was a potential (*sc* and reasonable) challenge to the efficiency of the ship herself.

Finally, suppose time lost due to the detention of a vessel by the authorities arising out of the discovery of contraband on board her, an example debated before me. In such a case the position may well depend on who was responsible for the presence of the contraband. If the owners (or their crew) were responsible, the vessel might well be off-hire, particularly under an amended clause, but even perhaps in the absence of amendment. If, however, the charterers were responsible, it would seem to be absurd to hold the vessel off-hire: how would that square under an amended clause with my construction, seeing that the detention by the authorities under my construction would be 'any other cause whatsoever preventing the full working of the vessel'? It seems to me that there would be an implicit exclusion of causes for which the charterers were responsible.

Considerations such as these indicate that there will always be difficult decisions to make in borderline cases or unusual combinations of circumstances. In many if not most cases the ultimate

decision will depend on findings of fact or mixed fact and law made by the arbitrators, which could not be easily, if at all, faulted. So in the present case, even upon the construction of the words 'preventing the full working of the vessel' which I have preferred, and even after taking into account the charterers' shift of position, it seems to me that ultimately my decision is concluded for me by the arbitrators' findings.

7 REDELIVERY

Time charters typically require redelivery at the end of the period of the charter in good order at a port or place within an agreed range. The charter period may include an express or implied margin, as Lord Denning's judgment in *The Dione* explains.

Alma Shipping Corp of Monrovia v Mantovani, The Dione
[1975] 1 Lloyd's Rep 115, CA

Facts

The agreement was 'for a period of six months time charter 20 days more or less'. The Court of Appeal considered whether an additional margin could be implied.

Held

Lord Denning MR:

(a) *Implied margin or allowance*

When a charterparty is for a stated period – such as 'three months' or 'six months' – without any express margin or allowance, then the court will imply a reasonable margin or allowance. The reason is because it is not possible for anyone to calculate exactly the day on which the last voyage will end. It is legitimate for the charterer to send her on a last voyage which may exceed the stated period by a few days. If the vessel does exceed the stated period – and the market rate has gone up – nevertheless the charterer is only bound to pay the charter rate until she is actually redelivered, see *Gray and Co v Christie* (1889) 5 TLR 577: *Watson Steamship Co v Merryweather & Co* (1913) 18 Com Cas 294 at p 300 (without the handwritten words).

(b) *No margin or allowance express or implied*

But it is open to the parties to provide in the charterparty – by express words or by implication – that there is to be no margin or allowance. In such a case the charterer must ensure that the vessel is redelivered within the stated period. If he does not do so – and the market rate has gone up – he will be bound to pay the extra. That is to say, he will be bound to pay the charter rate up to the end of the stated period, and the market rate thereafter, see *Watson v Merryweather* (1913) 18 Com Cas 294 (with the handwritten words).

(c) *Express margin or allowance*

It is also, in my opinion, open to the parties themselves to fix expressly what the margin or allowance shall be. In that case the charterer must ensure that the vessel is redelivered within the permitted margin or allowance. If he does not do so – and the market rate has gone up – he will be bound to pay the extra. That is to say, he will be bound to pay the charter rate up to the end of the expressly permitted margin or allowance, and the market rate for any overlap thereafter . . .

In view of those three propositions, when I speak of the 'charter period', I mean the stated period plus or minus any permitted margin or allowance, express or implied. There follows these two propositions:

(d) If the charterer sends the vessel on a legitimate last voyage – that is, a voyage which it is reasonably expected will be completed by the end of the charter period, the shipowner must obey the directions. If the vessel is afterwards delayed by matters for which neither party is responsible, the charter is presumed to continue in operation until the end of that voyage, even though it

extends beyond the charter period. The hire is payable at the charter rate until redelivery, even though the market rate may have gone up or down, see *Timber Shipping Co SA v London & Overseas Freighters Ltd* [1972] AC 1.

(e) If the charterer sends the vessel on an illegitimate last voyage – that is, a voyage which it cannot be expected to complete within the charter period, then the shipowner is entitled to refuse that direction and call for another direction for a legitimate last voyage. If the charterer refuses to give it, the shipowner can accept his conduct as a breach going to the root of the contract, fix a fresh charter for the vessel, and sue for damages. If the shipowner accepts the direction and goes on the illegitimate last voyage, he is entitled to be paid – for the excess period – at the current market rate, and not at the charter rate, see *Meyer v Sanderson* (1916) 32 TLR 428. The hire will be payable at the charter rate up to the end of the charter period, and at the current market rate for the excess period thereafter.

. . . If this clause had said simply 'six months time charter' without any express margin or allowance, I should have thought that there would be implied a reasonable margin or allowance. But this clause expressly defines the margin as '20 days more or less'. That leaves no room for any implied margin or allowance. The express margin is greater than any period which would normally be implied . . .

Note

Paragraphs (a) to (c) in Lord Denning's judgment, dealing with the charter period and margins, are conventional and widely accepted. But paragraph (d) has been criticised and said not to be settled law: *Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co Ltd, The Peonia* [1991] 1 Lloyd's Rep 100, CA. In that case it was said, *obiter,* that 'if charterers send a vessel on a legitimate last voyage and the vessel is thereafter delayed for any reason (other than the fault of the owners) so that it is redelivered after the final terminal date, the charterers will (in the absence of agreement to the contrary) be in breach of contract and accordingly, if the market rate has gone up, will be obliged to pay by way of damages the market rate for any excess period after the final terminal date up to redelivery' (*per* Slade LJ). The phrase *final terminal date* here means the date at the end of the charter period and any agreed or implied margin or tolerance. It was acknowledged in *The Peonia* that charter hire remains payable until actual delivery, so that the practical difference between the two cases is that only hire is payable if the market has dropped, but damages are payable in addition if owners have suffered because the market has risen. The technical difference between the two positions is that *The Peonia* treats a charterer who fails to redeliver by the final terminal date as in breach of contract while the *The Dione* does not, provided the final voyage instructions were legitimate. *The Peonia* was cited with approval in the House of Lords in *Torvald Klaveness A/S v Arni Maritime Corp, The Gregos,* below, by Lord Mustill.

7.1 The legitimate final voyage

The judgment in *The Dione* used the phrase *legitimate final voyage* to refer to a voyage that can reasonably be expected to be completed within the charter period. The reference to the effect of a subsequent delay in Lord Denning's judgment suggested that the legitimacy of the instruction was to be considered at the moment the order was given. But when this point was fully argued in the House of Lords in *The Gregos*, a different solution was adopted. An apparently valid order was said to be 'no more than a contingency' so that if circumstances change and compliance with the order would call for a service that the owner had not undertaken to perform, the obligation to comply would fall away.

Torvald Klaveness A/S v Arni Maritime Corp, The Gregos
[1994] 1 WLR 1465, HL

Facts

The *Gregos* was chartered 'for about 50 to maximum 70 days' (thus excluding any further margin). The charterers ordered the vessel to carry a cargo of iron ore from Palau, on the Orinoco river, to Fos, prior to redelivery. If judged when the order was given, compliance with the order could reasonably have been judged to allow redelivery by the last permissible date. But obstructions in the Orinoco caused delays which meant that if the orders were followed, the vessel could not be redelivered in time. The owners then declined to perform the laden voyage and called for fresh instructions. No such orders were given but the voyage was in fact performed on terms that gave the owners an increased rate of hire if subsequent proceedings found that they had been entitled to decline the final instruction. Two issues were argued before the House of Lords: (1) Should the validity of the order for the final voyage be judged as at the time when it was given or as at the time when it fell to be complied with? (2) If the validity of the order was to be judged in the light of matters as they stood when the owners declined to comply, so that the voyage was not one for which a legitimate order could be given, what was the effect of the charterers having given the order and their refusal to replace it by another?

Held

> **Lord Mustill:** … I begin with the first issue, concerning the date for judging the validity of the charterers' order. Here, it seems to me that the inquiry has been led astray by concentrating too much on the order and too little on the shipowner's promise to furnish the services of the vessel, which is what the contract is about. Initially, the practical implications of the promise are undefined, since they depend on how in the future the charterer decides to employ the vessel; but they are not unlimited, being constrained from the start as to duration, nature and extent by express terms in the charter (concerning for example the types of cargo to be carried and the geographical limits of trade) and also by important implied terms. Later, when the time for performance has arrived, this broad promise is converted to a series of specific obligations by the charterer's orders for employment, but the constraints expressly or impliedly accepted by the charterer in the original contract continue to apply. Whatever the charterer may order, a service which falls outside the range encompassed by the owner's original promise is not one which he can be compelled to perform; and this is so as regards not only the duration of the chartered service, but also all the other limitations imposed by the charterparty on the charterer's freedom of choice. There is thus to be a measuring of the service called for against the service promised. As a matter of common sense, it seems to me that the time for such measurement is, primarily at least, the time when performance falls due.
>
> My Lords, I have qualified this statement with the words 'primarily at least' because in practice the interests of both parties demand that the charterer is entitled to give orders in advance of the time for performance; and this must entail at least a provisional judgment on the validity of the order. If it can be seen at this early stage that compliance will involve a service which lies outside the shipowner's undertaking the latter can say so at once, and reject the order. But if the order is apparently valid its validity is no more than contingent, since the time for matching the service against the promise to serve does not arrive until the nature of the service is definitively known; and this will not usually be until the service is due to begin, or in some instances until it is already in progress. Thus, if and for so long as the service required conforms with those which the shipowner promised in advance to render the specific order creates a specific obligation to perform them when the time arrives. But only for so long as that state of affairs persists. If circumstances change, so that compliance with the order will call for a service which in the original contract the shipowner never undertook, the obligation to comply must fall away. As I see

it, the charterers' order in advance amounts to a continuing requirement, the validity of which may change with the passage of time …

I turn to the issue of repudiation. Although the appeal is concerned with an invalid order for a final voyage this is only a special case of an order issued for the performance of a service which lies outside the scope of the shipowner's promise. Since orders for employment and compliance with them lie at the heart of a time charter the question is of general importance, and the solution arrived at should hold good for all types of order …

The original order having become ineffectual the charterers were obliged by cl 11 to replace it with one which they were entitled to give. Whether at the time of the cancellation they had committed an actual breach of this obligation is debatable, but at all events the breach was not final, since (if I correctly understand the arbitrator's reasons) there would have been time if all else failed for the charterers to ballast the vessel back to the redelivery area before the final date, or conceivably to issue an order for a revised laden voyage. But it is plain from the facts stated by the arbitrator that the charterers had no intention of doing this, and that the critical time would pass without any valid orders being given. This is the significance of the changed circumstances which rendered the original order invalid. Not that the order constituted a repudiation in itself, but that the charterers' persistence in it after it had become invalid showed that they did not intend to perform their obligations under the charter. That is to say, they 'evinced an intention no longer to be bound' by the charter. This was an anticipatory breach, which entitled the owners to treat the contract as ended …

7.2 Redelivery in disrepair

Most time charters call for redelivery in repair. But good repair is not normally a condition precedent to redelivery. *The Puerto Buitrago* related to a demise charter, but the judgment cites cases dealing with time charters and the principle applied was said to be common to both forms of contract.

Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH, The Puerto Buitrago [1976] 1 Lloyd's Rep 250, CA

Facts

The *Puerto Buitrago* was to be redelivered in good repair. Repairs would have cost twice the value of the vessel. The owners claimed that the charterers had to pay charter hire until repairs were complete.

Held

Lord Denning MR: The first question is as to the true construction of the charterparty. I will not set it out in full, but in substance the question is whether or not, on the wording of the charterparty, the charterers are entitled to redeliver the vessel now: or must wait until after the ship has been surveyed and all repairs done (ordinary wear and tear excepted) and passed in class without recommendations …

… it is plain that the charterer is under an obligation to put the vessel in good repair before redelivery. But the question is whether that stipulation is a condition precedent to his right to redeliver the vessel (so that he is not entitled to redeliver the vessel until he has performed it): or whether it is merely a stipulation which, if broken, gives a remedy in damages but does not prevent him from redelivering the vessel to the owner. This is the sort of question which has come before the courts for the last 200 or 300 years. I summarised the history in *Cehave NV v Bremer mbH* [1975] 3 WLR 447 at pp 453–54.

The parties can, by clear words, provide that complete performance of a particular stipulation can be a condition precedent: but, in the absence of clear words, the court looks to see which of the

rival interpretations gives the more reasonable result. Lord Reid said so in *Wickman v Schuler* [1974] AC 235 at p 251E. He said:

> The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it, the more necessary it is that they shall make that intention abundantly clear.

There are only two cases in the books where the courts have had to apply this principle to the obligation to repair a ship. They were both cases of ordinary time charters (not by demise). The first is the *Wye Shipping* case [1922] 1 KB 617. McCardie J looked to see what was reasonable. He said:

> In my opinion they [the charterers] are not liable for hire after they have tendered redelivery at the proper time. If the rule were otherwise, it seems to me that absurd situations would arise.

and he gave an illustration of such an absurdity. That case was followed in *Black Sea v Goeland* (1942) 74 LIL Rep 192 by Atkinson J, who regarded it as authority that 'the contract terminated on redelivery whether the repairs had been effected or not'.

> Those were both cases of ordinary time charters in which the word 'redelivery' is used in a different sense from that in a demise charterparty … But the distinction makes no difference to our present question. The illustration given by McCardie J of an absurdity can be applied equally to a charterparty by demise. Another illustration was given in the present case. Suppose some spare parts were needed for the turbo-generator (so as to maintain classification without recommendations or qualifications), and it would take some months to get them. It would be most unreasonable to require the charterer to keep the vessel – and pay the hire – for the months that would elapse. It was suggested that the doctrine of frustration would apply, but I do not think it would. The correct answer is that the obligation to repair in cl 15 (in class without recommendations) was not a condition precedent to the right to redeliver, but only a stipulation giving a remedy in damages …

7.3 Redelivery at the wrong place

The owner has a contractual right to have the ship kept in employment at the charter rate of hire until the ship reaches the agreed place of redelivery. Breach of the obligation gives a right to damages calculated on the basis of the hire that would have been earned by the shortest voyage to the agreed place.

Santa Martha Baay Scheepvaart and Handelsmaatschappij NV v Scanbulk A/S, The Rijn [1981] 2 Lloyd's Rep 267

Facts

Charterers redelivered the ship at Galveston rather than at a Japanese port as required by the charter. The owners claimed damages.

Held

> **Mustill J:** … For the charterers it is pointed out that where a charterer has tendered the vessel for redelivery at a port within the redelivery range, the tender is valid even 'if the vessel is not, as she ought to be, in the same good order and condition as on delivery': *Wye Shipping Co Ltd v Compagnie du Chemin de Fer Paris-Orleans* (1922) 10 LIL Rep 55, and *The Puerto Buitrago* [1976] 1 Lloyd's Rep 250. They say that there should be a similar result where the complaint is reversed. If the charter terminates when the ship is redelivered at the right port in the wrong condition, then it should equally come to an end when she is redelivered at the wrong port in the right condition.

This argument sounds attractive, but I do not accept it. There is no true analogy between the two situations. Both legal and commercial considerations demand that the charter shall come to an end, even if the condition of the vessel on redelivery is unsatisfactory. So far as concerns the law, the contractual service is defined in terms of the place or time, or both, at which the vessel is redelivered. The stipulation concerning the vessel's condition on redelivery is not part of this definition. Once the stated time has expired, or the stated port or range has been reached, the period of hiring is accomplished, even if the charterer is in breach at the time. Equally, from a commercial point of view, it would be absurd if the charter were to run on indefinitely, with the charterer obliged to retain the ship in service, even though there was no longer any voyage upon which she could permissibly be sent.

The position is quite different where the ship is tendered at a port which is not within the redelivery range. Here there is no question of the charterer breaking a collateral obligation attaching at the moment of redelivery, nor is it the owner's sole complaint that the ship has been returned to him in the wrong place. He has a contractual right to have the ship kept in employment at the charter rate of hire until the service is completed. This does not happen until the ship reaches the redelivery range, and the voyage to that range forms part of the chartered service. In a case such as the present, therefore, the tender is not only in the wrong place but also at the wrong time; and full compensation for the breach requires the charterer to restore to the owner the hire which he would have earned if the voyage had in fact been performed.

I therefore consider that the arbitrators were right in basing their award of damages on the cost of a notional final voyage to Japan …

This is not the end of the question of damages, for there remains a dispute as to the basis on which to calculate loss of hire on the notional redelivery voyage. For how long should that voyage be presumed to have lasted?

Apart from any express agreement as to the nature of the voyage, there is little room for doubt. It is quite clear that where a promisor has the choice of how his promise shall be performed, it is presumed for the purpose of calculating damages that he would have chosen the way which would have brought least benefit to the promisee. This principle, that an option is presumed to have been exercised in the way which reduces damages to a minimum, is too well established to require citation in support. Applying this approach to the present case yields the conclusion that the loss should be assessed in terms of the voyage which would have yielded the least hire. This was a voyage to the nearest safe port within the redelivery range, namely, Yokohama; and it would have been a voyage in ballast, because this would have saved time which would otherwise have been occupied.

CHAPTER 16

STATUTORY EXCLUSION AND LIMITATION OF LIABILITY

This subject has a long history. As an introduction to the modern law, the first extract in this chapter outlines the legislative background.

Abbott, C, *Merchant Ships and Seamen*, 1802, London

Of the Limitation of the Responsibility of the Owners and Master

1 In considering the instances, in which the owners are answerable to the merchant for the loss or damage of his goods, I have hitherto forborn to mention the limits of their responsibility, and have treated them as being responsible up to the full extent of the amount of such loss or damage; and so both by the Civil Law and by the Common Law of England they formerly were …

The ancient laws of *Oleron*, *Wisbuy* and the *Hanse-Towns*, contain no provision on this subject. Nor is any alteration of the rule of the Civil Law noticed by *Roccus*, although *Vinnius*, an earlier author, says, that by the law of Holland the owners are not chargeable beyond the value of the ship and the things that are in it; in conformity to which principle the *French* Ordinance declares, 'that the owners of ships shall be answerable for the acts of the master, but shall be discharged therefrom upon relinquishing their ship and the freight'. A similar provision is contained in the Ordinance of *Rotterdam* made in 1721, which declares, 'That the owners shall not be answerable for any act of the master done without their order, any further than their part of the ship amounts to' … *Valin* in his commentary on the *French* Ordinance, informs us that the same regulations are also established at *Hamburg*.

2 The earliest provision of the British Legislature on this subject is a statute [Responsibility of Shipowners Act 1734] made a few years after the date of the Ordinance of *Rotterdam*, and which was passed in consequence of a petition presented to the House of Commons by several merchants and other persons owners of ships belonging to the port of London, setting forth the alarm of the petitioners at the event of a late action, in which it was determined that the owners were answerable for the value of merchandize embezzled by the master …

Notes

1 Abbott was Chief Justice of the Court of King's Bench 1818–32. The book was the leading work in the field in England at the start of the 19th century and made extensive use of codes and texts on maritime law from other jurisdictions.

- *Laws of Oleron*: a code, which exists in variant forms, the oldest articles of which appear to date from the 13th century and which was influential in western and northern Europe. Its precise origins and connection with the island of Oleron are uncertain.
- *Wisbuy*: a translation and adaption of *Oleron*, from Visby, Gotland.
- *Hanse-Towns*: probably a reference to the Hanseatic Ordinance of 1614.
- *Roccus*: Francesco Rocco 1605–76, advocate and judge, Naples*; Mercatorium Notabilia: de Navibus et Naulo*, 1655, Naples; 1708, Amsterdam.
- *Vinnius*: Arnoldus Vinnius 1588–1657, professor of law, Leyden; in *Petrus Peckius, Ad rem nauticam*, Leyden, 1647.
- *French Ordinance*: *Ordonnance de la marine,* 1681.
- *Valin:* a commentary on the *Ordonnance* of 1681, Rochelle, 1761.
- *Ordinance of Rotterdam*: from *Magens, An Essay on Insurances,* London, 1755, vol 2.

2 The case referred to in para 2 of the extract from *Abbott* is *Boucher v Lawson* (1734) Cas Temp Hard 85 where a claim was made against owners to recover the value of gold loaded in Portugal and stolen by the master. The 1734 Act declared that in future owners were not to be responsible for more than the value of the ship, equipment and freight for acts of the master or mariners which were done 'without the privity and knowledge' of the owners. An Act of 1786 added robbery not involving the master or crew to the acts for which a shipowner was entitled to limit liability. The same Act took away entirely responsibility for loss or damage by fire on board, and for the loss or damage to any gold, silver, diamonds, watches, jewels, or precious stones unless the nature, quality and value of the goods had been inserted in the bill of lading or declared in writing. Later British legislation in 1813 and 1854 gave owners the right to limit liability for damage arising from collisions and cases involving loss of life and personal injury. An Act of 1862 altered the limit of liability to a sum based on tonnage rather than the value of the ship. The legislation mentioned in this section has now been repealed, although traces of older ideas are still visible in the modern law, which is now contained in the Merchant Shipping Act 1995.

1 MODERN LAW: THE LIMITATION CONVENTION 1976

The 1976 International Convention on Limitation of Liability for Maritime Claims (LLMC 1976) permits shipowners and salvors to limit their liability for certain claims to the amounts fixed by the Convention. LLMC 1976 replaced the International Convention Relating to Limitation of Liability of Owners of Seagoing Ships, Brussels 1957. Forty States, representing 45% of the world's tonnage, are parties to the 1976 Convention, which raises the former ceiling of liability but makes that limit breakable only in the extraordinary circumstances defined in Art 4. The Convention is implemented in the UK by s 185 of the Merchant Shipping Act (MSA) 1995, which re-enacts earlier legislation (s 17 of the MSA 1979). The Convention is set out in Part 1 of Sched 7 of the 1995 Act. The 1976 Convention specifies distinct limits for two type of claim: loss of life and personal injury and, at a lower level, property claims. The limitation amounts are expressed in terms of units of account, which are defined as the special drawing right of the International Monetary Fund (changes in value can be tracked through the IMF website: www.imf.org).

In 1996, a Diplomatic Conference convened in London adopted a Protocol, not yet in force, to amend the 1976 Convention and, in particular, to increase the liability limits fixed in 1976. The Merchant Shipping and Maritime Security Act 1997 amends the 1995 Act and provides powers which will enable the revisions made by the Protocol to become law in the UK from a date to be fixed. The Protocol and other proposed amendments are shown in brackets in the following text.

2 MERCHANT SHIPPING ACT 1995

Limitation of liability of shipowners, etc and salvors for maritime claims

Limitation of liability for maritime claims

185—(1) The provisions of the Convention on Limitation of Liability for Maritime Claims 1976 as set out in Part I of Sched 7 (in this section and Part II of that Schedule referred to as 'the Convention') shall have the force of law in the United Kingdom.

(2) The provisions of Part II of that Schedule shall have effect in connection with the Convention, and subsection (1) above shall have effect subject to the provisions of that Part.

[2A–E. Inserted by the Merchant Shipping and Maritime Security Act 1997, s 15(1). These subsections permit revision of the financial limits in Sched 7 and allow Sched 7 to be modified to take account of revisions of the Convention and the amending Protocol of 1996.]

(3) The provisions having the force of law under this section shall apply in relation to Her Majesty's ships as they apply in relation to other ships.

(4) The provisions having the force of law under this section shall not apply to any liability in respect of loss of life or personal injury caused to, or loss of or damage to any property of, a person who is on board the ship in question or employed in connection with that ship or with the salvage operations in question if:

(a) he is so on board or employed under a contract of service governed by the law of any part of the United Kingdom; and

(b) the liability arises from an occurrence which took place after the commencement of this Act.

In this sub-section, 'ship' and 'salvage operations' have the same meaning as in the Convention.

(5) . . .

Exclusion of liability

186—(1) Subject to sub-s (3) below, the owner of a United Kingdom ship shall not be liable for any loss or damage in the following cases, namely:

(a) where any property on board the ship is lost or damaged by reason of fire on board the ship; or

(b) where any gold, silver, watches, jewels or precious stones on board the ship are lost or damaged by reason of theft, robbery or other dishonest conduct and their nature and value were not at the time of shipment declared by their owner or shipper to the owner or master of the ship in the bill of lading or otherwise in writing.

(2) Subject to sub-s (3) below, where the loss or damage arises from anything done or omitted by any person in his capacity of master or member of the crew or (otherwise than in that capacity) in the course of his employment as a servant of the owner of the ship, sub-s (1) above shall also exclude the liability of:

(a) the master, member of the crew or servant; and

(b) in a case where the master or member of the crew is the servant of a person whose liability would not be excluded by that subsection apart from this paragraph, the person whose servant he is.

(3) This section does not exclude the liability of any person for any loss or damage resulting from any such personal act or omission of his as is mentioned in Article 4 of the Convention set out in Part I of Sched 7.

(4) This section shall apply in relation to Her Majesty's ships as it applies in relation to other ships.

(5) In this section 'owner', in relation to a ship, includes any part owner and any charterer, manager or operator of the ship.

SCHEDULE 7

CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS 1976

PART I

Chapter I

The Right of Limitation

Article 1

Persons entitled to limit liability

1 Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in Article 2.

2 The term 'shipowner' shall mean the owner, charterer, manager or operator of a seagoing ship.

3 Salvor shall mean any person rendering services in direct connection with salvage operations. Salvage operations shall also include operations referred to in Article 2, paragraph 1(d), (e) and (f).

4 If any claims set out in Article 2 are made against any person for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this Convention.

5 In this Convention the liability of a shipowner shall include liability in an action brought against the vessel herself.

6 An insurer of liability for claims subject to limitation in accordance with the rules of this Convention shall be entitled to the benefits of this Convention to the same extent as the assured himself.

7 The act of invoking limitation of liability shall not constitute an admission of liability.

Article 2

Claims subject to limitation

1 Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:

(a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;

(b) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;

(c) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations;

(d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;

(e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;

(f) claims of a person other than the person liable in respect of measures taken in order to avert or minimise loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.

2 Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise. However, claims set out under paragraph 1(d), (e) and (f) shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable.

Article 3

Claims excepted from limitation

The rules of this Convention shall not apply to:

(a) claims for salvage or contribution in general average; [*The 1996 Protocol replaces this subparagraph with the following: 'claims for salvage, including, if applicable, any claim for special compensation under Article 14 of the International Convention on Salvage 1989, as amended, or contribution in general average.'*]

(b) claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage dated 29 November 1969 or of any amendment or Protocol thereto which is in force;

(c) claims subject to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage;

(d) claims against the shipowner of a nuclear ship for nuclear damage;

(e) claims by servants of the shipowner or salvor whose duties are connected with the ship or the salvage operations, including claims of their heirs, dependants or other persons entitled to make such claims, if under the law governing the contract of service between the shipowner or salvor and such servants the shipowner or salvor is not entitled to limit his liability in respect of such claims, or if he is by such law only permitted to limit his liability to an amount greater than that provided for in Article 6.

Article 4

Conduct barring limitation

A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

Article 5

Counterclaims

Where a person entitled to limitation of liability under the rules of this Convention has a claim against the claimant arising out of the same occurrence, their respective claims shall be set off against each other and the provisions of this Convention shall only apply to the balance, if any.

Chapter II

Limits of Liability

Article 6

The general limits

1 The limits of liability for claims other than those mentioned in Article 7 arising on any distinct occasion, shall be calculated as follows:

(a) in respect of claims for loss of life or personal injury,

(i) 333,000 Units of Account for a ship with a tonnage not exceeding 500 tons,

(ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):

for each ton from 501 to 3,000 tons, 500 Units of Account;

for each ton from 3,001 to 30,000 tons, 333 Units of Account;

for each ton from 30,001 to 70,000 tons, 250 Units of Account; and

for each ton in excess of 70,000 tons, 167 Units of Account,

(b) in respect of any other claims,

(i) 167,000 Units of Account for a ship with a tonnage not exceeding 500 tons,

(ii) for a ship with a tonnage in excess thereof the following amount in addition to that mentioned in (i):

for each ton from 501 to 30,000 tons, 167 Units of Account;

for each ton from 30,001 to 70,000 tons, 125 Units of Account; and

for each ton in excess of 70,000 tons, 83 Units of Account.

[*The 1996 Protocol replaces Article 6, paragraph 1 of the Convention with the following text:*

'*1. The limits of liability for claims other than those mentioned in Article 7, arising on any distinct occasion, shall be calculated as follows:*

(a) in respect of claims for loss of life or personal injury,

(i) 2 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,

(ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):

for each ton from 2,001 to 30,000 tons, 800 Units of Account;

for each ton from 30,001 to 70,000 tons, 600 Units of Account;

for each ton in excess of 70,000 tons, 400 Units of Account,

(b) in respect of any other claims,

(i) 1 million Units of Account for a ship with a tonnage not exceeding 2000 tons,

(ii) for a ship with a tonnage in excess thereof the following amount in addition to that mentioned in (i):

for each ton from 2,001 to 30,000 tons, 400 Units of Account;

for each ton from 30,001 to 70,000 tons, 300 Units of Account; and

for each ton in excess of 70,000 tons, 200 Units of Account.]

2 Where the amount calculated in accordance with paragraph 1(a) is insufficient to pay the claims mentioned therein in full, the amount calculated in accordance with paragraph 1(b) shall be available for payment of the unpaid balance of claims under paragraph 1(a) and such unpaid balance shall rank rateably with claims mentioned under paragraph 1(b).

4 The limits of liability for any salvor not operating from any ship or for any salvor operating solely on the ship to, or in respect of which he is rendering salvage services, shall be calculated according to a tonnage of 1,500 tons.

Article 7

The limit for passenger claims

1 In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner thereof shall be an amount of 46,666 Units of Account multiplied by the number of passengers which the ship is authorised to carry according to the ship's certificate, but not exceeding 25 million Units of Account.

[*The 1996 Protocol increases this limit to 175,000 units of account and deletes the cap of 25 million units*.]

2 For the purpose of this Article 'claims for loss of life or personal injury to passengers of a ship' shall mean any such claims brought by or on behalf of any person carried in that ship:

(a) under a contract of passenger carriage, or

(b) who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods.

Article 8

Unit of Account

The Unit of Account referred to in Articles 6 and 7 is the special drawing right as defined by the International Monetary Fund. The amounts mentioned in Articles 6 and 7 shall be converted into the national currency of the State in which limitation is sought, according to the value of that currency at the date the limitation fund shall have been constituted, payment is made, or security is given which under the law of that State is equivalent to such payment.

Article 9

Aggregation of claims

1 The limits of liability determined in accordance with Article 6 shall apply to the aggregate of all claims which arise on any distinct occasion:

(a) against the person or persons mentioned in paragraph 2 of Article 1 and any person for whose act, neglect or default he or they are responsible; or

(b) against the shipowner of a ship rendering salvage services from that ship and the salvor or salvors operating from such ship and any person for whose act, neglect or default he or they are responsible; or

(c) against the salvor or salvors who are not operating from a ship or who are operating solely on the ship to, or in respect of which, the salvage services are rendered and any person for whose act, neglect or default he or they are responsible.

2 The limits of liability determined in accordance with Article 7 shall apply to the aggregate of all claims subject thereto which may arise on any distinct occasion against the person or persons mentioned in paragraph 2 of Article 1 in respect of the ship referred to in Article 7 and any person for whose act, neglect or default he or they are responsible.

Article 10

Limitation of liability without constitution of a limitation fund

1 Limitation of liability may be invoked notwithstanding that a limitation fund as mentioned in Article 11 has not been constituted.

2 If limitation of liability is invoked without the constitution of a limitation fund, the provisions of Article 12 shall apply correspondingly.

3 Questions of procedure arising under the rules of this Article shall be decided in accordance with the national law of the State Party in which action is brought.

Chapter III

The Limitation Fund

Article 11

Constitution of the fund

1 Any person alleged to be liable may constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation. The fund shall be constituted in the sum of such of the amounts set out in Articles 6 and 7 as are applicable to claims for which that person may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.

2 A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority.

3 A fund constituted by one of the persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2 of Article 9 or his insurer shall be deemed constituted by all persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2, respectively.

Article 12

Distribution of the fund

1 Subject to the provisions of paragraphs 1 and 2 of Article 6 and of Article 7, the fund shall be distributed among the claimants in proportion to their established claims against the fund.

2 If, before the fund is distributed, the person liable, or his insurer, has settled a claim against the fund such person shall, up to the amount he has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under this Convention.

3 The right of subrogation provided for in paragraph 2 may also be exercised by persons other than those therein mentioned in respect of any amount of compensation which they may have paid, but only to the extent that such subrogation is permitted under the applicable national law.

4 Where the person liable or any other person establishes that he may be compelled to pay, at a later date, in whole or in part any such amount of compensation with regard to which such person would have enjoyed a right of subrogation pursuant to paragraphs 2 and 3 had the compensation been paid before the fund was distributed, the Court or other competent authority of the State where the fund has been constituted may order that a sufficient sum shall be provisionally set aside to enable such person at such later date to enforce his claim against the fund.

Article 13

Bar to other actions

1 Where a limitation fund has been constituted in accordance with Article 11, any person having made a claim against the fund shall be barred from exercising any right in respect of such a claim against any other assets of a person by or on behalf of whom the fund has been constituted.

2 After a limitation fund has been constituted in accordance with Article 11, any ship or other property, belonging to a person on behalf of whom the fund has been constituted, which has been arrested or attached within the jurisdiction of a State Party for a claim which may be raised against the fund, or any security given, may be released by order of the Court or other competent authority of such State. However, such release shall always be ordered if the limitation fund has been constituted:

(a) at the port where the occurrence took place, or, if it took place out of port, at the first port of call thereafter; or

(b) at the port of disembarkation in respect of claims for loss of life or personal injury; or

(c) at the port of discharge in respect of damage to cargo; or

(d) in the State where the arrest is made.

3 The rules of paragraphs 1 and 2 shall apply only if the claimant may bring a claim against the limitation fund before the Court administering that fund and the fund is actually available and freely transferable in respect of that claim.

Article 14

Governing law

Subject to the provisions of this chapter the rules relating to the constitution and distribution of a limitation fund, and all rules of procedure in connection therewith, shall be governed by the law of the State Party in which the fund is constituted.

Chapter IV

Scope of Application

Article 15

[1] This Convention shall apply whenever any person referred to in Article 1 seeks to limit his liability before the Court of a State Party or seeks to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of any such State.

[2 A State Party may regulate by specific provisions of national law the system of limitation of liability to be applied to vessels which are:

(a) according to the law of that State, ships intended for navigation on inland waterways;

(b) ships of less than 300 tons.

A State Party which makes use of the option provided for in this paragraph shall inform the depositary of the limits of liability adopted in its national legislation or of the fact that there are none.

3bis. Notwithstanding the limit of liability prescribed in paragraph 1 of Article 7, a State Party may regulate by specific provisions of national law the system of liability to be applied to claims for loss of life or personal injury to passengers of a ship, provided that the limit of liability is not lower than that prescribed in paragraph 1 of Article 7. A State Party which makes use of the option provided for in this paragraph shall inform the Secretary-General of the limits of liability adopted or of the fact that there are none.]

[Article 18

Reservations

1 Any State may, at the time of signature, ratification, acceptance, approval or accession, or at any time thereafter, reserve the right:

(a) to exclude the application of Article 2, paragraphs 1(d) and (e);

(b) to exclude claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 or of any amendment or Protocol thereto.

No other reservations shall be admissible to the substantive provisions of this Convention.]

PART II

PROVISIONS HAVING EFFECT IN CONNECTION WITH CONVENTION

Interpretation

1 In this Part of this Schedule any reference to a numbered article is a reference to the Article of the Convention which is so numbered.

Right to limit liability

2 [*Subject to paragraph 6 below*] The right to limit liability under the Convention shall apply in relation to any ship whether seagoing or not, and the definition of 'shipowner' in paragraph 2 of Article 1 shall be construed accordingly.

[2A. Paragraph 1(a) of Article 2 shall have effect as if the reference to 'loss of life or personal injury' did not include a reference to loss of life or personal injury to passengers of seagoing ships.]

Claims subject to limitation

3 (1) Paragraph 1(d) of Article 2 shall not apply unless provision has been made by an order of the Secretary of State for the setting up and management of a fund to be used for the making to harbour or conservancy authorities of payments needed to compensate them for the reduction, in consequence of the said paragraph 1(d), of amounts recoverable by them in claims of the kind there mentioned, and to be maintained by contributions from such authorities raised and collected by them in respect of vessels in like manner as other sums so raised by them.

(2) Any order under sub-paragraph (1) above may contain such incidental and supplemental provisions as appear to the Secretary of State to be necessary or expedient.

Claims excluded from limitation

4 (1) The claims excluded from the Convention by paragraph (a) of Article 3 include claims under Article 14 of the International Convention on Salvage 1989 as set out in Part I of Schedule 11 and corresponding claims under a contract. [*The deletion of this subparagraph is proposed.*]

[(1) Claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996, or any amendment of or Protocol to that Convention, which arise from occurrences which take place after the coming into force of the first Order in Council made by Her Majesty under section 182B of this Act shall be excluded from the Convention.]

(2) The claims excluded from the Convention by paragraph (b) of Article 3 are claims in respect of any liability incurred under section 153 of this Act.

(3) The claims excluded from the Convention by paragraph (c) of Article 3 are claims made by virtue of any of sections 7 to 11 of the Nuclear Installations Act 1965.

The general limits

5 (1) In the application of Article 6 to a ship with a tonnage less than 300 tons that Article shall have effect as if:

(a) paragraph 1(a)(i) referred to 166,667 *[1,000,000]* Units of Account; and

(b) paragraph 1(b)(i) referred to 83,333 *[500,000]* Units of Account.

(2) For the purposes of Article 6 and this paragraph a ship's tonnage shall be its gross tonnage calculated in such manner as may be prescribed by an order made by the Secretary of State.

(3) Any order under this paragraph shall, so far as appears to the Secretary of State to be practicable, give effect to the regulations in Annex 1 of the International Convention on Tonnage Measurement of Ships 1969.

[*The LLMC 1976 allows states to regulate by national law the system of limitation of liability applied to ships of up to 300 tons. In June 1997 the Department of Transport invited views on a proposal to increase the UK limits in paragraph 5(1)(a) and 5(1)(b) to 1 million and 500,000 SDR for merchant ships*.]

Limit for passenger claims

6 (1) In the case of a ship for which there is in force a Passenger Ship Safety Certificate or Passenger Certificate, as the case may be, issued under or recognised by safety regulations, the ship's certificate mentioned in paragraph 1 of Article 7 shall be that certificate.

[Proposed to be substituted for paragraph 6, sub-paragraph 1: (1) Article 7 shall not apply in respect of any seagoing ship; and shall have effect in respect of any ship which is not seagoing as if, in paragraph 1 of that Article

(a) after 'thereof' there were inserted 'in respect of each passenger,';

(b) the words from 'multiplied' onwards were omitted.]

(2) In paragraph 2 of Article 7 the reference to claims brought on behalf of a person includes a reference to any claim in respect of the death of a person under the Fatal Accidents Act 1976, the Fatal Accidents (Northern Ireland) Order 1977 or the Damages (Scotland) Act 1976.

Units of account

7 (1) For the purpose of converting the amounts mentioned in Articles 6 and 7 from special drawing rights into sterling one special drawing right shall be treated as equal to such a sum in sterling as the International Monetary Fund have fixed as being the equivalent of one special drawing right for:

(a) the relevant date under paragraph 1 of Article 8; or

(b) if no sum has been so fixed for that date, the last preceding date for which a sum has been so fixed.

(2) A certificate given by or on behalf of the Treasury stating:

(a) that a particular sum in sterling has been fixed as mentioned in sub-paragraph (1) above for a particular date; or

(b) that no sum has been so fixed for that date and that a particular sum in sterling has been so fixed for a date which is the last preceding date for which a sum has been so fixed,

shall be conclusive evidence of those matters for the purposes of those articles; and a document purporting to be such a certificate shall, in any proceedings, be received in evidence and, unless the contrary is proved, be deemed to be such a certificate.

Constitution of fund

8 (1) The Secretary of State may, with the concurrence of the Treasury, by order prescribe the rate of interest to be applied for the purposes of paragraph 1 of Article 11.

(2) Any statutory instrument containing an order under sub-paragraph (1) above shall be laid before Parliament after being made.

(3) Where a fund is constituted with the court in accordance with Article 11 for the payment of claims arising out of any occurrence, the court may stay any proceedings relating to any claim arising out of that occurrence which are pending against the person by whom the fund has been constituted.

Distribution of fund

9 No lien or other right in respect of any ship or property shall affect the proportions in which under Article 12 the fund is distributed among several claimants.

Bar to other actions

10 Where the release of a ship or other property is ordered under paragraph 2 of Article 13 the person on whose application it is ordered to be released shall be deemed to have submitted to (or, in Scotland, prorogated) the jurisdiction of the court to adjudicate on the claim for which the ship or property was arrested or attached.

Meaning of 'court'

11 References in the Convention and the preceding provisions of this Part of this Schedule to the court are references to the High Court or, in relation to Scotland, the Court of Session.

Meaning of 'ship'

12 References in the Convention and in the preceding provisions of this Part of this Schedule to a ship include references to any structure (whether completed or in course of completion) launched and intended for use in navigation as a ship or part of a ship.

Meaning of 'State Party'

13 An Order in Council made for the purposes of this paragraph and declaring that any State specified in the Order is a party to the Convention shall, subject to the provisions of any subsequent Order made for those purposes, be conclusive evidence that the State is a party to the Convention.

[To be replaced from a date to be fixed by: 13. An Order in Council made for the purposes of this paragraph and declaring that any State specified in the Order is a party to the Convention as amended by the 1996 Protocol shall, subject to the provisions of any subsequent Order made for those purposes, be conclusive evidence that the State is a party to the Convention as amended by the 1996 Protocol.]

3 ARTICLE 4: CONDUCT BARRING LIMITATION

A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

A shipowner does not have a right to limit in every case. For many years, under UK law, an owner could not limit unless he could prove that the loss had occurred without 'actual fault or privity' on his part. The words 'actual fault or privity' were said to imply something personal to the owner, as distinct from constructive fault or the fault or privity of his servants or agents: *Asiatic Petroleum v Leonard's Carrying* [1914] 1 KB

419, CA; affirmed [1915] AC 705, *per* Buckley LJ. This approach is altered by LLMC 1976. Personal fault on the part of the owner is no longer enough to break the limit of liability: the fault must be of the specific and highly culpable type defined in Art 4.

The idea behind this feature of the 1976 Convention was that the liability of a shipowner should be limited, in all save exceptional circumstances, to levels at which insurance cover was available at reasonable rates. Under the 1976 Convention the limit of liability is therefore significantly greater than under the previous law, but it is more difficult for a claimant to break the limit under Art 4: *Caltex Singapore Pte Ltd v BP Shipping Ltd* [1996] 1 Lloyd's Rep 286, p 288. Other motives for the adoption of Art 4 included the elimination of uncertainty as to the meaning of 'actual fault or privity' and the abandonment of what were seen by some to be unduly high standards of care required in certain jurisdictions: see generally Boal, A M, 'International uniformity and limitation' [1979] 53 Tulane LR 1276.

One of the provisions on which Art 4 was modelled was Art 25 of the 1955 Hague Convention on Carriage by Air. The leading English case on the meaning of Art 25 is *Goldman v Thai Airways.*

Goldman v Thai Airways International Ltd [1983] 1 WLR 1186, CA

Facts

The pilot of an aircraft was alleged to have failed to illuminate the seat belt warning instruction light when entering an area of clear air turbulence, with the result that a passenger on an international flight was thrown from his seat and injured. Article 25 of the amended Warsaw Convention governing carriage by air provided that:

> The limits of liability specified in article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result . . .

The Court of Appeal held that Art 25 did not bar the right to limits on the facts.

Held

> **Eveleigh LJ:** . . . the article requires the plaintiff to prove the following: (1) that the damage resulted from an act or omission; (2) that it was done with intent to cause damage; or (3) that it was done when the doer was aware that damage would probably result, but he did so regardless of that probability . . .
>
> When conduct is stigmatised as reckless, it is because it engenders the risk of undesirable consequences. When a person acts recklessly he acts in a manner which indicates a decision to run the risk or a mental attitude of indifference to its existence. This is the ordinary meaning of the word . . . One cannot therefore decide whether or not an act or omission is done recklessly without considering the nature of the risk involved . . .
>
> However, the doing of the act or omission is not only qualified by the adverb 'recklessly,' but also by the adverbial phrase 'with knowledge that damage would probably result'. If the pilot did not know that damage would probably result from his omission, I cannot see that we are entitled to attribute to him knowledge which another pilot might have possessed or which he himself should have possessed . . .
>
> An act may be reckless when it involves a risk, even though it cannot be said that the danger envisaged is a probable consequence. It is enough that it is a possible consequence . . . Article 25 however refers not to possibility, but to the probability of resulting damage. Thus something more than a possibility is required. The word 'probable' is a common enough word. I understand it to mean that something is likely to happen. I think that is what is meant in article 25 . . .

Purchas LJ: . . . Article 25 when it is read as a whole involves the proof of actual knowledge in the mind of the pilot at the moment at which the omission occurs, that the omission is taking place and that it does involve probable damage of the sort contemplated in the article . . .

Notes

1 *Recklessness and knowledge.* The two requirements of recklessness and knowledge are separate and cumulative, although knowledge of the probability of damage may make it easier to find recklessness: *Margolle v Delta Maritime* [2002] EWHC 2452, *per* Gross J; *Nugent v Goss* [2002] 2 Lloyd's Rep 222, CA, *per* Auld LJ.

2 *Knowledge.* Later cases have followed Purchas LJ's formulation and treated 'actual knowledge' as meaning conscious awareness: *SS Pharmaceutical Co Ltd v Qantas Airways Ltd* [1991] 1 Lloyd's Rep 288; *Gurtner v Beaton* [1993] 1 Lloyd's Rep 369; *Nugent v Goss* [2000] EWCA 130.

3 *Risk.* Indifference to the bare possibility that an act will have undesirable but, at worst, trivial consequences would not normally be described as reckless. To establish recklessness the risk in question, it is submitted, must be one which is unjustified in the circumstances, having regard to both likelihood of occurrence and the seriousness of the potential harm.

4 *Burden of proof.* Under Art 4 the burden of proof is on the person making the claim to show that the loss resulted from the personal act or omission of the shipowner: *The Bowbelle* [1990] 1 Lloyd's Rep 532, p 535.

5 *Such loss.* Article 4 of LLMC 1976 and Art 25 of the Warsaw Convention are not identical. One difference in wording relates to the knowledge that must be demonstrated; the former requires knowledge that 'such loss' would probably result, while the latter refers to knowledge that 'damage would probably result'. The meaning of LLMC 1976 on this point was considered in the next case.

The Leerort [2001] EWCA Civ 1055; [2001] 2 Lloyd's Rep 291

Facts

The *Zim Piraeus*, in the course of entering Colombo harbour, collided with and sank *Leerort*. The owners of *Zim Piraeus* admitted liability but claimed the benefit of the 1976 Convention.

Held

Lord Phillips MR: … 13 The limitation provisions in relation to merchant shipping provide even greater protection than those in relation to carriage by air. It is only the personal act or omission of a shipowner which defeats the right to limit. A shipowner is defined in art 1 as the owner, charterer, manager or operator of a seagoing ship. Thus, to defeat the right to limit, it is necessary to identify the causative act or omission on the part of such a person that caused the loss. Furthermore, it is only conduct committed with intent to cause such loss, or recklessly with knowledge that such loss would probably result, that defeats the right to limit. It seems to me that this requires foresight of the very loss that actually occurs, not merely of the type of loss that occurs . . .

14 Mr Teare [counsel] submitted that the words 'such loss' meant loss of the type suffered and that, to identify the type of loss, it was necessary to refer back to art 2, which sets out the various types of loss in respect of which a right to limit arises. Thus, in the instant case, the claims advanced are in respect of 'loss of or damage to property', so that the only foresight required to defeat the right to limit was of the likelihood of loss of or damage to property.

15 This submission runs counter to the clear meaning of the wording of art 4. The words 'such loss' in that article clearly refer back to the loss that has actually resulted and which is the subject matter of the claim in which the right to limit is asserted.

16 It seems to me that where the loss in respect of which a claim is made resulted from a collision between ship A and ship B, the owners of ship A, or cargo in ship A, will only defeat the right to limit liability on the owner of ship B if they can prove that the owner of ship B intended that it should collide with ship A, or acted recklessly with the knowledge that it was likely to do so.

17 The alternative, which is perhaps arguable, is that the claimant merely has to prove that the owner of ship B intended that his ship should collide with another ship, or acted recklessly with the knowledge that it was likely to do so.

18 On the facts of this case it is not necessary to decide which alternative is correct. In either event the reality is that when damage results from a collision the shipowner will only lose his right to limit if it can be proved that he deliberately or recklessly acted in a way which he knew was likely to result in the loss of or damage to the property of another in circumstances where, inevitably, the same consequences would be likely to flow to his own vessel. Maritime history has many instances of scuttling, but I am not aware of one involving deliberate collision with another vessel. More pertinently, Mr Teare has been unable to point to any collision case in any jurisdiction where the right to limit under the 1976 Convention has been successfully challenged …

Note

It was suggested in this case that when a claim is made for damage resulting from a collision, it is virtually axiomatic that the defendant shipowner will be entitled to limit his liability. For a possible exception, see *LL Margolle v Delta Maritime Co Ltd* [2002] EWHC 2452; [2003] 1 Lloyd's Rep 203.

4 CONDUCT BARRING LIMITATION: COMPANIES

Article 4 bars the right to limit only where the loss results from an intentional or reckless personal act or omission. Where a company claims to be entitled to limit this makes it necessary to decide whose acts or omissions are to be treated as those of the company. Lord Hoffmann's judgment in *Meridian* analyses the principles and reviews the previous case law.

Meridian Global Funds Management Asia Ltd v Securities Commission
[1995] 2 AC 500

Facts

This appeal to the Privy Council from the Court of Appeal of New Zealand related to an alleged breach by a company of the Securities Amendment Act 1988 (NZ). Under that legislation, in identifying the individuals whose acts could be considered the acts of the company, the approach adopted by the courts was to look for 'the directing mind and will of the corporation'.

Held

Lord Hoffmann: … The phrase 'directing mind and will' comes of course from the celebrated speech of Viscount Haldane LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at 713. But their Lordships think that there has been some misunderstanding of the true principle upon which that case was decided. It may be helpful to start by stating the nature of the problem in a case like this and then come back to *Lennard's* case later.

Any proposition about a company necessarily involves a reference to a set of rules. A company exists because there is a rule (usually in a statute) which says that a *persona ficta* shall be deemed to exist and to have certain of the powers, rights and duties of a natural person. But there would be little sense in deeming such a *persona ficta* to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate

personality that there should be rules by which acts are attributed to the company. These may be called 'the rules of attribution'.

The company's primary rules of attribution will generally be found in its constitution, typically the articles of association, and will say things such as 'for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company' or 'the decisions of the board in managing the company's business shall be the decisions of the company'.

There are also primary rules of attribution which are not expressly stated in the articles but implied by company law …

These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company. And having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.

It is worth pausing at this stage to make what may seem an obvious point. Any statement about what a company has or has not done, or can or cannot do, is necessarily a reference to the rules of attribution (primary and general) as they apply to that company. Judges sometimes say that a company 'as such' cannot do anything; it must act by servants or agents. This may seem an unexceptionable, even banal remark. And of course the meaning is usually perfectly clear. But a reference to a company 'as such' might suggest that there is something out there called the company of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as the company as such, no *ding an sich,* only the applicable rules. To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company.

The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person 'himself', as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the *actus reus* and *mens rea* of the defendant himself. How is such a rule to be applied to a company?

One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, ie if the act giving rise to liability was specifically authorised by a resolution of the board or a unanimous agreement of the shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.

… Against this background of general principle, their Lordships can return to Viscount Haldane. In the *Lennard's* case the substantive provision for which an attribution rule had to be devised was s 502 of the Merchant Shipping Act 1894, which provided a shipowner with a defence to a claim for the loss of cargo put on board his ship if he could show that the casualty happened 'without his actual fault or privity'. The cargo had been destroyed by a fire caused by the unseaworthy condition of the ship's boilers. The language of s 502 excludes vicarious liability; it is clear that in the case of an individual owner, only his own fault or privity can defeat the statutory protection. How is this rule to be applied to a company? Viscount Haldane rejected the possibility that it did not apply to companies at all or (which would have come to the same thing) that it required fault or privity attributable under the company's primary rules. Instead, guided by the language and purpose of the section, he looked for the person whose functions in the company, in relation to the cause of the casualty, were the same as those to be expected of the individual shipowner to whom the language primarily applied. Who in the company was responsible for monitoring the condition of the ship, receiving the reports of the master and ship's agents, authorising repairs etc? This person was Mr Lennard, whom Viscount Haldane described as the 'directing mind and will' of the company. It was therefore his fault or privity which s 502 attributed to the company.

Because Lennard's Carrying Co Ltd does not seem to have done anything except own ships, there was no need to distinguish between the person who fulfilled the function of running the company's business in general and the person whose functions corresponded, in relation to the cause of the casualty, to those of an individual owner of a ship. They were one and the same person. It was this coincidence which left Viscount Haldane's speech open to the interpretation that he was expounding a general metaphysic of companies. In *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 at 172 Denning LJ certainly regarded it as a generalisation about companies 'as such' when, in an equally well known passage, he likened a company to a human body:

> It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre.

But this anthropomorphism, by the very power of the image, distracts attention from the purpose for which Viscount Haldane said he was using the notion of directing mind and will, namely to apply the attribution rule derived from s 502 to the particular defendant in the case:

> For if Mr Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself *within the meaning of section 502*. [Original emphasis.]

The true nature of the exercise became much clearer, however, in later cases on the 1894 Act. In *HMS Truculent, The Admiralty v The Divina (owners)* [1951] P 1, an action to limit liability for damage caused by collision under s 503, which also required the owner of the ship which caused the collision to show that the casualty happened without his 'actual fault or privity', the offending ship was a Royal Navy submarine. Her collision with a fishing vessel had been caused by the inadequate system of navigation lights then carried by submarines. Willmer J held that for this purpose the 'directing mind and will' of the Crown, which owned the submarine, was the Third Sea Lord, to whom the Board of Admiralty had entrusted the function of supervising such matters as the systems of navigation lights carried by warships. That function was one which an individual owner of a ship would be expected to fulfil. In *The Lady Gwendolen, Arthur Guinness, Son & Co (Dublin) Ltd v MV Freshfield (owners)* [1965] P 294 the owners of the ship were Arthur Guinness, Son & Co (Dublin) Ltd. The collision occurred because the master, in accordance with his custom, had taken his vessel laden with stout up the Mersey Channel to Liverpool at full speed in dense fog without more than the odd casual glance at his radar. Owning ships was a very subsidiary part of the company's activities. It had a traffic department which managed the ships under the general supervision of a member of the board who was a brewer and took no interest in the safety of their navigation. The manager of the traffic department knew about railways but took equally little interest in ships. The marine superintendent, one beneath him in the hierarchy, failed to observe that the master of *The Lady Gwendolen* was given to dangerous navigation, although, as Willmer LJ said ([1965] P 294 at 338):

> It would not have required any very detailed examination of the engine room records in order to ascertain that *The Lady Gwendolen* was frequently proceeding at full speed at times when the deck log was recording dense fog.

In applying s 503 of the 1894 Act, Sellers LJ said of the company ([1965] P 294 at 333):

> In their capacity as shipowners they must be judged by the standard of conduct of the ordinary reasonable shipowner in the management and control of a vessel or of a fleet of vessels.

The court found that a reasonable shipowner would have realised what was happening and given the master proper instruction in the use of radar. None of the people in the company's hierarchy had done so.

It is difficult to see how, on any reasonable construction of s 503, these findings would not involve the actual fault or privity of Guinness. So far as anyone in the hierarchy had functions corresponding to those to be expected of an individual owner, his failure to discharge them was attributable to the company. So far as there was no such person, the superior management was at fault in failing to ensure that there was. In either case, the fault was attributable to the company. But the Court of Appeal found it necessary to identify a 'directing mind and will' of the company and lodged it in the responsible member of the board or (in the case of Willmer LJ) the railway expert who managed the traffic department.

Some commentators have not been altogether comfortable with the idea of the Third Sea Lord being the directing mind and will of the Crown or the traffic manager being the directing mind and will of Guinness. Their Lordships would agree that the phrase does not fit the facts of *HMS Truculent* or *The Lady Gwendolen* as happily as it did those of the *Lennard's* case. They think, however, that the difficulty has been caused by concentration on that particular phrase rather than the purpose for which Viscount Haldane was using it. It will often be the most appropriate description of the person designated by the relevant attribution rule, but it might be better to acknowledge that not every such rule has to be forced into the same formula.

Once it is appreciated that the question is one of construction rather than metaphysics, the answer in this case seems to their Lordships to be as straightforward as it did to Heron J …

FURTHER READING

Gaskell, N (ed), *Limitation of Shipowners' Liability: The New Law*, 1986, London: Sweet & Maxwell

Sheen, B, 'Limitation of liability: the law gave and the Lords have taken away' (1987) 18 JMLC 473

Mustill, M, 'Ships are different – or are they?' (1993) LMCLQ 490

Steel, D, 'Ships are different: the case for limitation of liability' (1995) LMCLQ 77

Griggs, P and Williams, R, *Limitation of Liability*, 3rd edn, 1998, London: Lloyd's of London

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CHAPTER 17

GENERAL AVERAGE

The term 'general average' refers to those rules and principles of maritime law which govern the sharing of losses caused to the interests of ship and cargo by the intentional sacrifice of cargo or extraordinary expenditure by one or other of those interests in the face of exposure to a common danger.

The concept of general average was known as early as 900 BC when under Rhodian Law it was provided that if one party's cargo had to be jettisoned to save ship and cargo in a situation of common danger, the ship and remaining cargo had to contribute to those losses. The Romans knew of general average and the concept appears in the *Digest* of Justinian.

A general average loss is said to give rise to the duty to make a general average contribution but the definition of loss and the extent of the duty have not been without controversy. While the laws of most mercantile States made (and make) provision in one form or another for general average, there were considerable divergences. In the second half of the 19th century various international efforts culminated in the adoption of the York-Antwerp Rules of 1877. These rules established a uniform approach to the calculation of general average contribution and remain, as periodically amended, the most important source on general average today. The latest rules known as the York-Antwerp Rules 1994 were adopted during a meeting of the Comité Maritime International (CMI) held in Sydney, Australia.

English law has allowed claims for general average independently of the Rules since the 18th century (*Da Costa v Newnham* (1788) 2 TR 407; (1788) 100 ER 219). It is not clear whether the right to claim arises as a matter of contract (implied or otherwise) or as a matter of law. In practice however most contracts of affreightment incorporate the York-Antwerp Rules.

The words 'general average' are used to refer to the act which gives rise to the loss, the loss itself and the contribution which is claimed. The process of establishing the extent of the loss is known as general average adjustment and the professional adjusters who are employed for this purpose are average adjusters.

Examples of general average sacrifices include the jettison of cargo to enable a vessel to float off after being grounded and water damage caused by attempts to put out a fire. Expenses can include port of refuge expenses and other third party expenses such as those payable for towage.

It is not always clear what relationship exists between general average and the other international maritime agreements regulating the rights of ship, cargo and freight. The Hague Rules and the Hague-Visby Rules may often have a role in a fact situation out of which a claim for general average contribution is also made. The interface between general average and insurance law is not always an easy one either. The cargo owner will normally be insured against the risks of loss or damage to his goods caused by a general average loss and against the liability to contribute in respect of such a loss. The Marine Insurance Act 1906 provides explicitly for such recovery in s 66. In practice underwriters pay cargo owners for a general average loss well before adjustment and are then subrogated in respect of any contribution claim. Underwriters will normally provide the so called general average bond required by the shipowner

before release of the cargo pursuant to his lien. Disquiet in the insurance market about the scope of general average has prompted calls for reform of the York-Antwerp Rules. In response to pressure from marine insurers, the CMI debated the question of general average at its Singapore Conference in 2001 and set up an international working group to consider areas of concern within the Rules. This group has reported on its review of the proposals for reform and it is expected that the Vancouver Conference of the CMI in June 2004 will look again at the York-Antwerp Rules. The debate essentially focuses on the scope of general average and the view of insurers that allowances in general average should be restricted to those incurred while the vessel is actually 'in grip of a peril'. This would entail excluding port of refuge expenses, temporary repairs and costs of transhipment of cargo to the destination. This reform calls for only allowances based on 'common safety' to be recovered, not those based on the present principle of 'common benefit'.

Insurers argue that there is a lack of economic balance between shipping interests, and that Rules X, XI and XII in particular need amendment. More generally insurers are questioning the value of general average. Shipowners, on the other hand, argue that the common benefit principle ensures that parties cooperate and do not resort to individual agreements to ensure that ship and cargo reach their ultimate destination. The debate is likely to be ongoing and the Vancouver Conference may be decisive.

See the *Report of the CMI Working Group on General Average*, 7 March 2003, available at www.comitemaritime.org/worip/genaverage.html.

This chapter first sets out the York-Antwerp Rules and then examines each of the issues referred to above by way of extracts from illustrative cases.

1 THE YORK-ANTWERP RULES 1994

The York-Antwerp Rules 1994 consist of a rule paramount, a rule of interpretation, seven lettered rules setting out general principles and 22 numbered rules covering particular issues. The Rules have been amended over the years, principally to take account of technological changes, and while they now cater for most situations they are not free from problems of interpretation, as the cases below will reveal. The Rules have always been a voluntary code and never an international treaty. They are thus only relevant to the regulation of a claim for general average if the contractual documentation for the voyage (usually the charterparty or bill of lading) incorporates them.

York-Antwerp Rules 1994

The Rules

Rule of interpretation. In the adjustment of general average the following Rules shall apply to the exclusion of any Law and Practice inconsistent therewith.

Except as provided by the Rule Paramount and the numbered Rules, general average shall be adjusted according to the lettered Rules.

Rule Paramount. In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred.

Rule A. There is a general average act, when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.

General average sacrifices and expenditures shall be borne by the different contributing interests on the basis hereinafter provided.

Rule B. There is a common maritime adventure when one or more vessels are towing or pushing another vessel or vessels, provided that they are all involved in commercial activities and not in a salvage operation.

When measures are taken to preserve the vessels and their cargoes, if any, from a common peril, these Rules shall apply.

A vessel is not in common peril with another vessel or vessels if by simply disconnecting from the other vessel or vessels she is in safety; but if the disconnection is itself a general average act the common maritime adventure continues.

Rule C. Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average.

In no case shall there be any allowance in general average for losses, damages or expenses incurred in respect of damage to the environment or in consequence of the escape or release of pollutant substances from the property involved in the common maritime adventure.

Demurrage, loss of market, and any loss or damage sustained or expense incurred by reason of delay, whether on the voyage or subsequently, and any indirect loss whatsoever, shall not be admitted as general average.

Rule D. Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault.

Rule E. The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average.

All parties claiming in general average shall give notice in writing to the average adjuster of the loss or expense in respect of which they claim contribution within 12 months of the date of the termination of the common maritime adventure.

Failing such notification, or if within 12 months of a request for the same any of the parties shall fail to supply evidence in support of a notified claim, or particulars of value in respect of a contributory interest, the average adjuster shall be at liberty to estimate the extent of the allowance or the contributory value on the basis of the information available to him, which estimate may be challenged only on the ground that it is manifestly incorrect.

Rule F. Any additional expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided.

Rule G. General average shall be adjusted as regards both loss and contribution upon the basis of values at the time and place when and where the adventure ends.

This Rule shall not affect the determination of the place at which the average statement is to be made up.

When a ship is at any port or place in circumstances which would give rise to an allowance in general average under the provisions of Rules X and XI, and the cargo or part thereof is forwarded to destination by other means, rights and liabilities in general average shall, subject to cargo interests being notified if practicable, remain as nearly as possible the same as they would have been in the absence of such forwarding, as if the adventure had continued in the original ship for so long as justifiable under the contract of affreightment and the applicable law.

The proportion attaching to cargo of the allowances made in general average by reason of applying the third paragraph of this Rule shall not exceed the cost which would have been borne by the owners of cargo if the cargo had been forwarded at their expense.

Rule I. *Jettison of cargo*. No jettison of cargo shall be made good as general average, unless such cargo is carried in accordance with the recognised custom of the trade.

Rule II. *Loss or Damage by sacrifices for the common safety.* Loss of or damage to the property involved in the common maritime adventure by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

Rule III. *Extinguishing fire on shipboard*. Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage by smoke however caused or by heat of the fire.

Rule IV. *Cutting away wreck*. Loss or damage sustained by cutting away wreck or parts of the ship which have been previously carried away or are effectively lost by accident shall not be made good as general average.

Rule V. *Voluntary stranding*. When a ship is intentionally run on shore for the common safety, whether or not she might have been driven on shore, the consequent loss or damage to the property involved in the common maritime adventure shall be allowed in general average.

Rule VI. *Salvage remuneration*.

(a) Expenditure incurred by the parties to the adventure in the nature of salvage, whether under contract or otherwise, shall be allowed in general average to the extent that the salvage operations were carried out for the purpose of preserving from peril the property involved in the common maritime adventure.

Expenditure allowed in general average shall include any salvage remuneration in which the skill and efforts of the salvors in preventing or minimising damage to the environment such as is referred to in Article 13 paragraph 1(b) of the International Convention on Salvage, 1989 have been taken into account.

(b) Special compensation payable to a salvor by the shipowner under Article 14 of the said Convention to the extent specified in paragraph 4 of that Article or under any other provision similar in substance shall not be allowed in general average.

Rule VII. *Damage to machinery and boilers*. Damage caused to any machinery and boilers of a ship which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage; but where a ship is afloat no loss or damage caused by working the propelling machinery and boilers shall in any circumstances be made good as general average.

Rule VIII. *Expenses lightening a ship when ashore, and consequent damage.* When a ship is ashore and cargo and ship's fuel and stores or any of them are discharged as a general average act, the extra cost of lightening, lighter hire and reshipping (if incurred), and any loss or damage to the property involved in the common maritime adventure in consequence thereof, shall be admitted as general average.

Rule IX. *Cargo, ship's materials and stores used for fuel*. Cargo, ship's materials and stores, or any of them, necessarily used for fuel for the common safety at a time of peril shall be admitted as general average, but when such an allowance is made for the cost of the ship's materials and stores the general average shall be credited with the estimated cost of the fuel which would otherwise have been consumed in prosecuting the intended voyage.

Rule X. *Expenses at port of refuge, etc*.

(a) When a ship shall have entered a port or place of refuge or shall have returned to her port or place of loading in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her

original cargo, or part of it, the corresponding expenses of leaving such port or place consequent upon such entry or return shall likewise be admitted as general average.

When a ship is at any port or place of refuge and is necessarily removed to another port or place because repairs cannot be carried out in the first port or place, the provisions of this Rule shall be applied to the second port or place as if it were a port or place of refuge and the cost of such removal including temporary repairs and towage shall be admitted as general average. The provisions of Rule XI shall be applied to the prolongation of the voyage occasioned by such removal.

(b) The cost of handling on board or discharging cargo, fuel or stores whether at a port or place of loading, call or refuge, shall be admitted as general average, when the handling or discharge was necessary for the common safety or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, except in cases where the damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstance connected with such damage having taken place during the voyage.

The cost of handling on board or discharging cargo, fuel or stores shall not be admissible as general average when incurred solely for the purpose of restowage due to shifting during the voyage, unless such restowage is necessary for the common safety.

(c) Whenever the cost of handling or discharging cargo, fuel or stores is admissible as general average, the costs of storage, including insurance if reasonably incurred, reloading and stowing of such cargo, fuel or stores shall likewise be admitted as general average. The provisions of Rule XI shall be applied to the extra period of detention occasioned by such reloading or restowing.

But when the ship is condemned or does not proceed on her original voyage, storage expenses shall be admitted as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.

Rule XI. *Wages and maintenance of crew and other expenses bearing up for and in a port of refuge, etc.*

(a) Wages and maintenance of master, officers and crew reasonably incurred and fuel and stores consumed during the prolongation of the voyage occasioned by a ship entering a port or place of refuge or returning to her port or place of loading shall be admitted as general average when the expenses of entering such port or place are allowable in general average in accordance with Rule X(a).

(b) When a ship shall have entered or been detained in any port or place in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety, or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, the wages and maintenance of the master, officers, and crew reasonably incurred during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted in general average.

Fuel and stores consumed during the extra period of detention shall be admitted as general average, except such fuel and stores as are consumed in effecting repairs not allowable in general average.

Port charges incurred during the extra period of detention shall likewise be admitted as general average except such charges as are incurred solely by reason of repairs not allowable in general average.

Provided that when damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstance connected with such damage having taken place during the voyage, then the wages and maintenance of master, officers and crew and fuel and stores consumed and port charges incurred during the extra detention for

repairs to damages so discovered shall not be admissible as general average, even if the repairs are necessary for the safe prosecution of the voyage.

When the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers and crew and fuel and stores consumed and port charges shall be admitted as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.

(c) For the purpose of this and the other Rules wages shall include all payments made to or for the benefit of the master, officers and crew, whether such payments be imposed by law upon the shipowners or be made under the terms or articles of employment.

(d) The cost of measures undertaken to prevent or minimise damage to the environment shall be allowed in general average when incurred in any or all of the following circumstances:

(i) as part of an operation performed for the common safety which, had it been undertaken by a party outside the common maritime adventure, would have entitled such party to a salvage reward;

(ii) as a condition of entry into or departure from any port or place in the circumstances prescribed in Rule X (a);

(iii) as a condition of remaining at any port or place in the circumstances prescribed in Rule XI (b), provided that when there is an actual escape or release of pollutant substances the cost of any additional measures required on that account to prevent or minimise pollution or environmental damage shall not be allowed as general average;

(iv) necessarily in connection with the discharging, storing or reloading of cargo whenever the cost of those operations is admissible as general average.

Rule XII. *Damage to cargo in discharging, etc.* Damage to or loss of cargo, fuel or stores sustained in consequence of their handling, discharging, storing, reloading and stowing shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average.

Rule XIII. *Deductions from cost of repairs*. Repairs to be allowed in general average shall not be subject to deductions in respect of 'new for old' where old material or parts are replaced by new unless the ship is over 15 years old in which case there shall be a deduction of one third. The deductions shall be regulated by the age of the ship from 31 December of the year of completion of construction to the date of the general average act, except for insulation, life and similar boats, communications and navigational apparatus and equipment, machinery and boilers for which the deductions shall be regulated by the age of the particular parts to which they apply.

The deductions shall be made only from the cost of the new material or parts when finished and ready to be installed in the ship.

No deduction shall be made in respect of provisions, stores, anchors and chain cables.

Drydock and slipway dues and costs of shifting the ship shall be allowed in full.

The costs of cleaning, painting or coating of bottom shall not be allowed in general average unless the bottom has been painted or coated within the twelve months preceding the date of the general average act in which case one half of such costs shall be allowed.

Rule XIV. *Temporary repairs*. Where temporary repairs are effected to a ship at a port of loading, call or refuge, for the common safety, or of damage caused by general average sacrifice, the cost of such repairs shall be admitted as general average.

Where temporary repairs of accidental damage are effected in order to enable the adventure to be completed, the cost of such repairs shall be admitted as general average without regard to the saving, if any, to other interests, but only up to the saving in expense which would have been incurred and allowed in general average if such repairs had not been effected there.

No deductions 'new for old' shall be made from the cost of temporary repairs allowable as general average.

Rule XV. *Loss of freight.* Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act, or when the damage to or loss of cargo is so made good.

Deduction shall be made from the amount of gross freight lost, of the charges which the owner thereof would have incurred to earn such freight, but has, in consequence of the sacrifice, not incurred.

Rule XVI. *Amount to be made good for cargo lost or damaged by sacrifice.* The amount to be made good as general average for damage to or loss of cargo sacrificed shall be the loss which has been sustained thereby based on the value at the time of discharge, ascertained from the commercial invoice rendered to the receiver or if there is no such invoice from the shipped value. The value at the time of discharge shall include the cost of insurance and freight except insofar as such freight is at the risk of interests other than the cargo.

When cargo so damaged is sold and the amount of the damage has not been otherwise agreed, the loss to be made good in general average shall be the difference between the net proceeds of sale and the net sound value as computed in the first paragraph of this Rule.

Rule XVII. *Contributory values.* The contribution to a general average shall be made upon the actual net value of the property at the termination of the adventure except that the value of cargo shall be the value at the time of discharge, ascertained from the commercial invoice rendered to the receiver or if there is no such invoice from the shipped value. The value of the cargo shall include the cost of insurance and freight unless and insofar as such freight is at the risk of interests other than the cargo, deducting therefrom any loss or damage suffered by the cargo prior to or at the time of discharge. The value of the ship shall be assessed without taking into account the beneficial or detrimental effect of any demise or time charterparty to which the ship may be committed.

To these values shall be added the amount made good as general average for property sacrificed, if not already included, deduction being made from the freight and passage money at risk of such charges and crew's wages as would not have been incurred in earning the freight had the ship and cargo been totally lost at the date of the general average act and have not been allowed as general average; deduction being also made from the value of the property of all extra charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average or fall upon the ship by virtue of an award for special compensation under Article 14 of the International Convention on Salvage, 1989 or under any other provision similar in substance.

In the circumstances envisaged in the third paragraph of Rule G, the cargo and other property shall contribute on the basis of its value upon delivery at original destination unless sold or otherwise disposed of short of that destination, and the ship shall contribute upon its actual net value at the time of discharge of cargo.

Where cargo is sold short of destination, however, it shall contribute upon the actual net proceeds of sale, with the addition of any amount made good as general average.

Mails, passengers' luggage, personal effects and accompanied private motor vehicles shall not contribute in general average.

Rule XVIII. *Damage to ship.* The amount to be allowed as general average for damage or loss to the ship, her machinery and/or gear caused by a general average act shall be as follows:

(a) When repaired or replaced.

The actual reasonable cost of repairing or replacing such damage or loss subject to deduction in accordance with Rule XIII.

(b) When not repaired or replaced.

The reasonable depreciation arising from such damage or loss, but not exceeding the estimated cost of repairs. But where the ship is an actual total loss or when the cost of repairs of the damage would exceed the value of the ship when repaired, the amount to be allowed as general average shall be the difference between the estimated sound value of the ship after deducting therefrom the estimated cost of repairing damage which is not general average and the value of the ship in her damaged state which may be measured by the net proceeds of sale, if any.

Rule XIX. *Undeclared or wrongfully declared cargo*. Damage or loss caused to goods loaded without the knowledge of the shipowner or his agent or to goods wilfully misdescribed at time of shipment shall not be allowed as general average, but such goods shall remain liable to contribute, if saved.

Damage or loss caused to goods which have been wrongfully declared on shipment at a value which is lower than their real value shall be contributed for at the declared value, but such goods shall contribute upon their actual value.

Rule XX. *Provision of funds*. A commission of two per cent of general average disbursements, other than the wages and maintenance of master, officers and crew and fuel and stores not replaced during the voyage, shall be allowed in general average. The capital loss sustained by the owners of goods sold for the purpose of raising funds to defray general average disbursements shall be allowed in general average.

The cost of insuring general average disbursements shall also be admitted in general average.

Rule XXI. *Interest on losses made good in general average*. Interest shall be allowed on expenditure, sacrifices and allowances in general average at the rate of seven per cent, per annum, until three months after the date of issue of the general average adjustment, due allowance being made for any payment on account by the contributory interests or from the general average deposit fund.

Rule XXII. *Treatment of cash deposits*. Where cash deposits have been collected in respect of cargo's liability for general average, salvage or special charges, such deposits shall be paid without any delay into a special account in the joint names of a representative nominated on behalf of the shipowner and a representative nominated on behalf of the depositors in a bank to be approved by both. The sum so deposited, together with accrued interest, if any, shall be held as security for the payment to the parties entitled thereto of the general average, salvage or special charges payable by cargo in respect to which the deposits have been collected. Payments on account or refunds of deposits may be made if certified to in writing by the average adjuster. Such deposits and payments or refunds shall be without prejudice to the ultimate liability of the parties.

Notes

1 The key changes made to the Rules in 1994 were:

(a) the introduction of the Rule Paramount with its overriding requirement of reasonableness. The need for such a rule was clearly demonstrated by the first instance decision of *Corfu Navigation Co and Bain Clarkson Ltd v Mobil Shipping Co Ltd Zaire SEP and Petroca SA, The Alpha* [1991] 2 Lloyd's Rep 515 in which a contribution in general average was allowed despite a finding that the master's conduct in causing the general average act had been 'unskillful and unreasonable';

(b) a new Rule C on environmental liabilities to exclude pollutant substances;

(c) a new Rule B (tug and tows/push boat and barges);

(d) new paragraphs in Rule E to reduce delays in the preparation of adjustments;

(e) incidental amendments to Rules G, II, V, VIII, IX, XVII and in the relation to the calculation of interest; and

(f) a new Rule XI(d) about the costs of measures undertaken in relation to environmental damage.

2 The Court of Appeal in *Comatra Ltd and Arabian Bulk Trade Ltd v Various Underwriters, The Abt Rasher* [2000] EWCA Civ 244; [2000] 2 Lloyd's Rep 575 considered the 1994 amendments to Rules G and XVII in interpreting a non-separation agreement between ship and cargo. The amendments reflect what these agreements normally provide with respect to general average adjustment. The effect of a non-separation agreement incorporating the standard so-called 'Bigham' clause is to cap cargo's rateable contribution by reference to the cost which would have been borne by the owners of cargo, if cargo had been forwarded at their expense. Under a non-separation agreement, rights and liabilities in general average are not affected by early discharge for transhipment and forwarding. Cargo interests contribute to general average in the same way as they would do in the absence of such forwarding but where a 'Bigham' clause is agreed the amount payable by the cargo owner is not to exceed what it would have cost the owner had the cargo been delivered at the port of refuge and forwarded by the owner to the final destination. The Court of Appeal concluded from the fact of the amendments to the York-Antwerp Rules that the making of such agreements was viewed by the market as reasonable. The result was that hull underwriters were responsible for the higher general average exposure. In other words, because the making of the non-separation agreement was reasonable, the insurers were responsible for the extra expenditure under s 66(4) of the Marine Insurance Act 1906. This section of the Act provides that an assured who incurs a general average expenditure can recover the 'proportion' of loss which falls upon him. As a result of the non-separation agreement the proportion of the cargo owner's contribution was subject to the 'Bigham' cap and the assured (the ship) had to contribute the balance.

3 The relationship between Rule XI(b) and Rule A has now been explored in the English case of *Trade Green Shipping Inc v Securitas Bremer Allgemeine Versicherungs AG and Another, The Trade Green* [2000] EWHC 104; [2000] 2 Lloyd's Rep 451 which raised the question of the relationship between the market adventure and the voyage. This case is discussed at p 374, below, and highlights the reason cargo insurers are calling for reform of the York-Antwerp Rules. See the introduction to this chapter and the *Report of the CMI Working Group on General Average*, 7th March 2003. The focus of the proposed reforms is the extent to which expenses not incurred for the common safety but for the common benefit should be recovered. The main principle expressed in Rule A is that only expenditures made or incurred for the common safety should be allowed, but Rules X(b) and (c), XI(b) and XII allow recovery of certain expenses not incurred for the common safety. Under the 'Rule of Interpretation' numbered rules have preference above lettered Rules. Rules F and XIV (second para) concerning substituted expenses are also of concern and include such items as the cost of temporary repairs and towage. The Report also considers a number of other provisions relating to salvage charges, time bars, interest, commission and the absorption clause. Action on the Report may occur at the Vancouver Conference in 2004.

2 CAUSATION

Two crucial questions arise in the law of general average: (1) what is a general average act?; (2) what losses may be claimed in general average? Rule A of the York-Antwerp Rules defines 'general average act' and Rule C provides that only losses, damages and expenses which are 'the direct consequence of the general average act shall be allowed

as general average'. Not all sacrifices and expenditures give rise to valid claims for general average contribution however, and both under the York-Antwerp Rules 1994 and at common law, certain conditions must be met. Very generally the act giving rise to the loss alleged to found the duty to contribute must be: extraordinary in nature; voluntarily and deliberately undertaken but reasonably incurred at a time of general peril caused by a real and imminent danger; undertaken for the common safety of a common maritime adventure and resulting in some saving from which contribution can be made.

The extent to which expenses incurred in the aftermath of the occurrence of a general average act are recoverable can be difficult to define. The case below deals comprehensively with these causation issues and decides that a payment made under an indemnity in respect of damages to a tug may be a general average loss.

Australian Coastal Shipping Commission v Green [1971] 1 QB 456, CA

Facts

The motor vessel, the *Bulwarra,* was fully laden and moored when a violent storm arose. The shipowner employed a tug to come to the aid of the *Bulwarra*. The tug was retained on the basis of an indemnity by the shipowner to the tugowner for any damage or loss to the tug. The tug towed the *Bulwarra* for about 10 minutes before the towline parted and wrapped itself around the tug's propeller. The tug was a total loss but the *Bulwarra* got to safety. The tugowners claimed under the indemnity despite the tug being lost by their own negligence. In a similar case, the tug employed to rescue the *Wangara* after its grounding was damaged after the towline wrapped itself around the propeller. The tugowners claimed the amount they had to pay for salvage under their indemnity. The question for the court was whether the payments made by the shipowners to the tugowners under the indemnities were general average losses.

Held

Lord Denning MR:

1 Introductory

We so rarely have to consider the law of general average that it is as well to remind ourselves of it. It arises when a ship, laden with cargo, is in peril on the sea, such peril indeed that the whole adventure, both ship and cargo, is in danger of being lost. If the master then, for the sake of all, throws overboard some of the cargo, so as to lighten the ship, it is unjust that the owner of the goods so jettisoned should be left to bear all the loss of it himself. He is entitled to a contribution from the shipowner and the other cargo owners in proportion of their interests. See the exposition by Lord Tenterden quoted in *Hallett v Wigram* (1850) 9 CB 580, at pp 607 to 608; and *Burton & Co v English & Co* (1883) 12 QBD 218. Likewise, if the master, for the sake of all, at the height of a storm, cuts away part of the ship's tackle (as in *Birkley and Others v Presgrave* (1801) 1 East 220); or cuts away a mast (as in *Atwood and Others v Sellar & Co* (1880) 5 QBD 286), or, having sprung a leak, puts into a port of refuge for repairs and spends money on them (as in *Svendsen and Others v Wallace Bros* (1885) 10 App Cas 404), it is unfair that the loss should fall on the shipowner alone. He is entitled to contribution from the cargo owners for the loss or expenditure to which he has been put. In all such cases the act done by the master is called a 'general average act': and the loss incurred is called a 'general average loss'…

3 The general average act

The 'general average act' was I think the contract made by the shipowners with the tug. In each case the vessel was in dire peril and the shipowners called upon the tug for help. If the tug had rendered salvage services on the usual terms of 'no cure-no pay', the contract would undoubtedly

have been a 'general average act'. If the services had been successful, the owners would have been liable to pay a very high reward: which would count as 'general average expenditure'. If the services had been unsuccessful, they would have had to pay nothing, see *NV Bureau Wijsmuller v Tojo Maru (Owners)* [1969] 2 Lloyd's Rep 193, at p 199; [1969] 3 WLR 902, at p 913. Instead of entering into such a contract, the shipowners made a towage contract on the United Kingdom Standard Towage Conditions. That was a very reasonable contract to make for both sides. It is well known that there is a substantial risk in towage operations that the towrope may break and foul the propeller of the tug: and that, if that happens, the tug may run aground or be damaged and have to be rescued. In a salvage agreement, the tugowners take that risk on themselves in return for the chance of a very high salvage reward. In a hiring agreement, at a fixed rate of hire, they cannot be expected to take the risk on themselves. It is only right and fair that they should ask for and receive an indemnity. The benefit to the shipowners is that, if the service is successful, he pays much less than he would under a salvage award: but, in return, he has to give an indemnity to the tugowner. In these circumstances, I have no doubt that the towage contract is a 'general average act'. It was intentionally and reasonably made for the common safety: …

4 The general average loss

The next question is: What was the general average loss? If the towline had not parted, and the tug had completed her task in safety, the hiring charge would certainly have been a general average expenditure. But the towline did part. It wrapped itself round the propeller of the tug. The result was that, in the case of the *Bulwarra*, the tug became a total loss; and, in the case of the *Wangara,* the tug was salved at great expense. The shipowners have become bound under the indemnity clause to indemnify the tug owners. Is this expenditure under the indemnity clause, a 'general average loss'?

This depends on whether the expenditure was the 'direct consequence' of the general average act within rule C of the York-Antwerp Rules. At the time when the rules were made in 1924, all lawyers thought that they could tell the difference between 'direct' and 'indirect' consequences … But 40 years later the Privy Council poured scorn upon it. It was in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Company Ltd (The Wagon Mound)* [1961] AC 388, when Viscount Simonds said (at pp 423 …) that the test of the 'direct consequence' leads to nowhere but the never-ending and insoluble problem of causation. To add to the confusion, rule C of the York-Antwerp Rules gives 'loss of market' as a typical instance of indirect loss, following, no doubt, *The Parana* (1877) 2 PD 118; whereas in *Koufos v C Czarnikow Ltd* [1969] 1 AC 350, at p 385 … Lord Reid says that the loss of market there was 'directly caused' by the defendants' breach of contract.

In these circumstances I propose to go back to the concept, as I understood it in 1924, when the York-Antwerp Rules were made. 'Direct consequences' denote those consequences which flow in an unbroken sequence from the act: whereas 'indirect consequences' are those in which the sequence is broken by an intervening or extraneous cause. I realise that this is not very helpful: because the metaphor of 'breaking the chain' of causation means one thing to one man and another thing to another. But still we have to do the best we can with it.

Direct consequences

Applying this test, I would start with the engagement of the tug on the towage conditions. That was the 'general average act'. From that act we have this sequence: (i) the making fast of the towline and the subsequent towage; (ii) the snapping of the towline and its fouling the propeller; (iii) the loss, or salvage, of the tug; (iv) the claim for indemnity.

Is that a direct sequence in unbroken line? Or is the sequence broken? The only two points at which it may be broken are at (ii) and (iv). I will consider them separately.

(i) The subsequent accident: It was a most unfortunate thing that the towline snapped and fouled the propeller. That was an intervening cause of much importance. Without it, the loss and expenditure would never have happened. But did it break the chain of causation? There is a passage in the German author Ulrich (Grosse-Haverei) which seems to say that, when, after a general average

act, there is a 'subsequent accident' which results in loss or damage, it breaks the chain of causation: so that such loss or damage is never the direct consequence of the general average act. It was quoted with approval by Bigham J in *Anglo-Argentine Live Stock and Produce Agency v Temperley Shipping Company* [1899] 2 QB 403, at p 410; and by Bailhache J in *Austin Friars Steamship Company Ltd v Spillers & Bakers Ltd* [1915] 1 KB 833, at p 836.

I cannot accept this view. If the master, when he does the 'general average act' ought reasonably to have foreseen that a subsequent accident of the kind might occur – or even that there was a distinct possibility of it – then the subsequent accident does not break the chain of causation. The loss or damage is the direct consequence of the original general average act.

… If, however, there is a subsequent accident which was only a remote possibility, it would be different. Thus Lowndes (Lowndes & Rudolf: *Law of General Average*) gave the illustration of a sailing vessel, when the master cuts away the mast and thus reduces her speed; and afterwards she is captured by the enemy. Her loss is not the direct consequence of the general average act. It is due to the intervening capture.

In both cases before us, the master, when he engaged the tug, should have envisaged that it was distinctly possible that the towline might break and foul the propeller. When it happened, therefore, it did not break the chain of causation.

(ii) *The indemnity clause*: The indemnity clause was most stringent. It was an extraneous cause of much importance. Without it, the expenditure by the shipowners would never have been incurred. But did it break the chain of causation?

If the indemnity clause had been unreasonable and such that the master ought never, in justice to the cargo owners, to have agreed to it, then I think that the expenditure would not flow from the general average act. It would flow from the onerous clause in the towage agreement: … [S]eeing that the indemnity clause here was reasonable, and such that the master, quite justly and fairly, agreed to it, then I think the expenditure flowed directly from the general average act … The indemnity was quite reasonable. So was the expenditure under it. It was the direct consequence of the general average act and must be accepted as a general average loss …

Notes

1 Phillimore and Cairns LJJ also delivered judgments in favour of dismissing the appeal but neither was concerned about causation where the expenditure was incurred under a contract which was itself the general average act. Both judges did however accept Ulrich's test which Lord Denning questioned.

2 The case concerned the York-Antwerp Rules 1950 but the relevant provisions remained materially unchanged under the York-Antwerp Rules 1974. The York-Antwerp Rules 1994 add a reference in Rule C to the exclusion of environmental liabilities and amend the wording of the last paragraph of the rule so as to exclude 'loss of market' from 'indirect loss' as such, which had been the source of the confusion under earlier versions of the rules.

3 WHO CAN SUE AND WHEN?

At common law a cargo owner's liability to contribute to general average accrues at the time of sacrifice or when the expense is incurred. The Privy Council's decision in the following case demonstrates the significance of when liability accrues in the context of a time limitation clause. It also highlights that the effect of the general average clause in the bill of lading is to transfer liability to the consignee (as endorsee of the bill). Where, as is usually the case, the consignee has undertaken a fresh contractual liability to the shipowner by executing a Lloyd's standard form average

bond in exchange for the release of the cargo to him, time runs from the date of completion of the general average statement as provided in the bond.

Castle Insurance v Hong Kong Islands Shipping [1984] 1 AC 226, PC

Facts

The *Potoi Chau*, a general ship, ran aground in October 1972. Salvage operations followed and included jettison. Salvage operations lasted until the end of November 1972. The preserved cargo was released by the ship managers to the various (74) consignees between November 1972 and February 1973 but only upon execution of Lloyd's average bonds and insurer's letters of guarantee as security. The ship was a constructive total loss and the average adjustment and statement were completed in August 1977. In October 1978 the ship managers sued the consignees and cargo insurers, claiming general average contributions. This case concerned the application made in July 1979 to join the shipowners as additional plaintiffs. Under the bills of lading, general average was to be adjusted in accordance with the York-Antwerp Rules 1950.

Held

Lord Diplock: . . . the original writ was issued within six years of the first general average act and within six years of the execution of the average bonds by each of the consignees and of the letters of guarantee by each of the cargo insurers. On the other hand the application to join the shipowners as plaintiffs in the action was made more than six years after the last of these events.

Under that branch of English common law into which the *lex mercatoria* has long ago become absorbed, the personal liability to pay the general average contribution due in respect of any particular consignment of cargo that had been preserved in consequence of a general average sacrifice or expenditure lies, in legal theory, upon the person who was owner of the consignment at the time when the sacrifice was made or the liability for the expenditure incurred. In practice, however, the personal liability at common law of whoever was the owner of the contributing consignment of cargo at the time of the general average act is hardly ever relied upon. There are two reasons for this. The first is that the contract of carriage between the shipowner and the owner of the consignment, whether the contract be contained in a charterparty or a bill of lading, invariably nowadays (so far as the decided cases show) contains an express clause dealing with general average and so brings the claim to contribution into the field of contract law. The second, and this has in practice been the decisive reason, is that there attaches to all cargo that has been preserved in consequence of a general average sacrifice or expenditure a lien in favour of those concerned in ship or cargo who have sustained a general average loss. The lien attaches to the preserved cargo at the time when the sacrifice is made or the liability to the expenditure incurred. The lien is a possessory lien and it is the duty of the master of the vessel to exercise the lien at the time of discharge of the preserved cargo in such a way as will provide equivalent security for contributions towards general average sacrifices made or expenditure incurred not only by those concerned in the ship but also by those concerned in cargo in respect of which a net general average loss has been sustained. The lien, being a possessory one and not a maritime lien, is exercisable only against the consignee, but it is exercisable whether or not the consignee was owner of the consignment at the time of the general average sacrifice or expenditure that gave rise to the lien: a fact of which the shipowner may well be unaware. At the time of discharge the sum for which the lien is security (save in the simplest cases, which do not include that of a general ship) is unquantifiable until after there has been an average adjustment. Indeed in the case of some consignees of cargo that has been preserved in part only or damaged in consequence of a general average loss, so far from being liable to a net general average contribution they may eventually turn out to be entitled to a net payment in general average . . .

[The bills of lading created] a contractual liability on the part of the consignee as indorsee of the bill of lading to pay general average contribution, if there be any chargeable on the cargo shipped, whether it was he, the shipper or some intermediate indorsee of the bill of lading, who happened to be owner of the goods at the time when a general average sacrifice took place or a liability for a general average expenditure was incurred. Since this liability arises under a simple contract, the period of limitation is six years from the accrual of the cause of action; but the clause is intended to regulate, and to transfer to whoever acquires title to the consignment of cargo under the bill of lading, what would otherwise be a common law liability of the owner of the cargo at the time of the general average act; so for the purposes of the instant case a necessary starting point is first to determine when, at common law, a cause of action for a general average contribution would have accrued against the owner of cargo, and then to see whether the wording of the clause is apt to postpone the accrual of a cause of action for such contribution against a holder of the bill of lading or to create some different cause of action accruing at a later date than that of the general average act in respect of which contribution was claimed.

… as a matter of law, in the absence of any agreement to the contrary, the publication of the average statement settles nothing: it has no other legal effect than as an expression of opinion by a professional man as to what are the appropriate sums payable to one another by the various parties interested in ship and cargo. It is just not capable of giving rise to any fresh cause of action or of postponing the accrual of an existing cause of action for an unliquidated sum.

Causes of action for unliquidated sums that, in the absence of earlier agreement as to quantum reached between the parties themselves, will only become quantified by the judgment of a court or the award of an arbitrator, accrue at the time that the events occur which give rise to the liability to pay to the plaintiff compensation in an amount to be subsequently ascertained … in their Lordships' view it was rightly decided in *Chandris v Argo Insurance Co Ltd* [1963] 2 Lloyd's Rep 65, that claims for contributions in general average under contractual provisions which do no more than require general average to be adjusted according to York-Antwerp Rules fall within this class and that, accordingly, the cause of action under such a contractual provision in a bill of lading accrues at the time when each general average sacrifice was made or general average expense incurred.

[The effect of a general average bond] … The average bonds, to give them their common though legally inaccurate description, were in the usual Lloyd's forms which appear to have been in use in substantially the same terms for well over a century: *Svendsen v Wallace* (1885) 10 App Cas 406, 410. There are two varieties one of which provides for security in the form of a cash deposit on joint account in a bank, the other does not call for any cash deposit but it is stated on its face that it is: 'To be used in conjunction with underwriters' guarantee'. In both varieties the wording of the preamble and the mutual promises is the same.

… In their Lordships' view, although, from the point of view of clarity, the draftsmanship of the Lloyd's forms of average bond leave much to be desired, the application of commercial common sense to the language used makes clear the intention of the parties to it as respects payments by the consignees. The contractual obligation assumed by the consignee is to make a payment of a liquidated sum at a future date which will not arrive until the general average statement has been completed by an average adjuster appointed by the shipowners. That in the instant case, where no question of the issue by the adjuster of certificates for interim reimbursements arose, was the earliest date at which the shipowners' cause of action against the consignees under the average bond for payment of general average contribution arose. It was not time barred at the date of the application of 19 July 1979 to add the shipowners as additional plaintiffs …

Notes

1 The 1994 amendments to the Rules have had no impact on the status of this case which remains authoritative on the Lloyd's bond.

2 The case has been criticised on the issue of the contract: see Lowndes and Rudolf, *Law of General Average*, Wilson, DJ and Cooke, JHS (eds), 12th edn, 1997, London: Sweet & Maxwell, paras 00.29–30.

4 FAULT/RULE D/UNSEAWORTHINESS/JASON CLAUSES

The extent to which the shipowner may claim for general average contribution where his own negligence has caused the loss and the opposability of limitation clauses are the subjects of the following cases. Rule D of the York-Antwerp Rules provides that rights to contribution in general average are not to be affected by fault of one of the parties but that 'this shall not prejudice any remedies which may be open against that party for such fault'. The court in *Goulandris* had to decide if the equitable defence that a person should not recover from any other person in respect of the consequences of his own wrong was one preserved by the Rule. It found that it was.

The extract below from *Guinomar of Conakry v Samsung Fire & Marine Insurance Co Ltd, The Kamsar Voyager* [2002] 2 Lloyd's Rep 57 considers the effect of a Jason clause on the question of whether or not there needs to be a causal link between unseaworthiness and the loss where the shipowner cannot prove he exercised due diligence.

Goulandris Bros v Goldman & Sons [1958] 1 QB 74

Facts

A bill of lading issued for shipowners in respect of goods on the *Granhill* at Lagos provided that general average was to be payable in accordance with the York-Antwerp Rules 1950, and incorporated the Hague Rules. The ship was found to be unseaworthy on departure from Lagos and was towed in the Bay of Biscay in Januay 1951. The shipowners incurred general average expenditure owing to their failure to make the ship seaworthy. Cargo owners' goods did not incur any actual loss or damage.

Held

Pearson J: … In my view the manifest objects of rule D [of the York-Antwerp rules 1950] are to keep all questions of alleged fault outside the average adjustment and to preserve unimpaired the legal position at the stage of enforcement. The effect of the first part of the rule is that the average adjustment is compiled on the assumption that the casualty has not been caused by anybody's fault. The convenience of this arrangement appears when regard is had to the size and complexity that an average adjustment may attain. The average adjustment in the present case covers 183 pages and the compilation would involve much collection of information and many calculations … The average adjustment shows X owing to Y £100, but that showing is without prejudice to any remedies which may be open to X for Y's fault having caused the casualty. In my view that is clearly the intended mode of operation of the two parts of rule D, and it affords the clue to the interpretation of the rule. The first part refers to the rights to contribution in general average as they will be set out in the average adjustment, and these are properly and naturally called 'rights', because normally the holder of such rights is entitled to receive payment. But the second part of the rule provides that the first part is not to prejudice remedies for faults. That implies that in some cases the remedies referred to in the second part of the rule will override the rights referred to in the first part; in other words, the second part operates as a proviso, qualifying, overriding, cutting down or derogating from the first part. The rights may be nullified or defeated or diminished or otherwise affected by the remedies. In that sense the rights referred to in the first part of the rule are *prima facie* rights because they are subject to the remedies.

The position, therefore, is that the claimants have their *prima facie* right to recover from the respondents contribution in general average, but the respondents may be able to defeat that right by using their 'remedies' for the claimants' 'fault'. As I have said, the York-Antwerp Rules are silent as to what are the remedies and what is a fault, and for elucidation of those matters it is necessary to have resort to the English law.

> [Pearson J reviewed the relevant authorities and concluded:] . . . The question which is disputed at this stage of the argument is whether the word 'remedies' in rule D is wide enough to cover the so-called 'equitable' defence, that the casualty was caused by the claimants' own fault …
>
> . . . Mainly I am influenced by the evident objects of rule D, which are to keep the whole question of alleged fault outside the average adjustment and to leave the legal 'remedies' in respect of fault unimpaired. There is no reason to suppose an intention to destroy defences while keeping alive cross-claims. The intention which may reasonably be inferred is an intention to preserve the legal position intact at the stage of enforcement. Suitable effect is given to that intention by construing the word 'remedies' in rule D as wide enough to cover defences as well as cross-claims, shields as well as spears, pleas as well as counts.
>
> Next one has to consider what is, for the purposes of a case such as this, the meaning of the word 'fault' in English law. [Pearson J considered the relevant authorities and concluded:] … It appears, therefore, in my opinion, from the citations which have been given, that for the relevant purpose a 'fault' is a legal wrong which is actionable as between the parties at the time when the general average sacrifice or expenditure is made. In the present case there was a legal wrong, and it was actionable as between the parties at the time when the general average expenditure was made. There was, therefore, a 'fault' in this case. Whatever effect the third paragraph of article III, rule 6, of the Hague Rules may have upon the rights of the parties in other ways, it did not deprive the legal wrong of its character as a 'fault'.
>
> Now I have to consider what effect, if any, the third paragraph of article III, rule 6, of the Hague Rules has had upon the legal position. Has it destroyed the respondents' equitable defence, and has it destroyed their cross-claim? In my view clearly it has not destroyed the equitable defence because it brings about only a discharge of liabilities and not a barring of defences. Therefore, if I am right in my conclusion that the equitable defence is one of the 'remedies' preserved by the second part of rule D of the York-Antwerp Rules, that defence is unaffected by the third paragraph of article III, rule 6, of the Hague Rules, and defeats the claimants' claim . . .

Note

Actionable fault was also the subject of *Demand Shipping Co Ltd v Ministry of Food, Govt of the People's Republic of Bangladesh and Another, The Lendoudis Evangelo II* [2001] EWHC 403; [2001] 2 Lloyd's Rep 304. A crew member activated the fuel tank's emergency shut-off system and the vessel suffered complete electrical failure, grounded and suffered bottom damage. It was found that cargo interests were liable to contribute in general average, as in all the circumstances the ship was seaworthy and that while the activation of the shut-off device was a grossly irresponsible act by an unknown member of the crew, it was a matter of speculation whether the crew member would have been deterred if a glass panel had been in place as alleged. The contract of carriage provided that general average was to be payable in accordance with the York-Antwerp Rules 1974 and incorporated the Hague Rules. As in *The Kamsar Voyager*, extracted below, the court approached the question of unseaworthiness from a common sense angle. In the event the court found that the ship was seaworthy and thus that the contribution by way of general average was recoverable.

Guinomar of Conakry v Samsung Fire & Marine Insurance Co Ltd, The Kamsar Voyager [2002] 2 Lloyd's Rep 57

Facts

In the course of a voyage to Inchon in Korea, smoke was observed leaking from the *Kamsar Voyager's* crankcase. Tests revealed low pressure in two cylinders and after visual inspection of one of the pistons cracks were discovered. The vessel carried a spare piston and it was duly fitted. Shortly after the vessel had worked itself up to full

speed unusual noises were heard and severe physical damage occurred. The major damage to the engine was found to have been caused after the fitting of the spare piston because it was the wrong size. General average was proclaimed. The plaintiff vessel owners brought an action against the defendant cargo insurers under insurance guarantees. The defendants argued that they were not liable, as the general average expenditure was due to the plaintiffs' own failure to exercise due diligence to ensure the vessel was seaworthy, contrary to the terms of the carriage contract contained in bills of lading.

The contract of carriage provided that general average should be payable according to the York-Antwerp Rules 1974 as amended in 1990. The question was whether the relevant unseaworthiness had to be causative of the loss or whether mere want of due diligence which rendered the vessel unseaworthy was enough to prevent recovery in general average. The damage to the vessel was caused by the fitting of an incompatible spare piston, not the cracking of the original piston, but the court found that presence on board of an incompatible piston constituted unseaworthiness. The failure by the shipowner to show that the piston suppliers had exercised due diligence in respect of the supply of the piston meant that the general average expenditure was caused by the owners' actionable fault, hence recovery was precluded.

Held

Judge Dean QC: … In this action the defendants have the burden of proving that the ship was unseaworthy and that such unseaworthiness was a cause of the GA expenditure. If unseaworthiness is proved the claimants have the burden of proving that due diligence was exercised in seeking to make the vessel seaworthy.

Clause 5 [of the bill of lading] was a form of the Jason clause and provided that GA should be payable according to the York/Antwerp Rules as amended in 1990. It will be necessary to consider the terms of this clause in more detail as the defendants argued that its effect was to make the owners' exercise of due diligence a condition precedent to their right to recover a GA contribution irrespective of the question of any causal connection between unseaworthiness of the vessel and the GA expenditure …

Causation

…

22 Under English common law a shipowner is only debarred from recovering a GA contribution if the expenditure was caused by his actionable fault and the position remains the same when the contract of carriage is on Hague Rules terms whether as the result of a statutory or a contractual incorporation of the Rules … [it was] contended that, if the ship was unseaworthy, the effect of cl 5 was to make the owners' exercise of due diligence a condition precedent to their entitlement to recover a GA contribution irrespective of the causal effect of the unseaworthiness as the clause contains no reference to causation.

23 … [this] involves ignoring the origins and rationale of this traditional form of what is known as a Jason clause and which was introduced into contracts for the carriage of goods by sea to circumscribe the effect of decisions of the Courts of the United States of America in the context of a principle of public policy of that country which was never recognized by English common law. The differences of approach no doubt reflect the differing commercial interests of the two countries in the 19th century when the English merchant fleet dominated international sea carriage and the United States provided many of the cargoes carried by sea. In this climate the Courts of the United States held that it was contrary to public policy for a sea carrier to seek to exclude liability for unseaworthiness or negligence by contractual terms and that any contractual provision which purported to do this was void and of no effect. The American doctrine was modified by the US

Harter Act, 1893, s 3 of which entitled sea carriers to a limited exemption from liability for negligence in the navigation and management of the ship. In *The Irrawaddy* (1897) 171 US 187 the US Supreme Court decided that the exemptions permitted by the Harter Act were only available as a shield by way of defence to a claim against shipowners but did not enable the owners to pursue their own claims for a GA contribution against cargo when the GA incident had been caused by negligence for which they would have been responsible apart from the exemptions. In order to meet this problem a clause in substantially the same terms as cl 5 was regularly included in contracts of carriage when any GA adjustment was likely to be made under American law. The clause was upheld according to its strict terms in *The Jason* (1911) 225 US Rep 24. But it was only partly effective because the US Courts adopted the construction for which [counsel] now contends, making the exercise of due diligence a condition precedent to the owners' right to recover the cargo contribution independent of causative effect, see *The Isis*, (1934) 48 LIL Rep 35. This resulted in the introduction of the New Jason clause which is a contractual adoption of the English law position so that only the shipowner's actionable fault causing the loss will defeat his claim in GA, see generally Lowndes & Rudolf, 'The Law of General Average and the York Antwerp Rules', 12th ed (1997) at pars 51–53. Neither forms of the Jason clause were ever required under English law … No such clause, deleted or otherwise, appears in the *Kamsar Voyager* bills and [counsel] says that this is a material distinction. I disagree with him about this …

(The judge considered the facts and concluded.)

28 The common sense approach indicates that the question has to be decided as a matter of the impressionistic judgment of the Court on the facts of the case in the context of the relevant contractual obligations rather than upon a detailed intellectual analysis. Doing my best in the light of this somewhat limited guidance, the critical fact is that there would have been no need to install any spare if the original piston had not failed at sea. Although the installation of a defective spare was not reasonably foreseeable as such, if the vessel carried a spare, as a prudent shipowner would have done, its use was inevitable. Accordingly, the failure of the original piston was not simply an occasion giving rise to the opportunity to install the spare whose causative force had been spent. It was an operative cause that was indeed the only reason for the use of the only relevant spare part on board the vessel. It was thus causative of the installation of the spare part and the subsequent immobilization of the vessel at sea as I understand empirical common sense notions of causation.

(The judge considered the law and the decision of the House of Lords in *The Muncaster Castle* [1961] 1 Lloyd's Rep 57 on the question of due diligence and spares and continued.)

Conclusion on liability

39 It will be noted from the emphasis which I have indicated that, although the facts of the case involved fitter's work on the ship, Lord Merriman appears to have considered that similar principles applied to the cases of supply of ship's equipment and spare parts. In my judgment this is correct and entirely consistent with the nature of the obligation under the Hague Rules as clarified in the decision of the House of Lords. Once the distinction between work carried on by the shipowners as part of their ordinary business is rejected as being significant in the case of repairs, I cannot see any logical or practical reason for limiting his personal duties to one of inspection only in the case of the procurement of necessary spares. The position is quite different from the case of an employer in respect of the common law duties owed to his employees … The Hague Rules are not to be equated with common law duties in tort.

It follows that the arguments of Mr Brenton are correct. The owners have failed to prove that MAN [their supplier] exercised due diligence in and about the supply of the incompatible spare piston. The owners have not satisfied the burden upon them under art III, r 1 of the Hague Rules of proving the exercise of due diligence to make *Kamsar Voyager* seaworthy and are responsible for her unseaworthiness at the commencement of the voyage in respect of both the cracked piston in No 1 unit and the incompatible spare piston on board which was supplied by MAN. It follows that

the GA expenditure was caused by their actionable fault and they are unable to recover the cargoes' proportion from the defendant insurers under the average guarantees.

Note
Neither *Goulandris* nor Rule D of the York-Antwerp Rules were discussed although the Jason clause called for general average to be payable in accordance with the 1990 Rules.

5 RULE XIV AND RULE X

Where temporary repairs are all that is required, can a shipowner claim permanent repairs as general average?

***Marida Ltd v Oswal Steel, The Bijela* [1994] 1 WLR 615, HL**

Facts

In November 1985, the *Bijela* loaded a cargo of scrap iron in Providence, Rhode Island for carriage to an Indian port, pursuant to contracts of carriage that incorporated the York-Antwerp Rules 1974. The vessel sailed but while still in Rhode Island Sound she grounded and seriously damaged her double bottom tanks. Temporary repairs were completed at Jamestown, the nearest anchorage, and the vessel proceeded to her original destination of Kandla and discharged her cargo. She then sailed to Singapore where permanent repairs were carried out.

The plaintiff shipowners alleged that the cost of temporary repairs were allowable in general average as substituted expenses under the second paragraph of Rule XIV of the York-Antwerp Rules 1974. The shipowners' argument was that if temporary repairs had not been completed at Jamestown, the vessel would have had to proceed to New York for permanent repairs which would have entailed discharging, storing and reloading the cargo at a cost of more than US $500,000. They argued that this cost would have been allowed under Rule X(b) and (c), whereas doing the temporary repairs at Jamestown resulted in a very substantial saving, and that they were entitled to recover the appropriate proportion of the sum actually incurred in carrying out the temporary repairs as substituted expense under the York-Antwerp Rules 1974.

The defendants argued that had permanent repairs been carried out at New York none of the expenses of such repairs would have been recoverable in general average because the alternative of the temporary repairs existed and was all that was required to enable the vessel to complete the original voyage.

Held

Lord Lloyd of Berwick: My Lords, the issue in this appeal is whether the owners of *Bijela* can claim general average contribution in respect of the cost of temporary repairs carried out in the course of a voyage from Providence, Rhode Island to Kandla, in India. The question turns on the construction of the second paragraph of rule XIV of the York-Antwerp Rules 1974.

. . . It is accepted that the cost of entering Jamestown, as a port of refuge, and her detention there, is allowable in general average under rules X and XI of the York-Antwerp Rules. The question is whether the cost of the temporary repairs should also be admitted. This depends, as I have said, on the second paragraph of rule XIV.

. . . The second paragraph of rule XIV obliges us to suppose that the temporary repairs had not been effected at Jamestown. What then would have happened? The answer is simple. She would have gone into drydock in New York. Was the discharge of the cargo necessary to enable the

damage to the ship to be repaired in drydock? The answer is clearly yes. Were those repairs necessary to enable the vessel to proceed safely from New York to India, always assuming that she had not already been repaired in Jamestown? The answer, again, is clearly yes. The assumption required by rule XIV must be carried through when applying rule X. It is not necessary to assume that the vessel could not have been repaired in Jamestown in order to give effect to the two rules. It is necessary only to assume that she was not so repaired, as rule XIV requires. In this way effect can be given to the clear intention of the opening words of the second paragraph of rule XIV, that the cost of temporary repairs of accidental damage are admissible in general average, subject only to the limit imposed by the second half of the paragraph.

Notes

1 The second paragraph of Rule XIV survived the 1994 amendments intact despite a proposal to delete it.

2 The problem for the shipowners was that the cost of temporary repairs is not normally allowable in general average at common law. The case decided that incorporation of the York-Antwerp Rules 1974 had the effect of giving the shipowners a claim.

3 See the comment by Gaskell, N on the case and its importance for adjusters in (1995) LMCLQ 342.

4 See also Chapter 2, 'Liability of Sea Carriers', Chapter 5, 'Deviation' and Chapter 10, 'Hague-Visby Rules'.

6 RULE A AND RULE XI(b)

The following case considered the much debated question of whether in order to claim tug towage expenses as port charges under Rule XI(b) of the York-Antwerp Rules it was necessary to establish that the expenses were intentionally and reasonably incurred for the common safety, for the purposes of preserving the ship and cargo from peril within Rule A of the same rules.

The case also considers the relationship between 'voyage' and 'common maritime adventure'.

Trade Green Shipping Inc v Securitas Bremer Allgemeine Versicherungs AG and Another, The Trade Green [2000] EWHC 104; [2000] 2 Lloyd's Rep 451

Facts

A fire broke out in the engine room of the *Trade Green* as she was discharging a cargo of rice at Aqaba. The vessel was towed from the berth by two tugs, with a third tug on standby on the instructions of the port authority. The vessel was taken to an anchorage outside port while the fire was brought under control. She was towed back to anchorage the following evening to complete discharging. The shipowners argued that for the purpose of allowing wages, maintenance and port charges in general average there had been a relevant 'detention within the port' under Rule XI(b) of the York-Antwerp Rules 1974. It was accepted that the steps, which gave rise to the tug expenses, were not taken by the master to preserve the property involved in the common adventure or to enable the vessel to complete the voyage.

Held

Moore-Brick J:

… Was there a detention?

7 As became clear in the course of argument, one of the central issues between the parties was whether the word 'detention' in r XI(b) bears the meaning which the owners sought to put on it.

… [Counsel for the first defendants] submitted that the reference to detention is concerned only with the vessel's physical movements and is not apt to cover interruption to ordinary cargo handling operations as the port of discharge.

… Rule XI is the counterpart of r X which deals with expenses of entering and leaving a port of refuge and handling and storing cargo, fuel and stores. Rule XI deals with other kinds of expenses incurred as a result of making for and entering a port of refuge which are not themselves covered by r X. It is quite true that r XI refers to 'any port or place' and that that expression is capable of including the port of discharge, but I think it is apparent from the language of these two rules as a whole that they are concerned with the consequences of an unexpected interruption of the vessel's progress towards her destination rather than any interference with routine cargo operations once she has reached it. In particular, the phrases 'when she shall have sailed thence with her original cargo' in r X(a), 'when the ship does not proceed on her original voyage' in r X(c) and 'until the ship shall or should have been made ready to proceed upon her voyage' in r XI(b) all point strongly to that conclusion.

… [Counsel for the plaintiffs'] response to this argument was that references in the rules to the 'voyage' are intended to denote the whole of the operation involved in the carriage of cargo by sea from the moment when the first parcel is loaded until the moment when the last parcel is discharged. In other words, she submitted that the 'voyage' is the same as the 'common maritime adventure' and that the use of the different expressions can be explained by the development of the rules in a piecemeal fashion over a period of many years. In my view the word 'voyage' is capable of bearing different meanings in different contexts and it is therefore necessary to examine the particular way in which it is used in the rules. However, the suggestion that the use of these two different expressions is simply the result of inadvertence on the part of those who framed successive editions of the rules does not in my view do them justice. From the Glasgow Resolutions of 1860 to the York-Antwerp Rules, 1974 one finds the words 'voyage' and 'adventure' being used in a manner which suggests that they are intended to refer to quite different concepts …Throughout the successive editions of the rules 'voyage' has been used in a way which naturally refers to the passage of the vessel from her first loading port to her final discharging port; 'adventure' has been used in a way which naturally describes the common enterprise represented by the carriage of goods by sea in which ship and cargo are both involved.

[Common Safety]

… a vessel may lose her propeller at sea and thereby be rendered unfit to encounter the ordinary perils of the sea. A resort to a port of refuge will be justified for the 'common safety', but once within a port where repairs can be effected, safety will have been attained and some alternative expression is required if (as was intended by the early framers of the Rules) general average allowances are to continue. The alternative expression chosen was 'necessary for the safe prosecution of the voyage', and it merely provides for a situation in port which, if the ship were at sea, would endanger the 'common safety'. In the same way, when the vessel is berthed at her final port of discharge she has reached a place of safety, at least so far as the perils of the sea passage are concerned, even though the adventure is not finally over until the whole of the cargo has been discharged. While the adventure persists it is still possible for a general average sacrifice to be made for the common safety in accordance with the principles embodied in r A … but it does not follow that expenses incurred for reasons unconnected with the common safety in order to enable the cargo to be discharged are to be allowed. Expenses of that kind could only be allowed if

they fell within one of the numbered rules, but if that had been intended it would have been easy for the draughtsman to have used the expression 'for the completion of the adventure' in r XI(b) rather than referring to the 'safe prosecution of the voyage'. Since in many respects rr X and XI involve a departure from the basic principles of general average embodied in the lettered rules, I can see no grounds for construing them more generously than the natural meaning of the words used would indicate.

13 … in my opinion the language of the rules and the principles which underlie them all point to the conclusion that r XI(b) is only intended to apply to the detention of the ship in the course of her voyage, that is, to situations in which the common safety requires that for the time being she should not proceed on her passage towards her port of discharge … Read in that way it is unnecessary to give the word 'detention' an extended meaning of the kind suggested by the owners in the present case. The fact that the owners are unable to recover the towage charges under r XI(b) in the present case does not seem to me to be anomalous. If they had been incurred to preserve the ship and cargo from the common peril they would be recoverable under r A. As it is, it is difficult to see that they were in any sense incurred for the common benefit since the vessel was already at her discharging berth and was capable of extinguishing the fire without leaving it.

… 'Port or place'

… I would agree with the comment in par 10.34 of Lowndes & Rudolf that any place, which provides the shelter, needed for the common safety would fall within these words.

'Port charges'

… 17 The rules themselves contain no definition of 'port charges' and the ambit of the expression does not appear to have been considered in any of the authorities. One is therefore thrown back on the language of r XI(b) itself and the context provided by rr X and XI as a whole. Under r X the expenses of entering and leaving a port of refuge are to be allowed in general average when an accident, sacrifice or other extraordinary circumstances render that necessary for the common safety. Rule XI appears to be designed to extend the same treatment to other expenses which will inevitably be incurred as a result of the need to make use of a port of refuge, primarily the additional cost of wages and maintenance of the crew and the consumption of stores and fuel. In this context I think that the natural meaning of the expression 'port charges' in r XI(b) is apt to include any charges which the vessel would ordinarily incur as a necessary consequence of entering or staying at the port in question. That would obviously include standard charges and levies of all kinds and may also extend to charges for standard services such as garbage removal which may or may not be optional but would be regarded as ordinary expenses of being in port … I do not think that r XI(b) can be construed so as to cover all sums charged by the port authority regardless of the circumstances; in my view it is much more limited in its scope …

'The extra period of detention'

… I think [counsel for the first defendants] was right in submitting that the 'extra period of detention' in r XI(b) is the period during which the vessel is detained after she would otherwise have been ready to leave the port. In the case of a vessel which is detained in a port of call for the common safety that period will begin when she would, but for the accident, have been ready to continue her voyage. In the case of a ship which has entered a port of refuge for the common safety, that period will begin as soon as she enters the port: see Lowndes & Rudolf, par 11.28. In the present case, however, there was no such detention. If, as I think is the case, r XI(b) merely extends only to the ordinary expenses of being in port, the rule works perfectly well when construed in this way …

Note

The finding was that the tug expenses were not allowable in general average under Rule XI(b) but because they had been reasonably and intentionally incurred for the common safety, for the purpose of preserving the ship and the cargo within the

meaning of Rule A of the York-Antwerp Rules, they could nonetheless be allowed, which has alarmed some (insurers). This is one of the questions being examined by the CMI Working Group on General Average referred to above.

FURTHER READING

Lowndes and Rudolf, *The Law of General Average and the York-Antwerp Rules*, Wilson, DJ and Cooke, JHS (eds), 12th edn, 1997, London: Sweet & Maxwell

Macdonald, J, 'General average and the York-Antwerp Rules: common safety and other considerations' (2003) 9(5) JIML 439–47

For a discussion of the changes to the Rules agreed in 1994, see Myerson, H, 'General average – a working adjuster's view' (1995) 26 JMLC 465; Hudson, GN, *The York-Antwerp Rules*, 2nd edn, 1996, London: Lloyd's of London; Macdonald, J, 'General average ancient and modern' (1995) LMCLQ 480; Hudson, GN, 'The York-Antwerp Rules: background to the charges of 1994' (1996) 27 JMLC 469; Myerson, H, 'The York-Antwerp Rules 1994 – the American experience at Sydney' (1997) LMCLQ 379

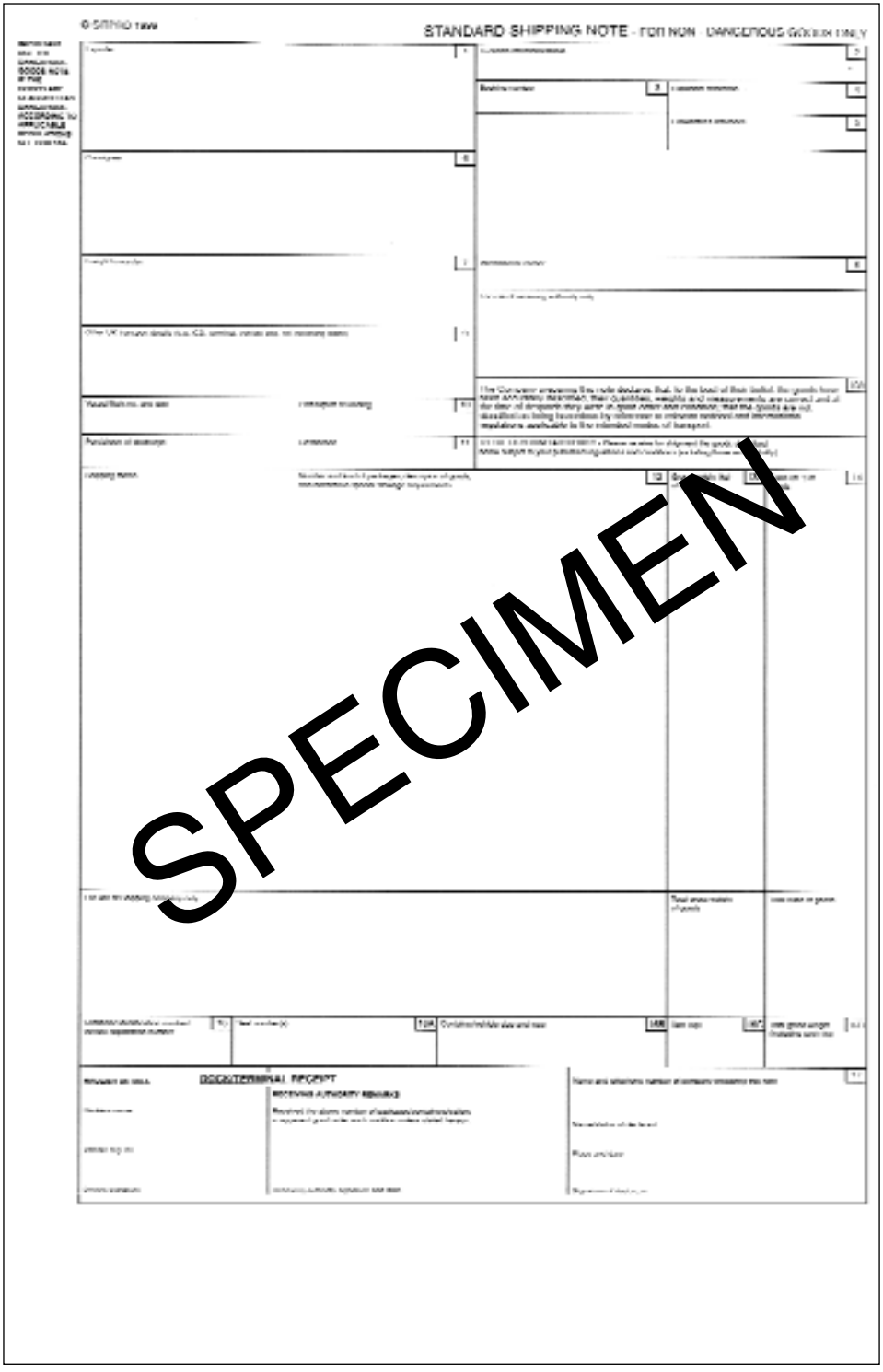
The Report of the CMI Working Group on General Average, 7 March 2003, available at www.comitemaritime.org/worip/genaverage.html

Shaw, R, 'CMI Bordeaux Colloquium' (2003) 9(4) JIML 396–99

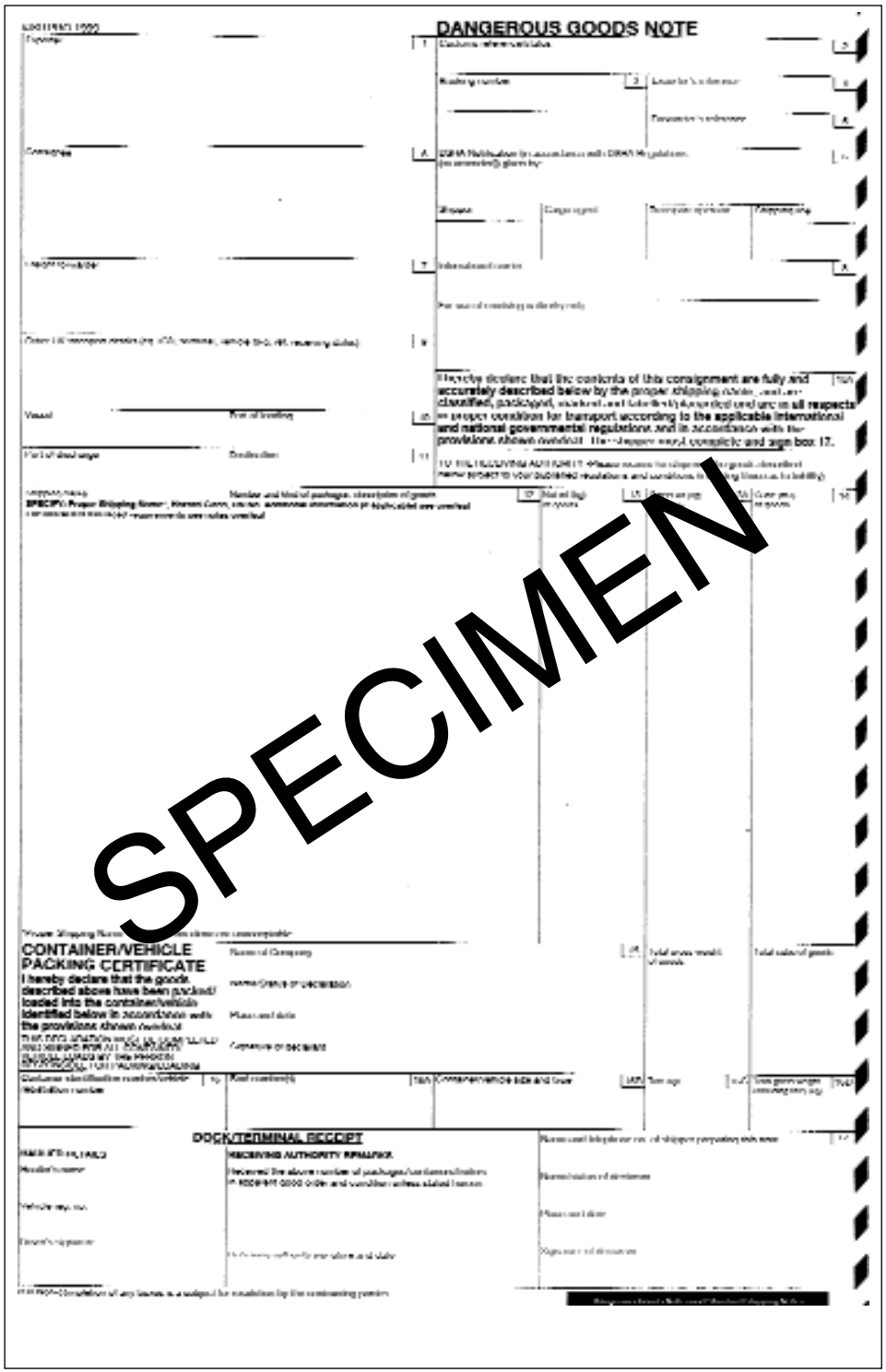
Rose, FD, *General Average: Law and Practice*, 1997, London: Lloyd's of London

Girvin, S, 'The 37th Comité Maritime International Conference: a report' (2002) LMCLQ 76

I STANDARD SHIPPING NOTE



2 DANGEROUS GOODS NOTE



DANGEROUS GOODS NOTE

I hereby declare that the contents of this consignment are fully and accurately described below by the proper shipping [illegible] classified, packaged, marked and labelled/placarded and are in all respects in proper condition for transport according to the applicable international and national governmental regulations and in accordance with the provisions shown overleaf. [illegible] and sign box 17.

SPECIMEN

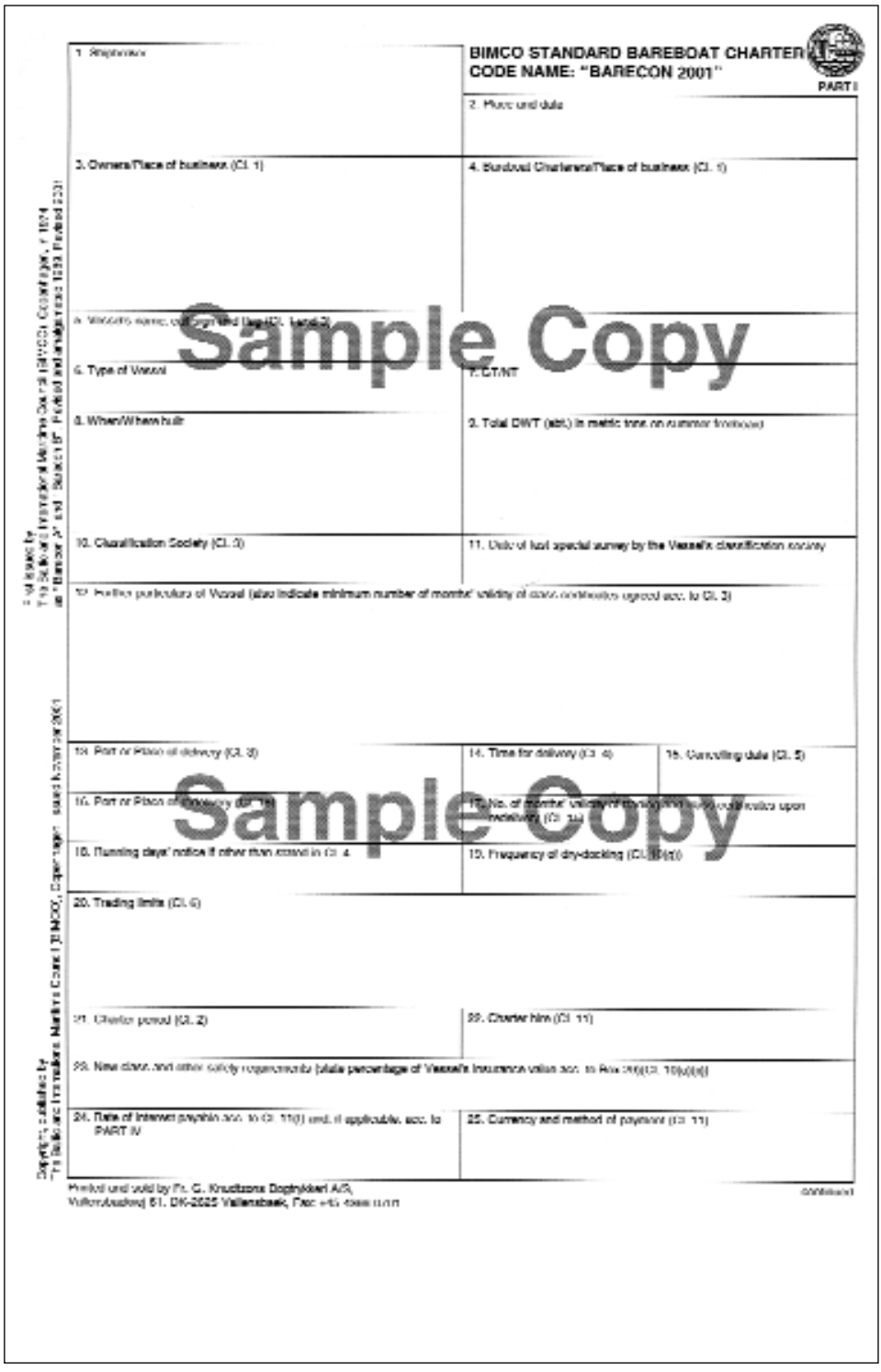
CONTAINER/VEHICLE PACKING CERTIFICATE

I hereby declare that the goods described above have been packed/loaded into the container/vehicle identified below in accordance with the provisions shown overleaf.

DOCK/TERMINAL RECEIPT

RECEIVING AUTHORITY REMARKS:

3 DEMISE CHARTERPARTY



BIMCO STANDARD BAREBOAT CHARTER
CODE NAME: "BARECON 2001"
PART I

1. Registration
2. Place and date
3. Owners/Place of business (Cl. 1)
4. Bareboat Charterer/Place of business (Cl. 1)
5. Vessel's name, call sign and flag (Cl. 1 and 2)
6. Type of Vessel
7. GT/NT
8. When/Where built
9. Total DWT (abt.) in metric tons on summer freeboard
10. Classification Society (Cl. 3)
11. Date of last special survey by the Vessel's classification society
12. Further particulars of Vessel (also indicate minimum number of months' validity of class certificates agreed acc. to Cl. 3)
13. Port or Place of delivery (Cl. 3)
14. Time for delivery (Cl. 4)
15. Cancelling date (Cl. 5)
16. Port or Place of redelivery (Cl. 3)
17. No. of months' validity of trading certificate upon redelivery (Cl. 3(a))
18. Running days' notice if other than stated in Cl. 4
19. Frequency of dry-docking (Cl. 10(a))
20. Trading limits (Cl. 6)
21. Charter period (Cl. 2)
22. Charter hire (Cl. 11)
23. Navigation and other warranties (state percentage of Vessel's insurance value acc. to Cl. 10(a)(i) 10(a)(ii))
24. Rate of interest payable acc. to Cl. 11(d) and, if applicable, acc. to PART IV
25. Currency and method of payment (Cl. 11)

(continued) "BARECON 2001" STANDARD BAREBOAT CHARTER (PART I

26. Place of payment; also state beneficiary and bank account (Cl. 11)	27. Bank guarantee/bond (sum and place)(Cl. 2(i)(optional)
28. Mortgage(s), if any (state whether 13(a) or (b) applies; if 13(b) applies state date of Financial Instrument and name of Mortgagee(s))(Place of business)(Cl. 13)	29. Insurance (hull and machinery and war risks)(state value acc. to Cl. 13(i) or, if applicable, acc. to Cl. 14(k))(also state if Cl. 14 applies)
30. Additional insurance cover, if any, for Owners' account limited to (Cl. 13(b) or, if applicable, Cl. 14(g))	31. Additional insurance cover, if any, for Charterers' account limited to (Cl. 13(b) or, if applicable, Cl. 14(g))
32. Latent defects (only to be filled in if period other than stated in Cl. 3)	33. Time/place of payment of hire to whom payable (Cl. 11)
34. Grace period (state number of clear banking days)(Cl. 24)	35. Dispute Resolution (state 35(a), 35(b) or 35(c); if 35(c) agreed Place of Arbitration must be stated (Cl. 20)
36. War cancellation (indicate countries agreed)(Cl. 26(f))	
37. Newbuilding Vessel (indicate with "yes" or "no" whether PART III applies)(optional)	38. Name and place of Builders (only to be filled in if PART III applies)
39. Vessel's Yard Building No. (only to be filled in if PART III applies)	40. Date of Building Contract (only to be filled in if PART III applies)
41. Liquidated damages and costs shall accrue to (state party acc. to Cl. 1) a) b) c)	
42. Hire/Purchase Agreement (indicate with "yes" or "no" whether PART IV applies)(optional)	43. Bareboat Charter Registry (indicate "yes" or "no" whether PART V applies)(optional)
44. Flag and Country of the Bareboat Charter Registry (only to be filled in if PART V applies)	45. Country of the Underlying Registry (only to be filled in if PART V applies)
46. Number of additional clauses covering special provisions, if agreed	

PREAMBLE - It is mutually agreed that this Contract shall be performed subject to the conditions contained in this Charter which shall include PART I and PART II. In the event of a conflict of conditions, the provisions of PART I shall prevail over those of PART II to the extent of such conflict but no further. It is further mutually agreed that PART III and/or PART IV and/or PART V shall only apply and only form part of this Charter if expressly agreed and stated in the Boxes 37, 42 and 43. If PART III and/or PART IV and/or PART V apply, it is further agreed that in the event of a conflict of conditions, the provisions of PART I and PART II shall prevail over those of PART III and/or PART IV and/or PART V to the extent of such conflict but no further.

Signature (Owners)	Signature (Charterers)

PART II
"BARECON 2001" Standard Bareboat Charter

1. Definitions
In this Charter, the following terms shall have the meanings hereby assigned to them:
"The Owners" shall mean the party identified in Box 3;
"The Charterers" shall mean the party identified in Box 4;
"The Vessel" shall mean the vessel named in Box 5 and with particulars as stated in Boxes 6 to 12.
"Financial Instrument" means the mortgage, deed of covenant or other such financial security instrument as annexed to this Charter and stated in Box 28

2. Charter Period
In consideration of the hire detailed in Box 22, the Owners have agreed to let and the Charterers have agreed to hire the Vessel for the period stated in Box 21 ("the Charter Period").

3. Delivery
(not applicable when Part III applies, as indicated in Box 37)
(a) The Owners shall before and at the time of delivery exercise due diligence to make the Vessel seaworthy and in every respect ready in hull, machinery and equipment for service under this Charter.
The Vessel shall be delivered by the Owners and taken over by the Charterers at the port or place indicated in Box 13 in such ready safe berth as the Charterers may direct.
(b) The Vessel shall be properly documented on delivery in accordance with the laws of the flag State indicated in Box 5 and the requirements of the classification society stated in Box 10. The Vessel upon delivery shall have her survey cycles up to date and trading and class certificates valid for at least the number of months agreed in Box 12.
(c) The delivery of the Vessel by the Owners and the taking over of the Vessel by the Charterers shall constitute a full performance by the Owners of all the Owners' obligations under this Clause 3, and thereafter the Charterers shall not be entitled to make or assert any claim against the Owners on account of any conditions, representations or warranties expressed or implied with respect to the Vessel but the Owners shall be liable for the cost of, and the time for repairs of, or renewals occasioned by, latent defects in the Vessel, her machinery or appurtenances, existing at the time of delivery under this Charter, provided such defects have manifested themselves within twelve (12) months after delivery unless otherwise provided in Box 32.

4. Time for Delivery
(not applicable when Part III applies, as indicated in Box 37)
The Vessel shall not be delivered before the date indicated in Box 14 without the Charterers' consent and the Owners shall exercise due diligence to deliver the Vessel not later than the date indicated in Box 15.
Unless otherwise agreed in Box 16, the Owners shall give the Charterers not less than thirty (30) running days' preliminary and not less than fourteen (14) running days' definite notice of the date on which the Vessel is expected to be ready for delivery.
The Owners shall keep the Charterers closely advised of possible changes in the Vessel's position.

5. Cancelling
(not applicable when Part III applies, as indicated in Box 37)
(a) Should the Vessel not be delivered latest by the cancelling date indicated in Box 15, the Charterers shall have the option of cancelling this Charter by giving the Owners notice of cancellation within thirty-six (36) running hours after the cancelling date stated in Box 15, failing which this Charter shall remain in full force and effect.
(b) If it appears that the Vessel will be delayed beyond the cancelling date, the Owners may, as soon as they are in a position to state with reasonable certainty the day on which the Vessel should be ready, give notice thereof to the Charterers asking whether they will exercise their option of cancelling, and the option must then be declared within one hundred and sixty-eight (168) running hours of the receipt by the Charterers of such notice or within thirty-six (36) running hours after the cancelling date, whichever is the earlier. If the Charterers do not then exercise their option of cancelling, the seventh day after the readiness date stated in the Owners' notice shall be substituted for the cancelling date indicated in Box 15 for the purpose of this Clause 5.
(c) This Clause 5 and the Charterers' option under Clause 5 shall be without prejudice to any claim the Charterers may otherwise have on the Owners under this Charter.

6. Trading Restrictions
The Vessel shall be employed in lawful trades for the carriage of suitable lawful merchandise within the trading limits indicated in Box 20.
The Charterers undertake not to employ the Vessel or suffer the Vessel to be employed otherwise than in conformity with the terms of the contracts of insurance (including any warranties expressed or implied therein) without first obtaining the consent of the insurers to such employment and complying with such requirements as to extra premium or otherwise as the insurers may prescribe.
The Charterers also undertake not to employ the Vessel or suffer her employment in any trade or business which is forbidden by the law of any country to which the Vessel may sail or is otherwise illicit or in carrying illicit or prohibited goods or in any manner whatsoever which may render her liable to condemnation, destruction, seizure or confiscation.
Notwithstanding any other provisions contained in this Charter it is agreed that nuclear fuels or radioactive products or waste are specifically excluded from the cargo permitted to be loaded or carried under this Charter. This exclusion does not apply to radio-isotopes used or intended to be used for any industrial, commercial, agricultural, medical or scientific purposes provided the Owners' prior approval has been obtained to loading thereof.

7. Surveys on Delivery and Redelivery
(not applicable when Part III applies, as indicated in Box 37)
The Owners and Charterers shall each appoint surveyors for the purpose of determining and agreeing in writing the condition of the Vessel at the time of delivery and redelivery hereunder. The Owners shall bear all expenses of the On-hire Survey including loss of time, if any, and the Charterers shall bear all expenses of the Off-hire Survey including loss of time, if any, at the daily equivalent to the rate of hire or pro rata thereof.

8. Inspection
The Owners shall have the right at any time after giving reasonable notice to the Charterers to inspect or survey the Vessel or instruct a duly authorised surveyor to carry out such survey on their behalf:-
(a) to ascertain the condition of the Vessel and satisfy

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themselves that the Vessel is being properly repaired and maintained. The costs and fees for such inspection or survey shall be paid by the Owners unless the Vessel is found in require repairs or maintenance in order to achieve the condition so provided:

(b) In dry dock if the Charterers have not dry-docked her in accordance with Clause 10(g). The costs and fees for such inspection or survey shall be paid by the Charterers; and

(c) for any other commercial reason they consider necessary (provided it does not unduly interfere with the commercial operation of the Vessel). The costs and fees for such inspection and survey shall be paid by the Owners.

All time used in respect of inspection, survey or repairs shall be for the Charterers' account and form part of the Charter Period.

The Charterers shall keep during the Charter Period and the Vessel's class, whenever required and shall whenever required by the Owners furnish them with full information regarding any casualties or other accidents or damage to the Vessel.

9. Inventories, Oil and Stores

A complete inventory of the Vessel's entire equipment, outfit including spare parts, appliances and of all consumable stores on board the Vessel shall be made by the Charterers in conjunction with the Owners on delivery and again on redelivery of the Vessel. The Charterers and the Owners, respectively, shall at the time of delivery and redelivery take over and pay for all bunkers, lubricating oil, unbroached provisions, paints, ropes and other consumable stores (excluding spare parts) in the said Vessel at the then current market prices at the ports of delivery and redelivery, respectively. The Charterers shall ensure that all spare parts listed in the inventory and used during the Charter Period are replaced at their expense prior to redelivery of the Vessel.

10. Maintenance and Operation

(a)(i) Maintenance and Repairs - During the Charter Period the Vessel shall be at the full disposal and at the risk and expense of the Charterers and under their complete control in every respect. The Charterers shall maintain the Vessel, her machinery, boilers, appurtenances and spare parts in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice and, except as provided for in Clause 14(i), if applicable, at their own expense they shall at all times keep the Vessel's Class fully up to date with the Classification Society indicated in Box 10 and maintain all other necessary certificates in force at all times.

(ii) New Class and Other Safety Requirements - In the event of any improvement, structural changes or new equipment becoming necessary for the continued operation of the Vessel by reason of new class requirements or by compulsory legislation costing (excluding the Charterers' loss of time) more than the percentage stated in Box 23, or if Box 23 is left blank, 5 per cent of the Vessel's insurance value as stated in Box 29, then the extent, if any, to which the rate of hire shall be varied and the ratio in which the cost of compliance shall be shared between the parties concerned in order to achieve a reasonable distribution thereof as between the Owners and the Charterers having regard, inter alia, to the length of the period remaining under this Charter shall, in the absence of agreement, be referred to the dispute resolution method agreed in Clause 30.

(iii) Financial Security - The Charterers shall maintain financial security or responsibility in respect of third party liabilities as required by any government, including federal, state or municipal or other division or authority thereof, to enable the Vessel, without penalty or charge, lawfully to enter, remain at, or leave any port, place, territorial or contiguous waters of any country, state or municipality in performance of this Charter without any delay. This obligation shall apply whether or not such requirements have been lawfully imposed by such government or division or authority thereof.

The Charterers shall make and maintain all arrangements by bond or otherwise as may be necessary to satisfy such requirements at the Charterers' sole expense and the Charterers shall indemnify the Owners against all consequences whatsoever (including loss of time) for any failure or inability to do so.

(b) Operation of the Vessel - The Charterers shall at their own expense and by their own procurement man, victual, navigate, operate, supply, fuel and, whenever required, repair the Vessel during the Charter Period and they shall pay all charges and expenses of every kind and nature whatsoever incidental to their use and operation of the Vessel under this Charter, including annual flag State fees and any foreign general municipality and/or state taxes. The Master, officers and crew of the Vessel shall be the servants of the Charterers for all purposes whatsoever, even if for any reason appointed by the Owners.

Charterers shall comply with the regulations regarding officers and crew in force in the country of the Vessel's flag or any other applicable law.

(c) The Charterers shall keep the Owners and the mortgagee(s) advised of the intended employment, planned dry docking and major repairs of the Vessel, as reasonably required.

(d) Flag and Name of Vessel - During the Charter Period, the Charterers shall have the liberty to paint the Vessel in their own colours, install and display their funnel insignia and fly their own house flag. The Charterers shall also have the liberty, with the Owners' consent, which shall not be unreasonably withheld, to change the flag and/or the name of the Vessel during the Charter Period. Painting and re-painting, instalment and re-instalment, registration and re-registration, if required by the Owners, shall be at the Charterers' expense and time.

(e) Changes to the Vessel – Subject to Clause 10(a)(ii), the Charterers shall make no structural changes in the Vessel or changes in the machinery, boilers, appurtenances or spare parts thereof without in each instance first securing the Owners' approval thereof. If the Owners so agree, the Charterers shall, if the Owners so require, restore the Vessel to its former condition before the termination of the Charter.

(f) Use of the Vessel's Outfit, Equipment and Appliances - The Charterers shall have the use of all outfit, equipment, and appliances on board the Vessel at the time of delivery, provided the same or their substantial equivalent shall be returned to the Owners on redelivery in the same good order and condition as when received, ordinary wear and tear excepted. The

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Charterers shall from time to time during the Charter Period replace such items of equipment as shall be so damaged or worn as to be unfit for use. The Charterers are to procure that all repairs to or replacement of any damaged, worn or lost parts or equipment be effected in such manner (both as regards workmanship and quality of materials) as not to diminish the value of the Vessel. The Charterers have the right to fit additional equipment at their expense and risk but the Charterers shall remove such equipment at the end of the period if requested by the Owners. Any equipment including radio equipment on hire on the Vessel at time of delivery shall be kept and maintained by the Charterers and the Charterers shall assume the obligations and liabilities of the Owners under any lease contracts in connection therewith and shall reimburse the Owners for all expenses incurred in connection therewith and/or any new equipment required in order to comply with local regulations.

(g) Periodical Dry Docking - The Charterers shall dry-dock the Vessel and clean and paint her underwater parts whenever the same may be necessary, but not less than once during the period stated in Box 19 or, if Box 19 has been left blank, every sixty (60) calendar months after delivery or such other period as may be required by the Classification Society or flag State.

*)

11. Hire

(a) The Charterers shall pay hire due to the Owners punctually in accordance with the terms of this Charter in respect of which time shall be of the essence.

(b) The Charterers shall pay to the Owners for the hire of the Vessel a lump sum in the amount indicated in Box 22 which shall be payable not later than every thirty (30) running days in advance, the first lump sum being payable on the date and hour of the Vessel's delivery to the Charterers. Hire shall be paid continuously throughout the Charter Period.

(c) Payment of hire shall be made in cash without discount in the currency and in the manner indicated in Box 23 and at the place mentioned in Box 24.

(d) Final payment of hire, if for a period of less than thirty (30) running days, shall be calculated proportionately according to the number of days and hours then running before redelivery and advance payment in the aforesaid accordingly.

(e) Should the Vessel be lost or missing, hire shall cease from the date and time when she was last or last heard of. The date upon which the Vessel is to be treated as lost or missing shall be ten (10) days after the Vessel was last reported or when the Vessel is posted as missing by Lloyd's, whichever occurs first. Any hire paid in advance to be adjusted accordingly.

(f) Any delay in payment of hire shall entitle the Owners to interest at the rate per annum as agreed in Box 24. If Box 24 has not been filled in, the three months interbank offered rate in London (LIBOR or its successor) for the currency stated in Box 23, as quoted by the British Bankers' Association (BBA) on the date when the hire fell due, increased by 2 per cent., shall apply.

(g) Payment of interest due under sub-clause 11(f) shall be made within seven (7) running days of the date of the Owners' invoice specifying the amount payable or, in the absence of an invoice, at the time of the next hire payment date.

12. Mortgage

(only to apply if Box 26 has been appropriately filled in)

(a) The Owners warrant that they have not effected any mortgage(s) of the Vessel and that they shall not effect any mortgage(s) without the prior consent of the Charterers, which shall not be unreasonably withheld.

(b) The Vessel chartered under this Charter is financed by a mortgage according to the Financial Instrument. The Charterers undertake to comply, and provide such information and documents to enable the Owners to comply, with all such instructions or directions in regard to the employment, insurances, operation, repairs and maintenance of the Vessel as laid down in the Financial Instrument or as may be directed from time to time during the currency of the Charter by the mortgagee(s) in conformity with the Financial Instrument. The Charterers confirm that, for this purpose, they have acquainted themselves with all relevant terms, conditions and provisions of the Financial Instrument and agree to acknowledge that in writing in any form that may be required by the mortgagee(s). The Owners warrant that they have not effected any mortgage(s) other than stated in Box 26 and that they shall not agree to any amendment of the mortgage(s) referred to in Box 26 or effect any other mortgage(s) without the prior consent of the Charterers, which shall not be unreasonably withheld.

(Optional, Clauses 12(a) and 12(b) are alternative; indicate alternative agreed in Box 28).

13. Insurance and Repairs

(a) During the Charter Period the Vessel shall be kept insured by the Charterers at their expense against hull and machinery, war and Protection and Indemnity risks (and any risks against which it is compulsory to insure for the operation of the Vessel, including maintaining financial security in accordance with sub-clause 10(a)(ii)) in such form as the Owners shall in writing approve, which approval shall not be unreasonably withheld. Such insurances shall be arranged by the Charterers to protect the interests of both the Owners and the Charterers and the mortgagee(s) (if any), and the Charterers shall be at liberty to protect under such insurances the proceeds of any damages they may obtain. Insurance policies shall name the Owners and the Charterers according to their respective interests. Subject to the provisions of the Financial Instrument, if any, and the approval of the Owners and the insurers, the Charterers shall effect all insured repairs and shall undertake settlement and reimbursement from the insurers of all costs in connection with such repairs as well as insured charges, expenses and liabilities to the extent of coverage under the insurances herein provided for.

The Charterers also to remain responsible for and to effect repairs and settlement of costs and expenses incurred thereby in respect of all other repairs not covered by the insurances and/or not exceeding any possible franchise(s) or deductible provided for in the insurances.

All time used for repairs under the provisions of sub-clause 13(a) and for repairs of latent defects according to Clause 3(c) above, including any deviation, shall be for the Charterers' account.

(b) If the conditions of the above insurances permit additional insurance to be placed by the parties, such cover shall be limited to the amount for each party set out in Box 30 and Box 31, respectively. The Owners or the Charterers as the case may be shall immediately furnish the other party with particulars of any additional

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insurance effected, including copies of any cover notes or policies and the written consent of the insurers of any such required insurance in any case where the consent of such insurers is necessary.

(c) The Charterers shall upon the request of the Owners, provide information and promptly execute such documents as may be required to enable the Owners to comply with the insurance provisions of the Financial Instrument.

(d) Subject to the provisions of the Financial Instrument, if any, should the Vessel become an actual, constructive, compromised or agreed total loss under the insurances required under sub-clause 13(a), all insurance payments for such loss shall be paid to the Owners who shall distribute the moneys between the Owners and the Charterers according to their respective interests. The Charterers' entitlement to the Owners and the mortgagee(s), if any, of any recoveries in consequence of which the Vessel is likely to become a total loss as defined in this Clause.

(e) The Owners shall upon the request of the Charterers, promptly execute such documents as may be required to enable the Charterers to abandon the Vessel to insurers and claim a constructive total loss.

(f) For the purpose of insurance coverage against hull and machinery and war risks under the provisions of sub-clause 13(a), the value of the Vessel is the sum indicated in Box 20.

14. Insurance, Repairs and Classification

(Optional, only to apply if expressly agreed and stated in Box 23, in which event Clause 13 shall be considered deleted)

(a) During the Charter Period the Vessel shall be kept insured by the Owners at their expense against hull and machinery and war risks under the form of policy or policies attached hereto. The Owners and/or insurers shall not have any right of recovery or subrogation against the Charterers on account of loss of or any damage to the Vessel or her machinery or appurtenances covered by such insurance, or on account of payments made in discharge of claims against the Vessel or the Owners covered by such insurance. Such insurance policies shall cover the Owners and the Charterers according to their respective interests.

(b) During the Charter Period the Vessel shall be kept insured by the Charterers at their expense against Protection and Indemnity risks (and any risks against which it is compulsory to insure for the operation of the Vessel, including maintaining financial security in accordance with sub clause 10(a)(iii)) in such form as the Owners shall in writing approve which approval shall not be unreasonably withheld.

(c) In the event that any act or negligence of the Charterers shall vitiate any of the insurance herein provided, the Charterers shall pay to the Owners all losses and indemnify the Owners against all claims and demands which would otherwise have been covered by such insurance.

(d) The Charterers shall, subject to the approval of the Owners or Owners' Underwriters, effect all insured repairs, and the Charterers shall undertake settlement of all miscellaneous expenses in connection with such repairs as well as all insured charges, expenses and liabilities, to the extent of coverage under the insurances provided for under the provisions of sub clause 14(a). The Charterers to be secured reimbursement through the Owners' Underwriters for such expenditures upon presentation of accounts.

(e) The Charterers to remain responsible for and to effect repairs and settlement of costs and expenses incurred thereby in respect of all other repairs not covered by the insurances and/or not exceeding any possible franchise(s) or deductibles provided for in the insurances.

(f) All time used for repairs under the provisions of sub-clauses 14(d) and 14(e) and for repairs of latent defects according to Clause 5 above, including any deviation, shall be for the Charterers' account and shall form part of the Charter Period.

The Owners shall not be responsible for any expenses as are incident to the use and operation of the Vessel for such time as may be required to make such repairs.

(g) If the conditions of the above insurances permit additional insurance to be placed by the parties such cover shall be limited so the amount for each party will not total more than their respective interests.

The Owners or the Charterers as the case may be shall immediately furnish the other party with particulars of any additional insurance effected, including copies of any cover notes or policies and the written consent of the insurers of any such required insurance in any case where the consent of such insurers is necessary.

(h) Should the Vessel become an actual, constructive, compromised or agreed total loss under the insurances required under sub-clause 14(a), all insurance payments for such loss shall be paid to the Owners, who shall distribute the moneys between themselves and the Charterers according to their respective interests.

(i) If the Vessel becomes an actual, constructive, compromised or agreed total loss under the insurances arranged by the Owners in accordance with sub clause 14(a), this Charter shall terminate as of the date of such loss.

(j) The Charterers shall upon the request of the Owners, promptly execute such documents as may be required to enable the Owners to abandon the Vessel to the insurers and claim a constructive total loss.

(k) For the purpose of insurance coverage against hull and machinery and war risks under the provisions of sub-clause 14(a), the value of the Vessel is the sum indicated in Box 20.

(l) Notwithstanding anything contained in sub-clause 10(a), it is agreed that under the provisions of Clause 14, if applicable, the Owners shall keep the Vessel's Class fully up to date with the Classification Society indicated in Box 10 and maintain all other necessary certificates in force at all times.

15. Redelivery

At the expiration of the Charter Period the Vessel shall be redelivered by the Charterers to the Owners at a safe and ice-free port or place as indicated in Box 16, in such ready safe berth as the Owners may direct. The Charterers shall give the Owners not less than thirty (30) running days' preliminary notice of expected date, range of ports of redelivery or port or place of redelivery and not less than fourteen (14) running days' definite notice of expected date and port or place of redelivery. Any changes thereafter in the Vessel's position shall be notified immediately to the Owners.

The Charterers warrant that they will not permit the Vessel to commence a voyage (including any preceding ballast voyage) which cannot reasonably be expected to be completed in time to allow redelivery of the Vessel within the Charter Period. Notwithstanding the above,

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should the Charterers fail to redeliver the Vessel within the Charter Period, the Charterers shall pay the daily equivalent to the rate of hire stated in Box 22 plus 10 per cent. or to the market rate, whichever is the higher, for the number of days by which the Charter Period is exceeded. All other terms, conditions and provisions of this Charter shall continue to apply.
Subject to the provisions of Clause 10, the Vessel shall be redelivered to the Owners in the same or as good structure, state, condition and class as that in which she was delivered, fair wear and tear not affecting class excepted.
The Vessel upon redelivery shall have her survey cycles up to date and trading and class certificates valid for at least the number of months agreed in Box 17.

16. Non-Lien
The Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the Owners in the Vessel. The Charterers further agree to fasten to the Vessel in a conspicuous place and to keep so fastened during the Charter Period a notice reading as follows:
"This Vessel is the property of (name of Owners). It is under charter to (name of Charterers) and by the terms of the Charter Party neither the Charterers nor the Master have any right, power or authority to create, incur or permit to be imposed on the Vessel any lien whatsoever."

17. Indemnity
(a) The Charterers shall indemnify the Owners against any loss, damage or expenses incurred by the Owners arising out of or in relation to the operation of the Vessel by the Charterers, and against any lien of whatsoever nature arising out of an event occurring during the Charter Period. If the Vessel be arrested or otherwise detained by reason of claims or liens arising out of her operation hereunder by the Charterers, the Charterers shall at their own expense take all reasonable steps to secure that within a reasonable time the Vessel is released, including the provision of bail.
Without prejudice to the generality of the foregoing, the Charterers agree to indemnify the Owners against all consequences or liabilities arising from the Master, officers or agents signing Bills of Lading or other documents.
(b) If the Vessel be arrested or otherwise detained by reason of a claim or claims against the Owners, the Owners shall at their own expense take all reasonable steps to secure that within a reasonable time the Vessel is released, including the provision of bail.
In such circumstances the Owners shall indemnify the Charterers against any loss, damage or expenses incurred by the Charterers (including hire paid under this Charter) as a direct consequence of such arrest or detention.

18. Lien
The Owners to have a lien upon all cargoes, sub-hires and sub-freights belonging or due to the Charterers or any sub-charterers and any Bill of Lading freight for all claims under this Charter, and the Charterers to have a lien on the Vessel for all moneys paid in advance and not earned.

19. Salvage
All salvage and towage performed by the Vessel shall be for the Charterers' benefit and the cost of repairing damage occasioned thereby shall be borne by the Charterers.

20. Wreck Removal
In the event of the Vessel becoming a wreck or obstruction to navigation the Charterers shall indemnify the Owners against any sums whatsoever which the Owners shall become liable to pay and shall pay in consequence of the Vessel becoming a wreck or obstruction to navigation.

21. General Average
The Owners shall not contribute to General Average.

22. Assignment, Sub-Charter and Sale
(a) The Charterers shall not assign this Charter nor sub-charter the Vessel on a bareboat basis except with the prior consent in writing of the Owners, which shall not be unreasonably withheld, and subject to such terms and conditions as the Owners shall approve.
(b) The Owners shall not sell the Vessel during the currency of this Charter except with the prior written consent of the Charterers, which shall not be unreasonably withheld, and subject to the buyer accepting an assignment of this Charter.

23. Contracts of Carriage
*) (a) The Charterers are to procure that all documents issued during the Charter Period evidencing the terms and conditions agreed in respect of carriage of goods shall contain a paramount clause incorporating any legislation relating to carrier's liability for cargo compulsorily applicable in the trade; if no such legislation exists, the documents shall incorporate the Hague Visby Rules. The documents shall also contain the New Jason Clause and the Both-to-Blame Collision Clause.
*) (b) The Charterers are to procure that all passenger tickets issued during the Charter Period for the carriage of passengers and their luggage under this Charter shall contain a paramount clause incorporating any legislation relating to carriers' liability for passengers and their luggage compulsorily applicable in the trade; if no such legislation exists, the passenger tickets shall incorporate the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974, and any protocol thereto.
*) *Delete as applicable.*

24. Bank Guarantee
(Optional, only to apply if box 27 filled in)
The Charterers undertake to furnish, before delivery of the Vessel, a first class bank guarantee or bond in the sum and at the place as indicated in Box 27 as guarantee for full performance of their obligations under this Charter.

25. Requisition/Acquisition
(a) In the event of the Requisition for Hire of the Vessel by any governmental or other competent authority (hereinafter referred to as "Requisition for Hire") irrespective of the date during the Charter Period when "Requisition for Hire" may occur and irrespective of the length thereof and whether or not it be for an indefinite

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or a limited period of time, and irrespective of whether it may or will remain in force for the remainder of the Charter Period, this Charter shall not be deemed thereby or thereupon to be frustrated or otherwise terminated and the Charterers shall continue to pay the stipulated hire in the manner provided by this Charter until the time when the Charter would have terminated pursuant to any of the provisions hereof always provided however that in the event of "Requisition for Hire" any Requisition Hire or compensation received or receivable by the Owners shall be payable to the Charterers during the remainder of the Charter Period or the period of the "Requisition for Hire" whichever be the shorter.

(b) In the event of the Owners being deprived of their ownership in the Vessel by any Compulsory Acquisition of the Vessel or requisition for title by any governmental or other competent authority (hereinafter referred to as "Compulsory Acquisition") then, irrespective of the date during the Charter Period when "Compulsory Acquisition" may occur, this Charter shall be deemed terminated as of the date of such "Compulsory Acquisition". In such event Charter Hire to be considered as earned and to be paid up to the date and time of such "Compulsory Acquisition".

25. War

(a) For the purpose of this Clause, the words "War Risks" shall include any war (whether actual or threatened), act of war, civil war, hostilities, revolution, rebellion, civil commotion, warlike operations, the laying of mines (whether actual or reported), acts of piracy, acts of terrorists, acts of hostility or malicious damage, blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), by any person, body, terrorist or political group, or the Government of any state whatsoever, which may be dangerous or are likely to be or to become dangerous to the Vessel, her cargo, crew or other persons on board the Vessel.

(b) The Vessel, unless the written consent of the Owners be first obtained, shall not continue or go through any port, place, area or zone (whether of land or sea), or any waterway or canal, where it reasonably appears that the Vessel, her cargo, crew or other persons on board the Vessel, in the reasonable judgement of the Owners, may be, or are likely to be, exposed to War Risks. Should the Vessel be within any such place as aforesaid, which only becomes dangerous, or is likely to be or to become dangerous, after her entry into it, the Owners shall have the right to require the Vessel to leave such area.

(c) The Vessel shall not load contraband cargo, or to pass through any blockade, whether such blockade be imposed on all vessels, or as imposed selectively in any way whatsoever against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever, or to proceed to an area where she shall be subject, or is likely to be subject to a belligerent's right of search and/or confiscation.

(d) If the insurers of the war risks insurance, when Clause 14 is applicable, should require payment of premiums and/or calls because, pursuant to the Charterers' orders, the Vessel is within, or is due to enter and remain within, any area or areas which are specified by such insurers as being subject to additional premiums because of War Risks, then such premiums and/or calls shall be reimbursed by the Charterers to the Owners at the same time as the next payment of hire is due.

(e) The Charterers shall have the liberty:

(i) to comply with all orders, directions, recommendations or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery, or in any other way whatsoever, which are given by the Government of the Nation under whose flag the Vessel sails, or any other Government, body or group whatsoever acting with the power to compel compliance with their orders or directions;

(ii) to comply with the orders, directions or recommendations of any war risks underwriters who have the authority to give the same under the terms of the war risks insurance;

(iii) to comply with the terms of any resolution of the Security Council of the United Nations, any directives of the European Community, the effective orders of any other supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the Owners are subject, and to obey the orders and directions of those who are charged with their enforcement.

(f) In the event of outbreak of war (whether there be a declaration of war or not) (i) between any two or more of the following countries: the United States of America, Russia, the United Kingdom, France, and the People's Republic of China, (ii) between any two or more of the countries stated in Box 26, both the Owners and the Charterers shall have the right to cancel this Charter, whereupon the Charterers shall redeliver the Vessel to the Owners in accordance with Clause 16. If the Vessel has cargo on board after discharge thereof at destination, or if delivered under this Clause from reaching or entering it at a near, open and safe port as directed by the Owners, or if the Vessel has no cargo on board, at the port at which the Vessel then is or if at sea at a near, open and safe port as directed by the Owners. In all cases hire shall continue to be paid in accordance with Clause 11 and except as aforesaid all other provisions of this Charter shall apply until redelivery.

27. Commission

The Owners to pay a commission at the rate indicated in Box 33 to the Brokers named in Box 33 on any hire paid under the Charter. If no rate is indicated in Box 33, the commission to be paid by the Owners shall cover the actual expenses of the Brokers and a reasonable fee for their work.

If the full hire is not paid owing to breach of the Charter by either of the parties the party liable therefor shall indemnify the Brokers against their loss of commission. Should the parties agree to cancel the Charter, the Owners shall indemnify the Brokers against any loss of commission but in such case the commission shall not exceed the brokerage on one year's hire.

28. Termination

(a) Charterers' Default

The Owners shall be entitled to withdraw the Vessel from the service of the Charterers and terminate the Charter with immediate effect by written notice to the Charterers if:

(i) the Charterers fail to pay hire in accordance with Clause 11. However, where there is a failure to make punctual payment of hire due to oversight, negligence, errors or omissions on the part of the

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Charterers or their bankers, the Owners shall give the Charterers written notice of the number of clear banking days stated in Box 34 (as recognised at the agreed place of payment) in which to rectify the failure, and when so rectified within such number of days following the Owners' notice, the payment shall stand as regular and punctual. Failure by the Charterers to pay hire within the number of days stated in Box 34 of their receiving the Owners' notice as provided herein, shall entitle the Owners to withdraw the Vessel from the service of the Charterers and terminate the Charter without further notice;

(ii) the Charterers fail to comply with the requirements of:
(1) Clause 6 (Trading Restrictions)
(2) Clause 10(a) (Insurance and Repairs)
provided that the Owners shall have the option, by written notice to the Charterers, to give the Charterers a specified number of days grace within which to rectify the failure without prejudice to the Owners' right to withdraw and terminate under this Clause if the Charterers fail to comply with such notice;

(iii) the Charterers fail to rectify any failure to comply with the requirements of sub-clause 10(a)(i) (Maintenance and Repairs) as soon as practically possible after the Owners have requested them in writing so to do and in any event so that the Vessel's insurance cover is not prejudiced.

(b) Owners' Default

If the Owners shall by any act or omission be in breach of their obligations under this Charter to the extent that the Charterers are deprived of the use of the Vessel and such breach continues for a period of fourteen (14) running days after written notice thereof has been given by the Charterers to the Owners, the Charterers shall be entitled to terminate this Charter with immediate effect by written notice to the Owners.

(c) Loss of Vessel

This Charter shall be deemed to be terminated if the Vessel becomes a total loss or is declared as a constructive or compromised or arranged total loss. For the purpose of this sub-clause, the Vessel shall not be deemed to be lost unless she has either become an actual total loss or agreement has been reached with her underwriters in respect of her constructive, compromised or arranged total loss or if such agreement with her underwriters is not reached it is adjudged by a competent tribunal that a constructive loss of the Vessel has occurred.

(d) Either party shall be entitled to terminate this Charter with immediate effect by written notice to the other party in the event of an order being made or resolution passed for the winding up, dissolution, liquidation or bankruptcy of the other party (otherwise than for the purpose of reconstruction or amalgamation) or if a receiver is appointed, or if it suspends payment, ceases to carry on business or makes any special arrangement or composition with its creditors.

(e) The termination of this Charter shall be without prejudice to all rights accrued due between the parties prior to the date of termination and to any claim that either party might have.

29. Repossession

In the event of the termination of this Charter in accordance with the applicable provisions of Clause 28, the Owners shall have the right to repossess the Vessel from the Charterers at her current or next port of call, or at a port or place convenient to them without hindrance or interference by the Charterers, courts or local authorities. Pending physical repossession of the Vessel in accordance with this Clause 29, the Charterers shall hold the Vessel as gratuitous bailee only to the Owners. The Owners shall arrange for an authorised representative to board the Vessel as soon as reasonably practicable following the termination of the Charter. The Vessel shall be deemed to be repossessed by the Owners from the Charterers upon the boarding of the Vessel by the Owners' representative. All arrangements and expenses relating to the settling of wages, disembarkation and repatriation of the Charterers' Master, officers and crew shall be the sole responsibility of the Charterers.

30. Dispute Resolution

(a) This Contract shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.

The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

(b) This Contract shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and any dispute arising out of or in connection with this Contract shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purposes of enforcing any award, judgment may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.

In cases where neither the claim nor any counterclaim

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exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc. current at the time when the arbitration proceedings are commenced.

*) (c) This Contract shall be governed by and construed in accordance with the laws of the place mutually agreed by the parties and any dispute arising out of or in connection with this Contract shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there.

(d) Notwithstanding (a), (b) or (c) above, the parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Contract.

In the case of a dispute in respect of which arbitration has been commenced under (a), (b) or (c) above, the following shall apply:

(i) Either party may at any time and from time to time elect to refer the dispute or part of the dispute in mediation by service on the other party of a written notice (the "Mediation Notice") calling on the other party to agree to mediation.

(ii) The other party shall thereupon within 14 calendar days of receipt of the Mediation Notice confirm that they agree to mediation, in which case the parties shall thereafter agree a mediator within a further 14 calendar days, failing which on the application of either party a mediator will be appointed promptly by the Arbitration Tribunal ("the Tribunal") or such person as the Tribunal may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the parties may agree or, in the event of disagreement, as may be set by the mediator.

(iii) If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the parties.

(iv) The mediation shall not affect the right of either party to seek such relief or take such steps as it considers necessary to protect its interest.

(v) Either party may advise the Tribunal that they have agreed to mediation. The arbitration procedure shall continue during the conduct of the mediation but the Tribunal may take the mediation timetable into account when setting the timetable for steps in the arbitration.

(vi) Unless otherwise agreed or specified in the mediation terms, each party shall bear its own costs incurred in the mediation and the parties shall share equally the mediator's costs and expenses.

(vii) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Tribunal except to the extent that they are discoverable under the law and procedure governing the arbitration.

(Note: The parties should be aware that the mediation process may not necessarily interrupt time limits.)

(a) If Box 35 in Part I is not appropriately filled in, sub-clause 30(a) of this Clause shall apply. Sub-clause 30(d) shall apply in all cases.

*) *Sub-clauses 30(a), 30(b) and 30(c) are alternatives; indicate alternative agreed in Box 35.*

31. **Notices**

(a) Any notice to be given by either party to the other party shall be in writing and may be sent by fax, telex, registered or recorded mail or by personal service.

(b) The address of the Parties for service of such communication shall be as stated in Boxes 3 and 4 respectively

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OPTIONAL PART

PART III
PROVISIONS TO APPLY FOR NEWBUILDING VESSELS ONLY
(Optional, only to apply if expressly agreed and stated in Box 3(r))

1. Specifications and Building Contract

(a) The Vessel shall be constructed in accordance with the Building Contract (hereafter called "the Building Contract") as annexed to this Charter, made between the Builders and the Owners and in accordance with the specifications and plans annexed thereto, such Building Contract, specifications and plans having been counter signed as approved by the Charterers.

(b) No change shall be made in the Building Contract or in the specifications or plans of the Vessel as approved by the Charterers as aforesaid without the Charterers' consent.

(c) The Charterers shall have the right to send their representative to the Builders' Yard to inspect the Vessel during the course of her construction to satisfy themselves that construction is in accordance with such approved specifications and plans as referred to under sub-clause (a) of this Clause.

(d) The Vessel shall be built in accordance with the Building Contract and shall be of the description set out therein. Subject to the provisions of sub-clause 7(c)(ii) hereunder, the Charterers shall be bound to accept the Vessel from the Owners, completed and constructed in accordance with the Building Contract, on the date of delivery by the Builders. The Charterers undertake that having accepted the Vessel they will not thereafter make any claims against the Owners in respect of the Vessel's performance or specification or defects, if any. Nevertheless, in respect of any repairs, replacements or defects which appear within the first 12 months from delivery by the Builders, the Owners shall endeavour to compel the Builders to repair, replace or remedy any defects or to recover from the Builders any expenditure incurred in carrying out such repairs, replacements or remedies. However, the Owners' liability to the Charterers shall be limited to the extent the Owners have a valid claim against the Builders under the guarantee clause of the Building Contract (a copy whereof has been supplied to the Charterers). The Charterers shall be bound to accept such sums as the Owners are reasonably able to recover under this Clause and shall make no further claim on the Owners for the difference between the amount(s) so recovered and the actual expenditure on repairs, replacement or remedying defects or for any loss of time incurred.

Any liquidated damages for physical defects or deficiencies shall accrue to the account of the party stated in Box 41(a) or if not filled in shall be shared equally between the parties. The costs of pursuing a claim or claims against the Builders under this Clause (including any liability to the Builders) shall be borne by the party stated in Box 41(b) or if not filled in shall be shared equally between the parties.

2. Time and Place of Delivery

(a) Subject to the Vessel having completed her acceptance trials including trials of cargo equipment in accordance with the Building Contract and specifications to the satisfaction of the Charterers, the Owners shall give and the Charterers shall take delivery of the Vessel afloat when ready for delivery and properly documented at the Builders' Yard or some other safe and readily accessible dock, wharf or place as may be agreed between the parties hereto and the Builders. Under the Building Contract the Builders have estimated that the Vessel will be ready for delivery to the Owners as therein provided but the delivery date for the purposes of this Charter shall be the date when the Vessel is in fact ready for delivery by the Builders after completion of trials whether that be before or after as indicated in the Building Contract. The Charterers shall not be entitled to refuse acceptance of delivery of the Vessel and upon and after such acceptance, subject to Clause 1(d), the Charterers shall not be entitled to make any claim against the Owners in respect of any conditions, representations or warranties, whether express or implied, as to the ocean trades of the Vessel or in respect of delay in delivery.

(b) If for any reason other than a default by the Owners under the Building Contract, the Builders become entitled under that Contract not to deliver the Vessel to the Owners, the Owners shall upon giving to the Charterers written notice of Builders' becoming so entitled, be excused from giving delivery of the Vessel to the Charterers and upon receipt of such notice by the Charterers this Charter shall cease to have effect.

(c) If for any reason the Owners become entitled under the Building Contract to reject the Vessel the Owners shall, before exercising such right of rejection, consult the Charterers and thereupon

(i) if the Charterers do not wish to take delivery of the Vessel they shall inform the Owners within seven (7) running days by notice in writing and upon receipt by the Owners of such notice this Charter shall cease to have effect, or

(ii) if the Charterers wish to take delivery of the Vessel they may by notice in writing within seven (7) running days require the Owners to negotiate with the Builders as to the terms on which delivery should be taken and/or refrain from exercising their right to rejection and upon receipt of such notice the Owners shall commence such negotiations and/or take delivery of the Vessel from the Builders and deliver her to the Charterers;

(iii) in no circumstances shall the Charterers be entitled to reject the Vessel unless the Owners are able to reject the Vessel from the Builders.

(iv) If this Charter terminates under sub-clause (b) or (c) of this Clause, the Owners shall thereafter not be liable to the Charterers for any claim under or arising out of this Charter or its termination.

(d) Any liquidated damages for delay in delivery under the Building Contract and any costs incurred in pursuing a claim therefor shall accrue to the account of the party stated in Box 41(c) or if not filled in shall be shared equally between the parties.

3. Guarantee Works

If not otherwise agreed, the Owners authorize the Charterers to arrange for the guarantee works to be performed in accordance with the building contract terms, and hereto contracts during the period of guarantee works. The Charterers have to advise the Owners about the performance to the extent the Owners may request.

4. Name of Vessel

The name of the Vessel shall be mutually agreed between the Owners and the Charterers and the Vessel shall be painted in the colours, display the funnel insignia and fly the house flag as required by the Charterers.

5. Survey on Redelivery

The Owners and the Charterers shall appoint surveyors for the purpose of determining and agreeing in writing the condition of the Vessel at the time of re-delivery.

Without prejudice to Clause 15 (Part II), the Charterers shall bear all survey expenses and all other costs, if any, including the cost of docking and undocking, if required, as well as all repair costs incurred. The Charterers shall also bear all loss of time spent in connection with any docking and undocking as well as repairs, which shall be paid at the rate of hire per day or pro rata.

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OPTIONAL PART

PART IV
HIRE/PURCHASE AGREEMENT
(Optional, only to apply if expressly agreed and stated in Box 42)

On expiration of this Charter and provided the Charterers have fulfilled their obligations according to Part I and II as well as Part III, if applicable, it is agreed, that on payment of the final payment of hire as per Clause 11 the Charterers have purchased the Vessel with everything belonging to her and the Vessel is fully paid for.

In the following paragraphs the Owners are referred to as the Sellers and the Charterers as the Buyers.

The Vessel shall be delivered by the Sellers and taken over by the Buyers on expiration of the Charter.

The Sellers guarantee that the Vessel, at the time of delivery, is free from all encumbrances and maritime liens or any debts whatsoever other than those arising from anything done or not done by the Buyers or any existing mortgage agreed not to be paid off by the time of delivery. Should any claims, which have been incurred prior to the time of delivery be made against the Vessel, the Sellers hereby undertake to indemnify the Buyers against all consequences of such claims to the extent it can be proved that the Sellers are responsible for such claims. Any taxes, notarial, consular and other charges and expenses connected with the purchase and registration under Buyers' flag, shall be for Buyers' account. Any taxes, consular and other charges and expenses connected with closing of the Sellers' register, shall be for Sellers' account.

In exchange for payment of the last month's hire instalment the Sellers shall furnish the Buyers with a Bill of Sale duly attested and legalized, together with a certificate setting out the registered encumbrances, if any. On delivery of the Vessel the Sellers shall provide for deletion of the Vessel from the Ship's Register and deliver a certificate of deletion to the Buyers.
The Sellers shall, at the time of delivery hand to the Buyers all classification certificates (for hull, engines, electric, liners, etc.), as well as all plans which may be in Sellers' possession.

The Maintenance Installation and Nautical Instruments, unless on hire, shall be included in the sale without any extra payment.

The Vessel with everything belonging to her shall be at Sellers' risk and expense until she is delivered to the Buyers, subject to the conditions of this Contract and the Vessel with everything belonging to her shall be delivered and taken over as she is at the time of delivery, after which the Sellers shall have no responsibility for possible faults or deficiencies of any description.

The Buyers undertake to pay for the repatriation of the Master, officers and other personnel if appointed by the Sellers to the port where the Vessel entered the Bareboat Charter as per Clause 3 (Part II) or to pay the equivalent cost for their journey to any other place.

PART V
PROVISIONS TO APPLY FOR VESSELS REGISTERED IN A BAREBOAT CHARTER REGISTRY
(Optional, only to apply if expressly agreed and stated in Box 43)

1. Definitions
For the purpose of this PART V, the following terms shall have the meanings hereby assigned to them.
"The Bareboat Charter Registry" shall mean the registry of the State where flag the Vessel will fly and in which the Charterers are registered as the bareboat charterers during the period of the Bareboat Charter.
"The Underlying Registry" shall mean the registry of the State in which the Owners of the Vessel are registered as Owners and in which jurisdiction and control of the Vessel will revert upon termination of the Bareboat Charter Registration.

2. Mortgage
The Vessel chartered under this Charter is financed by a mortgage and the provisions of Clause 12(h) (Part II) shall apply.

3. Termination of Charter by Default
If the Vessel chartered under this Charter is registered in a Bareboat Charter Registry as stated in Box 44, and if the Owners shall default in the payment of any amounts due under the mortgage(s) specified in Box 28, the Charterers shall, if so required by the mortgagee, direct the Owners to re-register the Vessel in the Underlying Registry as shown in Box 45.
In the event of the Vessel being deleted from the Bareboat Charter Registry as stated in Box 44, due to a default by the Owners in the payment of any amounts due under the mortgage(s), the Charterers shall have the right to terminate this Charter forthwith and without prejudice to any other claim they may have against the Owners under this Charter.

4 VOYAGE CHARTERPARTIES

1. Shipbroker	**RECOMMENDED** **THE BALTIC AND INTERNATIONAL MARITIME COUNCIL** **UNIFORM GENERAL CHARTER (AS REVISED 1922, 1976 and 1994)** **(To be used for trades for which no specially approved form is in force)** **CODE NAME "GENCON"** **PART I**
	2. Place and date
3. Owners/Place of business (Cl. 1)	4. Charterers/Place of business (Cl 1)
5. Vessel's name (Cl. 1)	6. GT/NT (Cl. 1)
7. DWT all told on summer [illegible] (abt.) (Cl. 1)	8. Present position (Cl. 1)
9. Expected ready to load (abt.) (Cl. 1)	
10. Loading port or place (Cl. 1)	11. Discharging port or place (Cl. 1)
12. Cargo (also state quantity and margin in Owners' option, if agreed, if full and complete cargo not agreed state "part cargo" (Cl. 1)	
13. Freight rate (also state whether freight prepaid or payable on delivery) (Cl. 4)	14. Freight payment (state currency and method of payment, also beneficiary and bank account) (Cl. 4)
15. State if vessel's cargo handling gear shall not be used (Cl. 5)	16.Laytime (if separate laytime for load, and disch. is agreed fill in a) and b). If total laytime for load, and disch., fill in c) only) (Cl. 6)
17. Shippers/Place of business (Cl. 6)	(a) Laytime for loading
18. Agents (loading) (Cl. 6)	(b) Laytime for discharging
19. Agents discharging) (Cl. 6)	(c) Total laytime for loading and discharging
20. Demurrage [illegible] manner payable (loading and discharging) (Cl. 7)	21. Cancelling date (Cl. 9)
	22. General Average to be adjusted at (Cl. 12)
23. Freight Tax (state if for the Owners' Account (Cl. 13(c))	24. Brokerage commission and to whom payable (Cl. 15)
25. Law and Arbitration (state 19 (a), 19 (b) or 19 (c) of Cl. 19; if 19(c) agreed also state Place of Arbitration) (if not filled in 19(a) shall apply) (Cl. 19)	
(a) State maximum amount for small claims/shortened arbitration (Cl. 19)	26. Additional clauses covering special provision, if agreed

If mutually agreed that this contract shall be performed subject to the conditions contained in this Charter Party which shall include Part I as well as Part II. In the event of a conflict of conditions, the provisions of Part I shall prevail over those of Part II to the extent of such conflict.

Signature (Owners)	Signature (Charterers)

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by authority of The Baltic and International Maritime Council (BIMCO), Copenhagen

PART II
'Gencon' Charter (As Revised 1922, 1976 and 1994)

1. It is agreed between the party mentioned in Box 3 as the Owners of the Vessel named in Box 5, of the GT/NT indicated in Box 6 and carrying about the number of metric tons of deadweight capacity all told on summer loadline stated in Box 7, now in position as stated in Box 8 and expected ready to load under this Charter Party about the date indicated in Box 9, and the party mentioned as the Charterers in Box 4 that:
The said Vessel shall, as soon as her prior commitments have been completed, proceed to the loading port(s) or place(s) stated in Box 10 or so near thereto as she may safely get and lie always afloat, and there load a full and complete cargo (if shipment of deck cargo agreed same to be at the Charterers' risk and responsibility) as stated in Box 12, which the Charterers bind themselves to ship, and being so loaded the Vessel shall proceed to the discharging port(s) or place(s) stated in Box 11 as ordered on signing Bills of Lading, or so near thereto as she may safely get and lie always afloat, and there deliver the cargo.

2. Owners' Responsibility Clause
The Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss, damage or delay has been caused by personal want of due diligence on the part of the Owners or their Manager to make the Vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied, or by the personal act or default of the Owners or their Manager.
And the Owners are not responsible for loss, damage or delay arising from any other cause whatsoever, even from the neglect or default of the Master or crew or some other person employed by the Owners on board or ashore for whose acts they would, but for this Clause, be responsible, or from unseaworthiness of the Vessel on loading or commencement of the voyage or at any time whatsoever.

3. Deviation Clause
The Vessel has liberty to call at any port or ports in any order, for any purpose, to sail without pilots, to tow and/or assist Vessels in all situations, and also to deviate for the purpose of saving life and/or property.

4. Payment of Freight
(a) The freight at the rate stated in Box 13 shall be paid in cash calculated on the intaken quantity of cargo.
(b) *Prepaid*. If according to Box 13 freight is to be paid on shipment it shall be deemed earned and non-returnable, Vessel and/or cargo lost or not lost.
Neither the Owners nor their agents shall be required to sign or endorse bills of lading showing freight prepaid unless the freight due to the Owners has actually been paid.
(c) *On delivery*. If according to Box 13 freight, or part thereof, is payable at destination it shall not be deemed earned until the cargo is thus delivered. Notwithstanding the provisions under (a), if freight or part thereof is payable on delivery of the cargo the Charterers shall have the option of paying the freight on delivered weight/quantity provided such option is declared before breaking bulk and the weight/quantity can be ascertained by official weighing machine, joint draft survey or tally.
Cash for Vessel's ordinary disbursements at the port of loading to be advanced by the Charterers, if required, at highest current rate of exchange, subject to two (2) per cent to cover insurance and other expenses.

5. Loading/Discharging
(a) *Costs/Risks*
The cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed and/or secured and taken from the holds and discharged by the Charterers, free of any risk, liability and expense whatsoever to the Owners. The Charterers shall provide and lay all dunnage material as required for the proper stowage and protection of the cargo on board, the Owners allowing the use of all dunnage available on board. The Charterers shall be responsible for and pay the cost of removing their dunnage after discharge of the cargo under this Charter Party and time to count until dunnage has been removed.
(b) *Cargo Handling Gear*
Unless the Vessel is gearless, unless it has been agreed between the parties that the Vessel's gear shall not be used and stated as such in Box 15, the Owners shall throughout the duration of loading/discharging give free use of the Vessel's cargo handling gear and of sufficient motive power to operate all such cargo handling gear and all such equipment to be in good working order. Unless caused by negligence of the stevedores, time lost by breakdown of the Vessel's cargo handling gear or motive power - pro rata the total number of cranes/winches required at that time for the loading/discharging of cargo under this Charter Party - shall not count as laytime or time on demurrage.
On request the Owners shall provide free of charge cranemen/winchmen from the crew to operate the Vessel's cargo handling gear, unless local regulations prohibit this, in which latter event shore labourers shall be for the account of the Charterers. Cranemen/winchmen shall be under the Charterers' risk and responsibility and as stevedores to be deemed as their servants but shall always work under the supervision of the Master.
(c) *Stevedore Damage*
The Charterers shall be responsible for damage (beyond ordinary wear and tear) to any part of the Vessel caused by Stevedores. Such damage shall be notified as soon as reasonably possible by the Master to the Charterers or their agents and to their Stevedores, failing which the Charterers shall not be held responsible. The Master shall endeavour to obtain the Stevedores' written acknowledgement of liability.
The Charterers are obliged to repair any stevedore damage prior to completion of the voyage, but must repair stevedore damage affecting the Vessel's seaworthiness or class before the Vessel sails from the port where such damage was caused or found. All additional expenses incurred shall be for the account of the Charterers and any time lost shall be for the account of and shall be paid to the Owners by the Charterers at the demurrage rate.

6. Laytime
* (a) *Separate laytime for loading and discharging*
The cargo shall be loaded within the number of running days/hours as indicated in Box 16, weather permitting, Sundays and holidays excepted, unless used, in which event time used shall count.
The cargo shall be discharged within the number of running days/hours as indicated in Box 16, weather permitting, Sundays and holidays excepted unless used, in which event time used shall count.
* (b) *Total laytime for loading and discharging*
The cargo shall be loaded and discharged within the number of total running days/hours as indicated in Box 16, weather permitting Sundays and holidays excepted, unless used, in which event time used shall count.
(c) *Commencement of laytime (loading and discharging)*
Laytime for loading and discharging shall commence at 13.00 hours, if notice of readiness is given up to and including 12.00 hours, and at 06.00 hours next working day if notice given during office hours after 12.00 hours. Notice of readiness at loading port to be given to the Shippers named in Box 17 or if not named, to the Charterers or their agents named in Box 18. Notice of readiness at the discharging port to be given to the Receivers or, if not known, to the Charterers or their agents named in Box 19.
If the loading/discharging berth is not available on the Vessel's arrival at or off the port of loading/discharging, the Vessel shall be entitled to give notice of readiness within ordinary office hours on arrival there, whether in free pratique or not, whether customs cleared or not. Laytime or time on demurrage shall then count as if she were in berth and in all respects ready for loading/ discharging provided that the Master warrants that she is in fact ready in all respects. Time used in moving from the place of waiting to the loading/ discharging berth shall not count as laytime.
If, after inspection, the Vessel is found not to be ready in all respects to load/ discharge time lost after the discovery thereof until the Vessel is again ready to load/discharge shall not count as laytime.
Time used before commencement of laytime shall count.
* *Indicate alternative (a) or (b) as agreed, in Box 16.*

7. Demurrage
Demurrage at the loading and discharging port is payable by the Charterers at the rate stated in Box 20 in the manner stated in Box 20 per day or pro rata for any part of a day. Demurrage shall fall due day by day and shall be payable upon receipt of the Owners' invoice.
In the event the demurrage is not paid in accordance with the above, the Owners shall give the Charterers 96 running hours written notice to rectify the failure. If the demurrage is not paid at the expiration of this time limit and if the vessel is in or at the loading port, the Owners are entitled at any time to terminate the Charter Party and claim damages for any losses caused thereby.

8. Lien Clause
The Owners shall have a lien on the cargo and on all sub-freights payable in respect of the cargo, for freight, deadfreight, demurrage, claims for damages and for all other amounts due under this Charter Party including costs of recovering same.

9. Cancelling Clause
(a) Should the Vessel not be ready to load (whether in berth or not) on the cancelling date indicated in Box 21, the Charterers shall have the option of cancelling this Charter Party.
(b) Should the Owners anticipate that, despite the exercise of due diligence the Vessel will not be ready to load by the cancelling date, they shall notify the Charterers thereof without delay stating the expected date of the Vessel's readiness to load and asking whether the Charterers will exercise their option of cancelling the Charter Party, or agree to a new cancelling date.
Such option must be declared by the Charterers within 48 running hours after the receipt of the Owners' notice. If the Charterers do not exercise their option of cancelling, then this Charter Party shall be deemed to be amended such that the seventh day after the new readiness date stated in the Owners' notification to the Charterers shall be the new cancelling date.
The provisions of sub-clause (b) of this Clause shall operate only once, and in case of the Vessel not arriving thereafter, the Charterers shall have the option of cancelling the Charter Party as per sub-clause (a) of this Clause.

10. Bills of Lading
Bills of Lading shall be presented and signed by the Master as per the 'Congenbill' Bill of Lading form, Edition 1994, without prejudice to this Charter Party, or by the Owners' agents provided written authority has been given by Owners to the agents, a copy of which is to be furnished to the Charterers. The Charterers shall indemnify the Owners against all consequences or liabilities that may arise from the signing of bills of lading as presented to the extent that the terms or contents of such bills of lading impose or result in the imposition of more onerous liabilities upon the Owners than those assumed by the Owners under this Charter Party.

11. Both-to-Blame Collision Clause
If the Vessel comes into collision with another vessel as a result of the negligence of the other vessel and any act, neglect or default of the Master, Mariner, Pilot or the servants of the Owners in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder will indemnify the Owners against all loss or liability to the other or non-carrying vessel or her owners in so far as

such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said cargo, paid or payable by the other or non-carrying vessel or her owners to the owners of said cargo and set-off, recouped or recovered by the other or non-carrying vessel or her owners as part of their claim against the carrying Vessel or the Owners.
The foregoing provisions shall also apply where the owners, operators or those in charge of any vessel or vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision or contact.

12. General Average and New Jason Clause
General Average shall be adjusted in London unless otherwise agreed in Box 22 according to York-Antwerp Rules 1994 and any subsequent modification thereof. Proprietors of cargo to pay the cargo's share in the general expenses even if same have been necessitated through neglect or default of the Owners' servants (see Clause 2).
If General Average is to be adjusted in accordance with the law and practice of the United States of America, the following Clause shall apply: 'In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Owners are not responsible, by statute contract or otherwise, the cargo, shippers, consignees or owners of the cargo shall contribute with the Owners in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the cargo. If a salving vessel is owned or operated by the Owners, salvage shall be paid for as fully as if the said salving vessel or vessels belonged to strangers. Such deposit as the Owners, or their agents, may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the cargo, shippers consignees or owners of the goods to the Owners before delivery.'.

13. Taxes and Dues Clause
(a) *On Vessel* - The Owners shall pay all dues, charges and taxes customarily levied on the Vessel, howsoever the amount thereof may be assessed.
(b) *On cargo* - The Charterers shall pay all dues, charges, duties and taxes customarily levied on the cargo, howsoever the amount thereof may be assessed.
(c) *On freight* - Unless otherwise agreed in Box 23, taxes levied on the freight shall be for the Charterers' account.

14. Agency
In every case the Owners shall appoint their own Agent both at the port of loading and the port of discharge.

15. Brokerage
A brokerage commission at the rate stated in Box 24 on the freight, dead-freight and demurrage earned is due to the party mentioned in Box 24.
In case of non-execution 1/3 of the brokerage on the estimated amount of freight to be paid by the party responsible for such non-execution to the Brokers as indemnity for the latter's expenses and work. In case of more voyages the amount of indemnity to be agreed.

16. General Strike Clause
(a) If there is a strike or lock-out affecting or preventing the actual loading of the cargo, or any part of it, when the Vessel is ready to proceed from her last port or at any time during the voyage to the port or ports of loading or after her arrival there, the Master or the Owners may ask the Charterers to declare, that they agree to reckon the laydays as if there were no strike or lock-out. Unless the Charterers have given such declaration in writing (by telegram, if necessary) within 24 hours, the Owners shall have the option of cancelling this Charter Party. If part cargo has already been loaded, the Owners must proceed with same, (freight payable on loaded quantity only) having liberty to complete with other cargo on the way for their own account.
(b) If there is a strike or lock-out affecting or preventing the actual discharging of the cargo on or after the Vessel's arrival at or off port of discharge and same has not been settled within 48 hours, the Charterers shall have the option of keeping the Vessel waiting until such strike or lock-out is at an end against paying half demurrage after expiration of the time provided for discharging until the strike or lock-out terminates and thereafter all demurrage shall be payable until the completion of discharging, or of ordering the Vessel to a safe port where she can safely discharge without risk of being detained by strike or lock-out. Charterers are to give Owners 48 hours after the Master or the Owners have given notice to the Charterers of the strike or lock-out affecting the discharge. On delivery of the cargo at such port, all conditions of this Charter Party and of the Bill of Lading shall apply and the Vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance to the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion.
(c) Except for the obligations described above, neither the Charterers nor the Owners shall be responsible for the consequences of any strikes or lock-outs preventing or affecting the actual loading or discharging of the cargo.

17. War Risks ('Voywar 1993')
(1) For the purpose of this Clause, the words:
(a) The 'Owners' shall include the shipowners, bareboat charterers, disponent owners, managers or other operators who are charged with the management of the Vessel, and the Master; and
(b) 'War Risks' shall include any war (whether actual or threatened), act of war, civil war, hostilities, revolution, rebellion, civil commotion, warlike operations, the laying of mines (whether actual or reported), acts of piracy, acts of terrorists, acts of hostility or malicious damage, blockades (whether imposed against all Vessels or imposed selectively against Vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), by any person, body, terrorist or political group, or the Government of any state whatsoever which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or are likely to be or to become dangerous to the Vessel, her cargo, crew or other persons on board the Vessel.
(2) If at any time before the Vessel commences loading, it appears that, in the reasonable judgement of the Master and/or the Owners, performance of the Contract of Carriage, or any part of it, may expose, or is likely to expose, the Vessel, her cargo, crew or other persons on board the Vessel to War Risks the Owners may give notice to the Charterers cancelling this Contract of Carriage, or may refuse to perform such part of it as may expose, or may be likely to expose, the Vessel, her cargo, crew or other persons on board the Vessel to War Risks; provided always that if this Contract of Carriage provides that loading or discharging is to take place within a range of ports, and at the port or ports nominated by the Charterers the Vessel, her cargo, crew, or other persons onboard the Vessel may be exposed, or may be likely to be exposed, to War Risks, the Owners shall first require the Charterers to nominate another safe port which lies within the range for loading and discharging, and may only cancel this Contract of Carriage if the Charterers shall not have nominated such safe port or ports within 48 hours of receipt of notice of such requirement.
(3) The Owners shall not be required to continue to load cargo for any voyage, or to sign Bills of Lading for any port or place or to proceed or continue on any voyage, or on any part thereof, or to proceed through any canal or waterway, or to proceed to or remain at any port or place whatsoever, where it appears, either after the loading of the cargo commences, or at any stage of the voyage thereafter before the discharge of the cargo is completed, that, in the reasonable judgement of the Master and/or the Owners, the Vessel, her cargo (or any part thereof), crew or other persons on board the Vessel (or any one or more of them) may be, or are likely to be, exposed to War Risks. If it should so appear, the Owners may by notice request the Charterers to nominate a safe port for the discharge of the cargo or any part thereof, and if within 48 hours of the receipt of such notice, the Charterers shall not have nominated such a port, the Owners may discharge the cargo at any safe port of their choice (including the port of loading) in complete fulfilment of the Contract of Carriage. The Owners shall be entitled to recover from the Charterers the extra expenses of such discharge and, if the discharge takes place at any port other than the loading port, to receive the full freight as though the cargo had been carried to the discharging port and if the extra distance exceeds 100 miles, to additional freight which shall be the same percentage of the freight contracted for as the percentage which the extra distance represents to the distance of the normal and customary route, the Owners having a lien on the cargo for such expenses and freight.
(4) If at any stage of the voyage after the loading of the cargo commences, it appears that, in the reasonable judgement of the Master and/or the Owners, the Vessel, her cargo, crew or other persons on board the Vessel may be, or are likely to be, exposed to War Risks on any part of the route (including any canal or waterway) which is normally and customarily used in a voyage of the nature contracted for, and there is another longer route to the discharging port, the Owners shall give notice to the Charterers that this route will be taken. In this event the Owners shall be entitled, if the total extra distance exceeds 100 miles, to additional freight which shall be the same percentage of the freight contracted for as the percentage which the extra distance represents to the distance of the normal and customary route.
(5) The Vessel shall have liberty:-
(a) to comply with all orders, directions, recommendations or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery or in any way whatsoever which are given by the Government of the Nation under whose flag the Vessel sails, or other Government to whose laws the Owners are subject, or any other Government which so requires, or any body or group acting with the power to compel compliance with their orders or directions;
(b) to comply with the orders, directions or recommendations of any war risks underwriters who have the authority to give the same under the terms of the war risks insurance;
(c) to comply with the terms of any resolution of the Security Council of the United Nations, any directives of the European Community, the effective orders of any other Supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the Owners are subject and to obey the orders and directions of those who are charged with their enforcement;
(d) to discharge at any other port any cargo or part thereof which may render the Vessel liable to confiscation as a contraband carrier;
(e) to call at any other port to change the crew or any part thereof or other persons on board the Vessel when there is reason to believe that they may be subject to internment, imprisonment or other sanctions;
(f) where cargo has not been loaded or has been discharged by the Owners under any provisions of this Clause, to load other cargo for the Owners' own benefit and carry it to any other port or ports whatsoever, whether backwards or forwards or in a contrary direction to the ordinary or customary route.
(6) If in compliance with any of the provisions of sub-clauses (2) to (5) of this Clause anything is done or not done, such shall not be deemed to be a deviation, but shall be considered as due fulfilment of the Contract of Carriage.

18. General Ice Clause
Port of loading
(a) In the event of the loading port being inaccessible by reason of ice when the Vessel is ready to proceed from her last port or at any time during the voyage or on the Vessel's arrival or in case frost sets in after the Vessel's arrival, the Master for fear of being

frozen in is at liberty to leave without cargo, and this Charter Party shall be null and void.
(b) If during loading the Master, for fear of the Vessel being frozen in, deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to any other port or ports with option of completing cargo for the Owners' benefit for any port or ports including port of discharge. Any part cargo thus loaded under this Charter Party to be forwarded to destination at the Vessel's expense but against payment of freight, provided that no extra expenses be thereby caused to the Charterers, freight being paid on quantity delivered (in proportion if lump-sum), all other conditions as per this Charter Party.
(c) In case of more than one loading port, and if one or more of the ports are closed by ice the Master or the Owners to be at liberty either to load the part cargo at the open port and fill up elsewhere for their own account as under sub-clause (b) or to declare the Charter Party null and void unless the Charterers agree to load full cargo at the open port.
Port of discharge
(a) Should ice prevent the Vessel from reaching port of discharge the Charterers shall have the option of keeping the Vessel waiting until the reopening of navigation and paying demurrage or of ordering the Vessel to a safe and immediately accessible port where she can safely discharge without risk of detention by ice. Such orders to be given within 48 hours after the Master or the Owners have given notice to the Charterers of the impossibility of reaching port of destination.
(b) If during discharging the Master for fear of the Vessel being frozen in deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to the nearest accessible port where she can safely discharge.
(c) On delivery of the cargo at such port, all conditions of the Bill of Lading shall apply and the Vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance of the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion.

19. Law and Arbitration
* (a) This Charter Party shall be governed by and construed in accordance with English law and any dispute arising out of this Charter Party shall be referred to arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force. Unless the parties agree upon a sole arbitrator, one arbitrator shall be appointed by each party and the arbitrators so appointed shall appoint a third arbitrator, the decision of the three-man tribunal thus constituted or any two of them, shall be final. On the receipt by one party of the nomination in writing of the other party's arbitrator, that party shall appoint their arbitrator within fourteen days, failing which the decision of the single arbitrator appointed shall be final.
For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25** the arbitration shall be conducted in accordance with the Small Claims Procedure of the London Maritime Arbitrators Association.
* (b) This Charter Party shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and should any dispute arise out of this Charter Party, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for purpose of enforcing any award, this agreement may be made a rule of the Court. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc. .
For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25** the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc. .
* (c) Any dispute arising out of this Charter Party shall be referred to arbitration at the place indicated in Box 25, subject to the procedures applicable there. The laws of the place indicated in Box 25 shall govern this Charter Party.
(d) If Box 25 in Part I is not filled in, sub-clause (a) of this Clause shall apply.
* *(a), (b) and (c) are alternatives; indicate alternative agreed in Box 25.*
** *Where no figure is supplied in Box 25 in Part I, this provision only shall be void but the other Provisions of this Clause shall have full force and remain in effect.*

UNITED NATIONS WORLD FOOD PROGRAMME
VOYAGE CHARTER PARTY
CODE NAME: "WORLDFOOD 99"

PART I

1. Shipbroker	
2. Vessel's name	3. Place and date
4. Owners and place of business (state full style and address)	5. Charterers and place of business World Food Programme of the United Nations Via Cesare Giulio Viola, 68/70 00148 Parco De' Medici ROME Tel: +39 06 6513 2048 Fax: +39 06 6513 2044
6. Loading port(s) or place(s). If applicable, also state number of days prior declaration of actual load port(s) or place(s) (Cl. 2)	7. Discharging port(s) or place(s). If applicable, also state number of days prior declaration of actual discharge port(s) or place(s) (Cl. 2)
8. Cargo (also state quantity. If full and complete cargo not agreed state "part cargo") (Cl. 3)	9. Vessel's description (see also Cl. 3)
10. Laydays date (Cl. 4) / 11. Cancelling date (Cl. 4)	12. Present position/ETA first load port (Cl. 4)
13. Advance notices (loading) (Cl. 8) to be given to: World Food Programme of the United Nations Fax: +39 06 6513 2044 & other parties	14. Advance notices (discharging) (Cl. 7) to be given to: World Food Programme of the United Nations Fax: +39 06 6513 2044 & other parties
15. Laytime for loading (Cl. 10)	16. Laytime for discharging (Cl. 10)
17. Demurrage (loading and discharging) (Cl. 11)	18. Freight rate (Cl. 22)
19. Freight payment (state currency and method of payment, beneficiary and bank account) (Cl. 22)	20. Brokerage commission and to whom payable (Cl. 39)
21. Numbers of additional clauses covering special provisions, if agreed	

It is mutually agreed that this Charter Party shall be performed subject to the conditions contained herein consisting of PART I and PART II. The provisions of PART I shall prevail over the terms of PART II to the extent of any conflict between them.

Signature (Owners)	Signature (Charterers)

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"WORLDFOOD 99"
SCHEDULE A

Vessel's name	

Owner's Details

A. Owner's name	The name of the registered Owner if the party identified in Box 4 is not the registered Owner
Address	Address
Telex	Telex
Phone	Phone
Contact	Contact
Owner's P&I Club	Registered Owner's P&I Club
Owner's Hull & Machinery Insurers/Hull & Machinery value	Registered Owner's Hull & Machinery Insurers/Hull & Machinery value
Certificates attached YES/NO	Certificates attached YES/NO

Vessel's Description

Flag	Year built
Call sign Fax/telex	Class
NT	GT
DWT	Draft
TPC	Speed
Gear	LOA
Masts	Twin hatch
Number of hatches	Hatch dimensions
Number of holds	
Grain cubic	Hide cubic

Supplementary Information

Last special survey	Last dry dock
Last 2 cargoes	
Details of General Average in last 2 years	Previous names in last 12 months

PART II
"Worldfood 99" Charter Party

1. Vessel

2. Voyage

3. Cargo

4. Laydays Date and Present Position

5. Cancelling

6. Advance Notices (Loading)

7. Advance Notices (Discharging)

8. Notice of Readiness (Loading and Discharging)

9. Laytime Counting (Loading and Discharging)

PART II
"Worldfood 99" Charter Party

(a) Demurrage.

(b) If, after tendering notice of readiness and provided the Charterers have appointed and paid for an independent surveyor to inspect the Vessel's holds on same as possible, the Vessel is nevertheless found not to be in all respects ready to load/discharge, the vessel does not count as on demurrage, as time on demurrage.

(c) Time lost as a result of inefficiency or any other cause, including strike by officers and crew, attributable to the Vessel, her Master, her crew or the Owners which affects the working of the Vessel, shall not count as laytime or as time on demurrage.

(d) In the event that the Vessel is working her or loading or discharging both and notice of readiness has been tendered according to Clause 9(b), no laytime shall be deducted during such period for reasons of weather, unless the vessel occupying the loading or discharging berth is operations actually prevented from working due to weather conditions, in which case laytime or time shall not count unless the vessel is occupying an alternative

(e) Excepted Periods

(i) In those countries in which Sunday is the recognised day of rest, laytime shall not run from either 12.00 hours on Thursday or, where Thursday is a day on which stevedores work only at overtime rates, from the time on Wednesday at which stevedores cease to be paid at the normal rate, until 07.00 hours on Monday.

(ii) In those countries in which Friday is the recognised day of rest, laytime shall not run from either 12.00 hours on Thursday or, where Thursday is a day on which stevedores work only at overtime rates, from the time on Wednesday at which stevedores cease to be paid at the normal rate, until 07.00 hours on Saturday.

(iii) Laytime shall not run from 17.00 hours on a day preceding a national or local holiday until 01.00 hours on the next working day.

(iv) If work is actually carried out during any of the excepted periods specified in sub-paragraphs (i) to (iii) hereof, only half of such time actually used shall count as laytime.

10. Loading and Discharging

(a) Bulk Cargo - If loading bulk cargo, the cargo shall be loaded and discharged by the Charterers at their expense, but under the supervision of the Master, at the rate stated in Box 16 per weather working day of 24 consecutive hours (subject to excepted periods according to Clause 9).

Other than Bulk Cargo - If loading other than bulk cargo, the cargo shall be loaded and stowed by the Charterers at their expense, but under the supervision of the Master, at the rate stated in Box 16 per weather working day of 24 consecutive hours (subject to excepted periods according to Clause 9).

(b) The cargo shall be discharged by the Charterers at their expense, but under the supervision of the Master, at the rate stated in Box 16 per weather working day of 24 consecutive hours (subject to excepted periods according to Clause 9).

(c) At each loading and discharging port stevedores shall be appointed and paid by the Charterers.

(d) Cargo Handling - During the loading and discharging operations, the Master shall supervise the work performed by the stevedores and shall instruct them properly to expedite handling. During cargo loading and discharging all hatches

should the stevedores refuse to follow the instructions, the Master shall protest to them in writing and shall advise both Charterers immediately thereof.

11. Demurrage/Despatch Money

(a) Demurrage for loading and discharging shall be paid by the Charterers at the rate as stated in Box 17 per running day or pro rata.

(b) Despatch money at half the demurrage rate shall be paid by the Owners for laytime saved in loading and/or discharging.

(c) Demurrage And Despatch accounts shall be settled when loading accounts as per Clause 22.

(d) Laytime between ports of loading and discharging shall be non-reversible. If the Vessel has to load at two or more ports, the ports shall be regarded as a single one for the purpose of laytime computation and the same principle applies to discharging ports. For the purposes of computing laytime, hatchboards/hatch covers shall count as one hatch only.

12. Shifting and Warping

(a) Shifting - The Charterers shall have the option of ordering the Vessel to load and/or discharge at a second safe berth if required. The costs of shifting from 1st to second berth shall be for the Owners' account. Time used for shifting shall count as laytime unless shifting is performed during excepted periods according to Clause 9.

(b) Warping - The Vessel shall be warped alongside the loading/discharging appliances, as reasonably required, at the Owners' risk and expense, but time shall count as laytime unless warping is performed during excepted periods according to Clause 9.

Overtime expenses for the Vessel's officers and crew and costs for

hawsers connected shall be for the Owners' account.

(c) Assembly Area - The Charterers shall berth the Vessel in a reasonably fast and safe berth or berths where she shall be in the Master's satisfaction between taking on/bunkers and between discharging ports, respectively. Any expenses resulting therefrom shall be for the Charterers' account and any time used shall count as laytime.

13. Damage/Repairs/Gear

(a) Damage - The Owners shall provide, lay and stow all dunnage materials (including paper, plastic, etc.) required for the proper stowage and protection of the cargo.

(b) Separation - The Charterers shall have the right to ship parcels of different qualities or parcels for different receivers in separate holds within the Vessel's normal segregation and suitable for her trim provided that such parcels can be loaded, carried and discharged without affecting the Vessel's seaworthiness. No separation other than natural separation will be required for cargoes carried under the Charter Party.

14. Opening and Closing of Hatches

Opening and closing of hatches at loading and discharging ports shall be performed by the Vessel's crew at the Owners' expense. Such operations shall, if required by Charterers, also be performed outside usual stevedore working hours. If any of the Vessel's crew is not permitted by local authorities or local union regulations, shore labour (stevedores) shall be provided and paid for by the Charterers.

The Master has the responsibility of taking action for closing of hatches in the event of inclement weather or the presence of substances harmful to the cargo during loading and discharging.

15. Vessel's Cargo Gear

(a) Cargo handling gear - The Owners shall always, also here and throughout the duration of loading and discharging, of all Vessel's cargo handling gear and the Vessel shall have sufficient strength power to operate all cargo handling gear simultaneously. The Owners also to make available all slings as on board.

(b) Breakdowns - All equipment referred to in (a) above shall be maintained in good working order up to vessel reporting and with valid certificates throughout the currency of this Charter Party. Unless caused by negligence of the Charterers' stevedores, time lost by breakdown of Vessel's cargo handling gear - you use the total number of seamen/winches required at that time for loading/discharging cargo under the Charter Party - shall not count as laytime or as time on demurrage, and cost of labour standing by or to avail shall be for the Owners' account.

(c) Overtime/restrictions - The vessel, the Owners shall provide, free of charge, sustenance/ meal/ meal time for crew to operate the Vessel's cargo handling gear, unless the crew's employment conditions or local union or port regulations prohibit this, in which event shore labourers shall be provided and paid for by the Charterers. Charterers/victualler's, stevedore crew or shore labourers, shall be deemed the Charterers' servants and shall always work under supervision of the Master, but at the Charterers' risk and responsibility.

The Clause shall not apply if Vessel is gearless and stated as such in Schedule A.

16. Light

Whenever required, the Owners shall provide free of charge, throughout the duration of loading/discharging, light (as on board) for the work on and about the

17. Loading/Stowing/Trimming and Discharging

(a) Bulk cargo - The vessel shall be suitable for grab discharge and no cargo shall be loaded into spaces inaccessible to grabs. However, the Master has the right to load cargo into such places for the purposes of stability of the Vessel. Any extra expenses is to be for the Owners' account. The vessel is loading and/or discharging less or from these places shall not count, unless the Vessel is on demurrage.

(b) The Owners warrant that the Vessel is approved by the Vessel's classification society or an organisation acceptable thereto for the carriage of bulk grain under the applicable SOLAS regulations. The Owners further warrant that approved information relating to compensation have loading and of load lines will be on board the Vessel on arrival at the loading port. Any stowing other than grain stowing (whether grain fastening, feed a moveable or fixed) shall be for the Owners' expense and time so used shall not count as laytime or demurrage. Any bagging, strapping or securing which may be required by or for supplied and paid for by the Owners and time used shall not count as laytime or demurrage. Bundles of hoops, if any, at discharging port shall be for Owners' time, risk and expense.

(c) Bagged, sanitised and palletised cargo - In the case of bagged, sanitised and palletised cargo, any cargo spaces into which such cargo is loaded shall be accessible to ordinary loading and discharging equipment.

18. Stevedore Damage

The Charterers shall be responsible for damage (beyond ordinary wear

PART II
"Worldfood 99" Charter Party

and that) caused by shortages in any part of the Vessel. Such damage shall be notified as soon as reasonably possible, but latest when the Vessel is sailing from her last discharge port, by the Master to the Charterers or their agents and to their sanctions, failing which the Charterers shall not be held responsible. The Master shall endeavour to obtain the shortages' certificate under each lgroof of the damage incurred.

The Charterers have the right to repair any shortage damage at any time prior to completion of the voyage where practicable or otherwise at a place mutually agreed between the parties, but must repair shortage damage affecting the Vessel's seaworthiness or class before the vessel sails from the port where such damage was caused or found. All additional expenses incurred shall be for the account of the Charterers and any time lost shall be for the account of and shall be paid for the Owners by the Charterers at the demurrage rate.

19. Overtime

(a) Loadrate - All overtime expenses in loading and discharging ports shall be for the account of the party ordering same.

If overtime is ordered by port authorities or the pilot, and being the Charterers' responsibility the loading and/or discharging terminal or facility, all overtime expenses are to be borne by the Charterers. Overtime expenses for the Vessel's officers and crew shall always be for the Owners' account.

(b) Time Counting - If sometimes reckoned by the Owners in method stating excepted periods the actual time used shall count as laytime. If overtime worked by the Charterers is worked during excepted periods half the actual time used shall count as laytime.

20. Cargo Receipts

(a) No bills of lading will be issued for shipments under this Charter Party.

(b) The Owners agree to issue a Cargo Receipt as per the

"Worldfoodcasupt 99" Cargo Receipt Form attached hereto incorporating all terms, conditions, liberties, clauses and exceptions of this Charter Party. In the event of a conflict of conditions between the Cargo Receipt and this Charter Party, the provisions of this Charter Party shall prevail to the extent of such conflict but no further.

21. Tally

(a) The Cargo Receipt shall be conclusive evidence of the quantity of cargo loaded.

(b) If the cargo consists of bags, cases, crates and/or chests, the Vessel shall be responsible for the number of packages shipped and the provisions of sub-clause (a) above to apply.

(c) At each discharging port, the Charterers shall appoint recognised lallymen to act jointly on behalf of the Owners and the Charterers. Each part lally shall be binding upon both parties provided that such lally to keep strictly and properly and all costs shall be for the Charterers' account.

(d) At each loading port the Owners and the Charterers shall accept the standard loading terminal procedures for weighing, controlled loading and lally of cargo at the Charterers' expense.

22. Freight Prepaid

(a) The freight at the rate indicated in Box 18 shall be considered as the gross stated weight/quantity stated in the Cargo Receipt.

(b) 95 (Ninety) per cent of the freight is due and payable to the Charterers within 5 (five) working days after release of signed Cargo Receipts.

(c) The Charterers shall, if the Owners so request, pay any demurrage which is due, every 14 days in advance.

(d) The balance of freight with any adjustment for demurrage, despatch money, dead freight and/or any other sums payable to the Owners under the Charter Party and any Cargo Receipt hereunder shall be paid promptly by the Charterers upon receipt of the Owners' freight to shipping clerk details of freight due, despatch/demurrage incurred at loading and discharging ports and supported by all the following documents in duplicate:

(i) Statement of Facts signed by the Master and the Charterers' agent and/or representatives at both ends;

(ii) Laytime calculations (time sheets);

(iii) Receipted commission bookings from all brokers mentioned in the Charter Party;

(iv) A comprehensive Stowage Plan showing gross cargo quantities loaded/laid by hold;

(v) Surveyor's report on shell and cable money in respect of any dead freight claim which shall also be supported by a voucher approved by the Master and the Charterers'/Shippers' representatives at loading port.

(vi) A fully executed copy of the Charter Party.

(e) The Charterers may deduct from any balance payable under (d) above a sufficient amount as security for duly particularised claims against the Owners for loss of or damage to cargo which shall have been established on discharge, but only insofar as the P & I Club named in Schedule A shall have failed to provide a Letter of Undertaking to cover any proper liability of the Owners for such claims, within 48 hours of a request from the Charterers for such Club Letter of Undertaking, which request shall also particularise the alleged claims as above and shall indicate the total amount of the security required.

(f) Dead freight and all/or sums due to the Owners shall be paid in the currency and/or the manner as detailed in Box 18.

23. Dues, Taxes and Charges

(a) On the Vessel - The Owners shall pay all dues, duties, taxes and other charges customarily levied on the Vessel, howsoever the amount thereof may be assessed.

(b) On the cargo - The Charterers shall pay all dues, duties, taxes and charges, levied on the cargo at the port of loading/discharging, howsoever the amount thereof may be assessed.

(c) On the freight - Taxes levied on the freight shall be paid by the Owners.

24. Cargo Insurance

Any cargo insurance on cargo owing to Vessels age, class, flag or ownership shall be the responsibility of and shall be deducted from the freight. The Charterers shall have no evidence of payment supporting any such deduction. Unless a maximum amount has been agreed, such agreement whether of the said amount or lesser sums provided which would be charged for the Vessel and any agreement to be made must be reached.

25. Lien

The Owners shall have a lien on the cargo for freight. The Charterers shall remain responsible for freight, dead freight and demurrage incurred at port(s) of loading and/or discharging.

26. Liberty

The Vessel shall have liberty to sail with or without pilots, to tow or go to the assistance of vessels in distress, to call at any port or ports for all fuel supplies, and to deviate for the purpose of saving life or property, or for any other reasonable purpose whatsoever.

27. United Nations Emergency Clause

The Charterers have the right in case of an emergency situation arising to change the Vessel's destination, subject only to the Owners' consent, which shall not be unreasonably withheld. In the event the Owners and the Charterers shall agree on any necessary adjustment to freight rates in consequence of the change of destination. Failing such agreement the case rate shall be determined by a shipbroker appointed, at the request of either party, by the Institute of Chartered Shipbrokers, London, acting as valuer and not as arbitrator.

28. General Clause Paramount

The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924 ("the Hague Rules") as amended by the Protocol signed at Brussels on 23 February 1968 ("the Hague-Visby Rules") and as enacted in the country of shipment shall apply to this Charter Party. Where the Hague-Visby Rules are not enacted in the country of shipment, the corresponding legislation of the country of destination shall apply, irrespective of whether such legislation may only regulate outbound shipments.

Where there is no enactment of the Hague-Visby Rules in either the country of shipment or the country of destination, the Hague-Visby Rules shall apply to this Charter Party as enacted in the Hague Rules as enacted in the country of shipment or if no such enactment is in place, the Hague Rules as enacted in the country of destination irrespectively applicable to shipments of which Lines the provisions of such Rules shall apply.

The Protocol signed at Brussels on 21st December 1979 ("the SDR Protocol 1979") shall apply where the Hague/Visby Rules apply, whether mandatorily or by this Charter Party.

The Carrier shall in no case be responsible for loss of or damage to cargo arising prior to loading, after discharging, or while the cargo is in the charge of another carrier, or with respect to deck cargo and live animals.

29. P & I Charter Party Pollution Clause

(a) The Owners warrant that throughout the currency of this Charter Party they will provide the Vessel with certificates issued pursuant to section 1018 (a) of the Oil Pollution Act 1990, and Section 108 (a) of the Comprehensive Environmental Response, Compensation and Liability Act 1980, as amended, in accordance with Part 130 of Coast Guard Regulations 33 CFR.

(b) Notwithstanding anything whether printed or typed herein to the contrary,

(i) save as required for compliance with paragraph (a) hereof, the Owners shall not be required to establish or maintain financial security or responsibility in respect of oil or other pollution damage to enable the Vessel lawfully to enter, remain in or leave any port, place, lockend or contiguous waters of any country, state or territory in performance of this Charter Party.

(ii) the Charterers shall indemnify the Owners and hold them harmless in respect of any loss, damage, liability or expense (including but not limited to the costs of any delay) incurred by the Vessel as a result of

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"Worldfood 99" Charter Party

any failure by the Charterers promptly to give alternative voyage orders) whatsoever and howsoever arising which the Owners may sustain by reason of any requirement to establish or maintain financial security or responsibility in order to enter, remain in or leave any port, place or waters, other than to the extent provided in paragraph (a) hereof.

(iii) the Owners shall not be liable for any loss, damage, liability or expense whatsoever and howsoever arising which the Charterers, and/or the holders of any cargo bill(s) issued pursuant to this Charter Party may sustain by reason of any requirement to establish or maintain financial security or responsibility in order to enter, remain in or leave any port, place or waters, other than to the extent provided in paragraph (a) hereof.

20. ISM Clause

From the date of coming into force of the International Safety Management (ISM) Code in relation to the Vessel and thereafter during the currency of this Charter Party, the Owners shall procure that the Company (as defined by the ISM Code) shall comply with the requirements of the ISM Code. Upon request the Owners shall produce a copy of the relevant Document of Compliance (DOC) and Safety Management Certificate (SMC) to the Charterers.

Except as otherwise provided in this Charter Party, loss, damage, expense or delay caused by failure on the part of the Owners or "the Company" to comply with the ISM Code shall not be the Charterers' concern.

21. Both to Blame Collision Clause

If the Vessel comes into collision with another vessel as a result of the negligence of the other vessel and any act, neglect or default of the Master, mariner, pilot or the servants of the Owners in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder will indemnify the Owners against all loss or liability to the other or non carrying vessel or her owners insofar as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of the said cargo, paid or payable by the other or non-carrying vessel or her owners to the owners of said cargo and set-off, recouped or recovered by the other or non-carrying vessel or her owners as part of their claim against the carrying Vessel or Owners.

The foregoing provisions shall also apply where the owners, operators or those in charge of any vessel or vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision or contact.

22. General Average and New Jason Clause

General average shall be adjusted at London according to York Antwerp Rules 1994 and any subsequent modification thereof.

If general average is to be adjusted at ascertained ports the law and practice of the United States of America, the following clause shall apply: "In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Owners are not responsible, by statute, contract or otherwise, the cargo, shippers, consignees or the owners of the cargo shall contribute with the Owners in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of cargo. If a salving vessel is owned or operated by the Owners, salvage shall be paid for as fully as if the said vessel or vessels belonged to strangers. Such deposit as the Owners, or their agents, may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the cargo, shippers, consignees or owners of the goods to the Owners before delivery".

23. Strike

(a) If there is a strike or lock-out affecting or preventing the actual loading of the cargo, or any part of it, when the Vessel is ready to proceed from her last port or at any time during the voyage to the port or ports of loading or after the Vessel is there, the Master or the Owners may ask the Charterers to declare, that they agree to reckon the laytime as if there were no strike or lock-out. Unless the Charterers have given such declaration in writing (by telegram, if necessary) within 24 hours, the Owners shall have the option of cancelling the Charter Party. If such cargo has already been loaded, the Owners shall proceed with same, (freight payable on loaded quantity only) having liberty to complete with other cargo on the way for their own account.

(b) If there is a strike or lock-out affecting or preventing the actual discharging of the cargo on or after the Vessel's arrival at or off port of discharge and same has not been settled within 48 hours, the Charterers shall have the option of keeping the Vessel waiting until such strike or lock-out is at an end against paying half demurrage after expiration of the time provided for discharging until the strike or lock-out terminates and thereafter full demurrage shall be payable until the completion of discharging, or of ordering the Vessel to a safe port where she can safely discharge without risk of being detained by strike or lock-out. Such orders to be given within 48 hours after the Master or the Owners have given notice to the Charterers of the strike or lock-out affecting the discharge.

On delivery of the cargo at such port, all conditions of the Charter Party and of the Cargo Receipt shall apply and the Vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance to the substituted port exceeds two nautical miles the freight on the cargo delivered at the substituted port to be increased in proportion.

(c) Except for the obligations described above, neither the Charterers nor the Owners shall be responsible for the consequences of any strikes or lock-outs preventing or affecting the actual loading or discharging of the cargo.

24. Ice

Loading Ice

(a) *Before Vessel's arrival* - If the Vessel cannot reach the loading port by reason of ice, she shall not be obliged to force her way into, nor remain in the port, or to get to the loading berth after her arrival, but the Master - after having used his best endeavours to get to the loading berth - may leave the port and ice and proceed to any other port or place whatsoever for bunkers or otherwise, whether directed hereunder or not, and there load a full cargo and/or part cargo for the Owners' own account as if no ice had been encountered and the Charter Party had not been entered into.

(b) *During loading* - If during loading the Master, in his or Vessel being frozen in, deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to the nearest safe and convenient port. Such port to be nominated by Charterers as soon as possible, but not later than 24 running hours. Sundays and holidays excluded, or receipt of Owners' request for nomination of a substitute discharging port, failing which the Master will himself choose such port.

(c) *Discharging at substitute port* - On delivery of the cargo at such port, all conditions of the Charter Party and of the Cargo Receipt shall apply and the Charterers shall receive the same freight as if the Vessel had discharged at the original port of destination except that if the distance to the substitute port exceeds 100 nautical miles the freight on the cargo delivered at that port to be increased in proportion.

25. War Risks

(a) For the purpose of this Clause, the words:

(i) "Owners" shall include the shipowners, bareboat charterers, disponent owners, managers or other operators who are charged with the management of the Vessel, and the Master; and

(ii) "war risks" shall include any war (whether actual or threatened), act of war, civil war, hostilities, revolution, rebellion, and insurrection, warlike operations, the laying of mines (whether actual or reported), acts of piracy, acts of terrorists, acts of hostility or malicious damage, blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), by any person, body, terrorist or political group, or the Government of any state whatsoever, which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or are likely to be or to become dangerous to the Vessel, her cargo, crew or other persons on board the Vessel.

(b) If on any time before the Vessel commences loading, it appears that, in the reasonable judgement of the Master and/or the Owners, performance of the Charter Party, or any part of it, may expose, or to likely to expose, the Vessel, her cargo, crew or other persons on board the Vessel to War Risks, the Owners may give notice to the Charterers cancelling this Charter Party, or may refuse to perform such part of it as may expose, or may be likely to expose, the Vessel, her cargo, crew or other persons on board the Vessel to War Risks; provided always that if this Charter Party provides that loading or discharging is to take place

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within a range of ports, and at the port or ports nominated by the Charterers the Vessel, her cargo, crew, or other persons onboard the Vessel may be exposed, or may be likely to be exposed, to War Risks. the Owners shall first require the Charterers to nominate any other safe port which may within the range for loading or discharging, and may only cancel this Charter Party if the Charterers shall not have nominated such safe port or ports within 48 hours of receipt of notice of such requirement.

(c) The Owners shall not be required to continue to load cargo for any voyage, or to ship, fills of Lading for any port or place, or to proceed or continue on any voyage, or to carry any part thereof, or to proceed through any canal or waterway, or to proceed to or remain at any port or place whatsoever, where it appears, either after the loading of the cargo commences, or at any stage of the voyage thereafter before the discharge of the cargo is completed, that, in the reasonable judgement of the Master and/or the Owners, the Vessel, her cargo (or any part thereof), crew or other persons on board the Vessel (or any one or more of them) may be, or are likely to be, exposed to War Risks. If it should so appear, the Owners may by notice request the Charterers to nominate a substitute safe port for discharge of the cargo or any part thereof which may be reached by the vessel (or another vessel to which the cargo or any part thereof may be transhipped) with all reasonable dispatch and there discharge the cargo or any part thereof which is at risk. Whether or not the Owners receive such notice, the Owners shall have liberty to discharge the cargo or any part thereof at any safe port which they (or the Master) may in their reasonable discretion decide on (including the port of loading) in complete fulfilment of the Charter Party. The Owners shall be entitled to recover from the Charterers the extra expenses of such discharge and, if the discharge takes place at any port other than the loading port, to receive the full freight as though the cargo had been carried to the discharging port and if the extra distance exceeds 100 miles, to additional freight which shall be the same percentage of the freight contracted for as the percentage which the extra distance represents to the distance of the nearest and customary route. the Owners shall have a lien on the cargo for such expenses and freight.

(d) If at any stage of the voyage after the loading of the cargo commences, it appears that, in the reasonable judgement of the Master and/or the Owners, the Vessel, her cargo, crew or other persons on board the Vessel may be, or are likely to be, exposed to War Risks on any part of the route (including any vessel or waterway) which is normally and customarily used in a voyage of the nature contemplated but that there is another longer route to the discharging port, the Owners shall give notice to the Charterers that the route will be taken. In this event the Owners shall be entitled, if the total extra distance exceeds 100 miles, to additional freight which shall be the same percentage of the freight contracted for as the percentage which the extra distance represents to the distance of the nearest and customary route.

(e) The Vessel shall have liberty

(i) to comply with all orders, directions, recommendations or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery or in any other matters which are given by the Government of the Nation under whose flag the Vessel sails, or other Government to whose laws the Owners are subject, or any other Governments which so requires, or any body or group acting with the power to compel compliance with their orders or directions;

(ii) to comply with the orders, directions or recommendations of any war risks underwriters who have the authority to give the same under the terms of the war risks insurance;

(iii) on complying with the terms of any resolution of the Security Council of the United Nations, any directives of the European Community, the effective orders of any other Government body which has the right in its case and also the customary practice of ports where the Vessel may be, to comply with the orders, directions or recommendations of any war risks underwriters who have the authority to give the same and which are binding upon the Vessel as if they were mandatory orders, directions or recommendations of the Government of the Flag State, provided always that in this sub-clause (iii) the Owners are subject, and to obey the orders and directions of those who are charged with their enforcement;

(iv) to discharge at any other port any cargo or part thereof which may remain the Vessel safe to continue on or as discharged earlier;

(v) to call at any other port to change the view or any part thereof or other persons on board the Vessel when there is reason to believe that they may be subject to internment, imprisonment or other sanctions.

(vi) where cargo has not been loaded or has been discharged by the Owners under any provisions of this Clause, to load other cargo for the Owners' own benefit and carry it to any other port or ports whatsoever, whether backwards or forwards or in a customary direction to the ordinary or customary route.

(f) If in compliance with any of the provisions of sub-clauses (b) to (e) of this Clause anything is done or not done, such shall not be deemed to be a deviation, but shall be considered as due fulfilment of the Charter Party

38. War Risk Premium

War Risk premium for the Vessel and/or crew shall be paid by the Owners. Any increases or decrease in the premium after the date of fixture shall be for the Charterers' account or benefit, whichever the case may be. In any case, the insurance shall not be any more, or the decrease any less, than that obtainable at the relevant time on the London market.

39. Agency

The Owners are to appoint the Charterers' nominated agent[s] with the Owners paying the customary fee except in ports where national agency companies are the only licensed agents. If the latter case agents are to be nominated and appointed by the Owners. This additional provision will apply to all countries where applicable, except in China, Vietnam, Cambodia, DPRK and Hainan where the Charterers shall nominate agents as above.

40. Brokerage

A brokerage commission at the rate stated in Box 20 on the freight, dead freight and demurrage earned and paid is due to the party or parties mentioned in Box 20.

In case of non-remittance of less 10. of the brokerage on the estimated amount of freight and dead freight to be paid by the party responsible for such non-remittance to the Brokers as indemnity for the latter's expenses and work. In case of more voyages the amount of indemnity to be mutually agreed.

41. Force Majeure

Neither the Owners nor the Charterers shall, except as otherwise provided in the Charter Party, be responsible for any loss, damage, delay or failure in performance hereunder occasioned by or resulting from act of God, act of War, hostilities (whether war be declared or not), warlike operations, piracy, blockade, riots, civil commotions, quarantine restrictions, seizure, boycotts, lockouts, labour disputes and strikes or restraint of princes, rulers or people.

42. Carriage of Unlawful Substances or Merchandise

(a) The Owners warrant that they will exercise due diligence in preventing unmanifested narcotic drugs, similar substances or unlawful merchandise to be loaded or concealed on board the Vessel.

(b) Non-compliance with the provisions of sub-clause (a) above shall entitle the Owners to demand by the Charterers of which the Owners shall be liable for all time lost and all expenses incurred and shall keep the Charterers indemnified against all claims whatsoever which may arise and be made against them as a consequence thereof.

(c) The Owners shall also be liable for all time lost and all expenses incurred in the event unmanifested drugs, similar substances or unlawful merchandise are found in the possession, or among the effects, of the Vessel's personnel.

(d) If at any time before the Vessel is loaded, the Vessel is detained or is the result of unmanifested narcotic drugs, similar substances or unlawful merchandise being detected on board the Vessel, the Charterers, if such detention lasts for more than seventy two running hours, shall have the right to cancel this Charter Party provided such right is exercised latest at 1200 hours after the expiry of the seventy two running hours. The Charterers' right to cancel this Charter Party in accordance with this sub-clause (d) shall not affect their right to claim damages.

43. Title to Cargo Clause

It is mutually accepted and agreed that this Charter Party & clause between the Vessel's Owners as specified in Part I of this Charter Party (clos 4) and the United Nations World Food Programme as Charterers and that the latter have full rights to claim and receive salvaged and not merely nominal damages for any damage to and/or loss of cargo carried under this Charter Party and/or under any Cargo Bill(s) issued pursuant to this Charter Party and/or any claim arising out of this Charter Party and/or any such consequential Cargo Damages issued pursuant to the Charter Party

44. Deviation

The Charterers shall have the right to bunker ships on board after completion of loading, prior to or during discharging at Charterers' time, risk and expense.

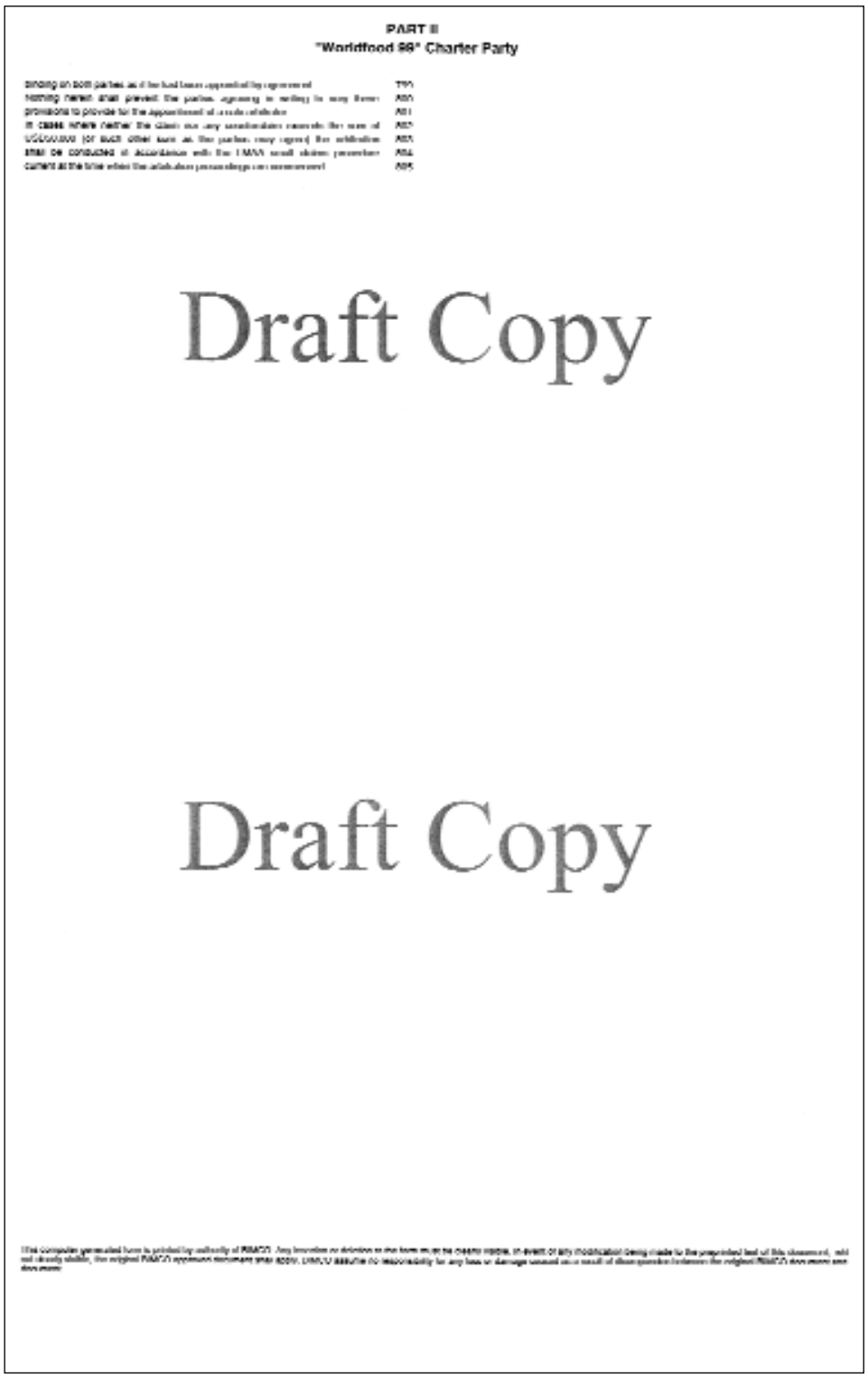
Crew of crew accommodation actions, if required by local authorities, shall be paid by the Charterers.

45. Law and Arbitration

This Charter Party shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Charter Party shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) terms current at the time when the arbitration proceedings are commenced.

The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be



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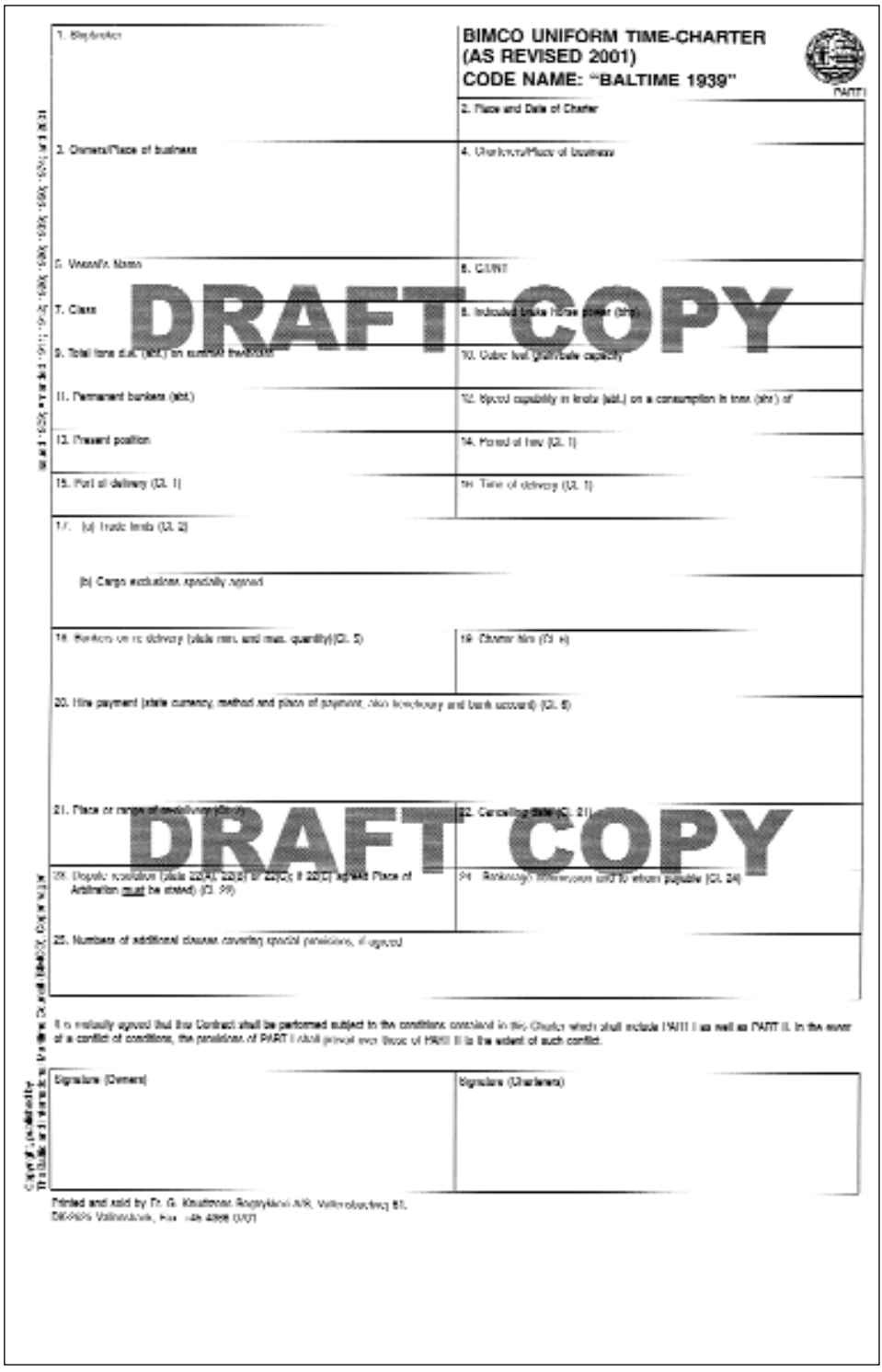
5 TIME CHARTERPARTIES



BIMCO UNIFORM TIME-CHARTER
(AS REVISED 2001)
CODE NAME: "BALTIME 1939"

[PART I]

1. Shipbroker

2. Place and Date of Charter

3. Owners/Place of business

4. Charterers/Place of business

5. Vessel's Name

6. GT/NT

7. Class

8. Indicated brake horse power (bhp)

9. Total tons d.w.t. (abt.) on summer freeboard

10. Cubic feet grain/bale capacity

11. Permanent bunkers (abt.)

12. Speed capability in knots (abt.) on a consumption in tons (abt.) of

13. Present position

14. Period of hire (Cl. 1)

15. Port of delivery (Cl. 1)

16. Time of delivery (Cl. 1)

17. (a) Trade limits (Cl. 2)

(b) Cargo exclusions specially agreed

18. Ranges on re-delivery (state min. and max. quantity)(Cl. 5)

19. Charter hire (Cl. 4)

20. Hire payment (state currency, method and place of payment; also beneficiary and bank account) (Cl. 6)

21. Place or range of trading limits (Cl. 2)

22. Cancelling date (Cl. 21)

23. Dispute resolution (state 22(a), 22(b) or 22(c); if 22(c) agreed Place of Arbitration must be stated) (Cl. 22)

24. Brokerage commission and to whom payable (Cl. 24)

25. Numbers of additional clauses covering special provisions, if agreed

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It is mutually agreed that this Contract shall be performed subject to the conditions contained in this Charter which shall include PART I as well as PART II. In the event of a conflict of conditions, the provisions of PART I shall prevail over those of PART II to the extent of such conflict.

Signature (Owners)

Signature (Charterers)

Printed and sold by Fr. G. Knudtzons Bogtrykkeri A/S, Vallensbaevej 61, DK-2605 Vallensbaek, Fax +45 4366 0101

PART II

"BALTIME 1939" Uniform Time-Charter (as revised 2001)

It is agreed between the party mentioned in Box 3 as Owners of the Vessel named in Box 5 of the gross/net tonnage indicated in Box 6, classed as stated in Box 7 and of indicated brake horse power (bhp) as stated in Box 8, carrying about the number of tons deadweight indicated in Box 9 on summer freeboard inclusive of bunkers, stores and provisions, having as per builder's plan a cubic-feet grain/bale capacity as stated in Box 10, exclusive of permanent bunkers, which contain about the number of tons stated in Box 11, and fully loaded capable of steaming about the number of knots indicated in Box 12 in good weather and smooth water on a consumption of about the number of tons fuel oil stated in Box 13, now in position as stated in Box 14 and the party mentioned as Charterer in Box 4, as follows:

1. Period/Port of Delivery/Time of Delivery

The Owners let, and the Charterers hire the Vessel for a period of the number of calendar months indicated in Box 14 from the time (*not a Sunday or a legal Holiday unless taken over*) the Vessel is delivered and placed at the disposal of the Charterers between 9 a.m. and 6 p.m., or between 9 a.m. and 2 p.m. if on Saturday, at the port stated in Box 15 in such available berth where she can safely lie always afloat, as the Charterers may direct, the Vessel being in every way fitted for ordinary cargo service. The Vessel shall be delivered at the time indicated in Box 16.

2. Trade

The Vessel shall be employed in lawful trades for the carriage of lawful merchandise only between safe ports or places where the Vessel can safely lie always afloat within the limits stated in Box 17. No live stock nor injurious, inflammable or dangerous goods (such as acids, explosives, calcium carbide, ferro silicon, naphtha, motor spirit, tar, or any of their products) shall be shipped.

3. Owners' Obligations

The Owners shall provide and pay for all provisions and wages, for insurance of the Vessel, for all deck and engine-room stores and maintain her in a thoroughly efficient state in hull and machinery during service. The Owners shall provide winchmen from the crew to operate the Vessel's cargo handling gear, unless the crew's employment conditions or local union or port regulations prohibit this, in which case shore-winchmen shall be provided and paid for by the Charterers.

4. Charterers' Obligations

The Charterers shall provide and pay for all fuel oil, port charges, pilotages (whether compulsory or not), canal steamages, hostage, lights, tug-assistance, consular charges (except those pertaining to the Master, officers and crew), canal, dock and other dues and charges, including any foreign general municipality or state taxes, also all dock, harbour and tonnage dues at the ports of delivery and re-delivery (unless incurred through cargo carried before delivery or after re-delivery), agencies, commissions, also shall arrange and pay for loading, trimming, stowing (including dunnage and shifting boards, excepting any already on board), unloading, weighing, tallying and delivery of cargoes, surveys on hatches, meals supplied to officials and men in their service and all other charges and expenses whatsoever including detention and expenses through quarantine (including cost of fumigation and disinfection). All ropes, slings and special runners actually used for loading and discharging and any special gear, including special ropes and chains required by the custom of the port for mooring shall be for the Charterers' account. The Vessel shall be fitted with winches, derricks, wheels and ordinary runners capable of handling lifts up to 2 tons.

5. Bunkers

The Charterers at port of delivery and the Owners at port of re-delivery shall take over and pay for all fuel oil remaining in the Vessel's bunkers at current price at the respective ports. The Vessel shall be re-delivered with not more than the number of tons and not exceeding the number of tons of fuel oil in the Vessel's bunkers stated in Box 18.

6. Hire

The Charterers shall pay as hire the rate stated in Box 19 per 30 days, commencing in accordance with Clause 1 until her re-delivery to the Owners.

Payment of hire shall be made in cash, in the currency stated in Box 20, without discount, every 30 days, in advance, and in the manner prescribed in Box 20. In default of payment the Owners shall have the right of withdrawing the Vessel from the service of the Charterers, without noting any protest and without interference by any court or any other formality whatsoever and without prejudice to any claim the Owners may otherwise have on the Charterers under the Charter.

7. Re-delivery

The Vessel shall be re-delivered on the expiration of the Charter in the same good order as when delivered to the Charterers (fair wear and tear excepted) at an ice-free port in the Charterers' option at the place or within the range stated in Box 21, between 9 a.m. and 6 p.m., and 9 a.m. and 2 p.m. on Saturday, but the day of re-delivery shall not be a Sunday or legal Holiday.

The Charterers shall give the Owners not less than ten days' notice at which port and on about which day the Vessel will be re-delivered. Should the Vessel be ordered on a voyage by which the Charter period will be exceeded the Charterers shall have the use of the Vessel to enable them to complete the voyage, provided it could be reasonably calculated that the voyage would allow redelivery about the time fixed for the termination of the Charter, but for any time exceeding the termination date the Charterers shall pay the market rate if higher than the rate stipulated herein.

8. Cargo Space

The whole reach and burthen of the Vessel, including lawful deck-capacity shall be at the Charterers' disposal, reserving proper and sufficient space for the Vessel's Master, officers, crew, tackle, apparel, furniture, provisions and stores.

9. Master

The Master shall prosecute all voyages with the utmost despatch and shall render customary assistance with the Vessel's crew. The Master shall be under the orders of the Charterers as regards employment, agency, or other arrangements. The Charterers shall indemnify the Owners against all consequences or liabilities arising from the Master, officers or Agents signing Bills of Lading or other documents or otherwise complying with such orders, as well as from any irregularity in the Vessel's papers or for overcarrying ports. The Owners shall not be responsible for shortage, mixture, marks, nor for number of pieces or packages, nor for damage to or claims on cargo caused by bad stowage or otherwise. If

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the Charterers have reason to be dissatisfied with the conduct of the Master or any officer, the Owners, on receiving particulars of the complaint, promptly to investigate the matter, and, if necessary and practicable, to make a change in the appointments.

10. Directions and Logs

The Charterers shall furnish the Master with all instructions and sailing directions and the Master shall keep full and correct logs accessible to the Charterers or their Agents.

11. Suspension of Hire etc.

(A) In the event of drydocking or other necessary measures to maintain the efficiency of the Vessel, deficiency of men or Owners' stores, breakdown of machinery, damage to hull or other accident, either hindering or preventing the working of the Vessel and continuing for more than twenty four consecutive hours, no hire shall be paid in respect of any time lost thereby during the period in which the Vessel is unable to perform the service immediately required. Any hire paid in advance shall be adjusted accordingly.

(B) In the event of the Vessel being driven into port or to anchorage through stress of weather, trading to shallow harbours or to rivers or ports with bars or suffering an accident to her cargo, any detention of the Vessel and/or expenses resulting from such detention shall be for the Charterers' account even if such detention and/or expenses, or the cause by reason of which either is incurred, be due to, or be contributed to by, the negligence of the Owners' servants.

12. Responsibility and Exemption

The Owners only shall be responsible for delay in delivery of the Vessel or for delay during the currency of the Charter and for loss or damage to goods onboard, if such delay or loss has been caused by want of due diligence on the part of the Owners or their Manager in making the Vessel seaworthy and fitted for the voyage or any other personal act or omission or default of the Owners or their Manager. The Owners shall not be responsible in any other case nor for damage or delay whatsoever and howsoever caused even if caused by the neglect or default of their servants. The Owners shall not be liable for loss or damage arising or resulting from strikes, lockouts or stoppages or restraint of labour (including the Master, officers or crew) whether partial or general. The Charterers shall be responsible for loss or damage caused to the Vessel or to the Owners by goods being loaded contrary to the terms of the Charter or by improper or careless bunkering or loading, stowing or discharging of goods or any other improper or negligent act on their part or that of their servants.

13. Advances

The Charterers or their Agents shall advance to the Master, if required, necessary funds for ordinary disbursements for the Vessel's account at any port charging only interest at 6 per cent. p.a., such advances shall be deducted from hire.

14. Excluded Ports

The Vessel shall not be ordered to nor bound to enter:
(A) any place where fever or epidemics are prevalent or to which the Master, officers and crew by law are not bound to follow the Vessel;
(B) any ice bound place or any place where lights, lightships, marks and buoys are or are likely to be withdrawn by reason of ice on the Vessel's arrival or where there is risk that ordinarily the Vessel will not be able on account of ice to reach the place or to get out after having completed loading or discharging. The Vessel shall not be obliged to force ice. If on account of ice the Master considers it dangerous to remain at the loading or discharging place for fear of the Vessel being frozen in and/or damaged, he has liberty to sail to a convenient open place and await the Charterers' fresh instructions. Unforeseen detention through any of above causes shall be for the Charterers' account.

15. Loss of Vessel

Should the Vessel be lost or missing, it shall cause from the date when she was lost. If the date of loss cannot be ascertained, no hire shall be paid from the date the Vessel was last reported until the calculated date of arrival at the destination. Any hire paid in advance shall be adjusted accordingly.

16. Overtime

The Vessel shall work day and night if required. The Charterers shall refund the Owners their outlays for all overtime paid to officers and crew according to the hours and rates stated in the Vessel's articles.

17. Lien

The Owners shall have a lien upon all cargoes and sub-freights belonging to the Time Charterers and any Bill of Lading freight for all claims under this Charter, and the Charterers shall have a lien on the Vessel for all moneys paid in advance and not earned.

18. Salvage

All salvage and assistance to other vessels shall be for the Owners' and the Charterers' equal benefit after deducting the Master's, officers' and crew's proportion and all legal and other expenses including hire paid under the charter for time lost in the salvage, also repairs of damage and fuel oil consumed. The Charterers shall be bound by all recourses taken by the Owners in order to secure payment of salvage and to fix its amount.

19. Sublet

The Charterers shall have the option of subletting the Vessel, giving due notice to the Owners, but the original Charterers shall always remain responsible to the Owners for due performance of the Charter.

20. War ("Conwartime 1993")

(A) For the purpose of this Clause, the words:
(i) "Owners" shall include the shipowners, bareboat charterers, disponent owners, managers or other operators who are charged with the management of the Vessel, and the Master; and
(ii) "War Risks" shall include any war (whether actual or threatened), act of war, civil war, hostilities, revolution, rebellion, civil commotion, warlike operations, the laying of mines (whether actual or reported), acts of piracy, acts of terrorists, acts of hostility or malicious damage, blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), by any person, body, terrorist or political group, or the Government of any state whatsoever, which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or are likely to be or to become dangerous to the Vessel, her cargo, crew or other persons on board the Vessel.
(B) The Vessel, unless the written consent of the Owners be first obtained, shall not be ordered to or required to continue to or through, any port, place, area or zone (whether oil land or sea), or any waterway or canal, where

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It appears that the Vessel, her cargo, crew or other persons on board the Vessel, in the reasonable judgement of the Master and/or the Owners, may be, or are likely to be, exposed to War Risks. Should the Vessel be within any such place as aforesaid, which only becomes dangerous, or is likely to be or to become dangerous, after her entry into it, she shall be at liberty to leave it.

(C) The Vessel shall not be required to load contraband cargo, or to pass through any blockade, whether such blockade be imposed on all vessels, or is imposed selectively in any way whatsoever against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever, or to proceed to an area where she will be exposed, or is likely to be subject to a belligerent's right of search and/or confiscation.

(D) (i) The Owners may effect war risks insurance in respect of the Hull and Machinery of the Vessel and their other interests (including, but not limited to, loss of earnings and detention, the crew and their Protection and Indemnity Risks), and the premiums and/or calls thereafter shall be for their account.

(ii) If the Underwriters of such insurance should require payment of premiums and/or calls because, pursuant to the Charterers' orders, the Vessel is within, or is due to enter and remain within, any area or areas which are specified by such Underwriters as being subject to additional premiums because of War Risks, then such premiums and/or calls shall be reimbursed by the Charterers to the Owners at the same time as the next payment of hire is due.

(E) If the Owners become liable under the terms of employment to pay to the crew any bonus or additional wages in respect of sailing into an area which is dangerous in the manner defined by the said terms, then such bonus or additional wages shall be reimbursed to the Owners by the Charterers at the same time as the next payment of hire is due.

(F) The Vessel shall have liberty-

(i) to comply with all orders, directions, recommendations or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery, or in any other way whatsoever, which are given by the Government of the Nation under whose flag the Vessel sails, or other Government to whose laws the Owners are subject, or any other Government, body or group whatsoever acting with the power to compel compliance with their orders or directions;

(ii) to comply with the orders, directions or recommendations of any war risks underwriter who have the authority to give the same under the terms of the war risks insurance;

(iii) to comply with the terms of any resolution of the Security Council of the United Nations, any directives of the European Community, the effective orders of any other Supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the Owners are subject, and to obey the orders and directions of those who are charged with their enforcement;

(iv) to divert and discharge at any other port any cargo or part thereof which may render the Vessel liable to confiscation as a contraband carrier;

(v) to divert and call at any other port to change the crew or any part thereof or other persons on board the Vessel when there is reason to believe that they may be subject to internment, imprisonment or other sanctions.

(G) If in accordance with their rights under the foregoing provisions of this Clause, the Owners shall refuse to proceed to the loading or discharging ports, or any one or more of them, they shall immediately inform the Charterers. No cargo shall be discharged at any alternative port without first giving the Charterers notice of the Owners' intention to do so and requesting them to nominate a safe port for such discharge. Failing such nomination by the Charterers within 48 hours of the receipt of such notice and request, the Owners may discharge the cargo at any safe port of their own choice.

(H) If in compliance with any of the provisions of sub-clauses (B) to (G) of this Clause anything is done or not done, such shall not be deemed a deviation, but shall be considered as the fulfilment of this Charter.

21. Cancelling

Should the Vessel not be delivered by the date indicated in Box 22, the Charterers shall have the option of cancelling. If the Vessel cannot be delivered by the cancelling date, the Charterers, if required, shall declare within 48 hours after receiving notice thereof whether they cancel or will take delivery of the Vessel.

22. Dispute Resolution

*) **(A)** This Charter shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Charter shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.

The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

*) **(B)** This Charter shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and any dispute arising out of or in connection with this Contract shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purposes of enforcing any award, judgement may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.

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In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc. current at the time when the arbitration proceedings are commenced.

*) **(C)** This Charter shall be governed by and construed in accordance with the laws of the place mutually agreed by the parties and any dispute arising out of or in connection with this Charter shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there.

(D) Nothing in sub-clause (A), (B) or (C) above, the parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Charter.

In the case of a dispute in respect of which arbitration has been commenced under (A), (B) or (C) above, the following shall apply:-

(I) Either party may at any time and from time to time elect to refer the dispute or part of the dispute to mediation by service on the other party of a written notice (the "Mediation Notice") calling on the other party to agree to mediation.

(II) The other party shall thereupon within 14 calendar days of receipt of the Mediation Notice confirm that they agree to mediation, in which case the parties shall thereafter agree a mediator within a further 14 calendar days, failing which on the application of either party a mediator will be appointed promptly by the Arbitration Tribunal ("the Tribunal") or such person as the Tribunal may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the parties may agree or, in the event of disagreement, as may be set by the mediator.

(III) If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the parties.

(IV) The mediation shall not affect the right of either party to seek such relief or take such steps as it considers necessary to protect its interest.

(V) Either party may advise the Tribunal that they have agreed to mediation. The arbitration procedure shall continue during the conduct of the mediation but the Tribunal may take the mediation timetable into account when setting the timetable for steps in the arbitration.

(VI) Unless otherwise agreed or specified in the mediation terms, each party shall bear its own costs incurred in the mediation and the parties shall share equally the mediator's costs and expenses.

(VII) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Tribunal except to the extent that they are discoverable under the law and procedure governing the arbitration.

(Note: The parties should be aware that the mediation process may not necessarily interrupt time limits.)

(E) If Box 23 in Part I is not appropriately filled in, sub-clause (A) of this Clause shall apply. Sub-clause (D) shall apply in all cases.

*) *(A), (B) and (C) are alternatives; indicate alternative agreed in Box 23*

23. General Average

General Average shall be settled according to York/Antwerp Rules, 1994 and any subsequent modification thereof. Hire shall not contribute to General Average.

24. Commission

The Owners shall pay a commission at the rate stated in Box 24 to the party mentioned in Box 24 on any hire paid under the Charter, but in no case less than is necessary to cover the actual expenses of the Brokers and a reasonable fee for their work. If the full hire is not paid owing to breach of Charter by either of the parties the party liable thereafter shall indemnify the Brokers against their loss of commission. Should the parties agree to cancel the Charter, the Owners shall indemnify the Brokers against any loss of commission but in such case the commission not to exceed the brokerage on one year's hire.

Code Name: **"NYPE 93"**

Recommended by:
The Baltic and International Maritime Council (BIMCO)
The Federation of National Associations of
Ship Brokers and Agents (FONASBA)

TIME CHARTER©

New York Produce Exchange Form
Issued by the Association of Ship Brokers and Agents (U.S.A.), Inc.

November 6th, 1913 - Amended October 20th, 1921, August 6th, 1931, October 3rd, 1946
Revised July 2nd, 1981, September 14th 1993

THIS CHARTER PARTY, made and concluded in this day of 19

Between

Owners of the Vessel described below, and

Charterers.

Description of Vessel

Name Flag Built (year).
Port and number of Registry
Classed In
Deadweight long*/metric* tons (cargo and bunkers, including freshwater and stores not exceeding long*/metric* tons) on a salt water draft of
on summer freeboard.

Capacity cubic feet grain cubic feet bale space.
Tonnage GT/CRT.
Speed about knots, fully laden, in good weather conditions up to and including maximum
I once on the Beaufort wind scale, on a consumption of about long*/metric*
tons of

** Delete as appropriate.*
For further description see Appendix "A" (if applicable)

1. **Duration**

The Owners agree to let and the Charterers agree to hire the Vessel from the time of delivery for a period of

within below mentioned trading limits.

2 **Delivery**

The Vessel shall be placed at the disposal of the Charterers at

The Vessel on her delivery shall be ready to receive cargo with clean-swept holds and tight, staunch, strong and in every way fitted for ordinary cargo service, having water ballast and with sufficient power to operate all cargo handling gear simultaneously.

The Owners shall give the Charterers not less than days notice of expected date of

delivery

3. **On-Off Hire Survey**

Prior to delivery and redelivery the parties shall, unless otherwise agreed, each appoint surveyors, for their respective accounts, who shall not later than at first loading port/last discharging port respectively, conduct joint on hire/off hire surveys, for the purpose of ascertaining quantity of bunkers on board and the condition of the Vessel. A single report shall be prepared on each occasion and signed by each surveyor, without prejudice to his right to file a separate report setting forth items upon which the surveyors cannot agree.
If either party fails to have a representative attend the survey and sign the joint survey report, such party shall nevertheless be bound for all purposes by the findings in any report prepared by the other party.
On hire survey shall be on Charterers' time and on-hire survey on Owners' time.

4. **Dangerous Cargo/Cargo Exclusions**

(a) The Vessel shall be employed in carrying lawful merchandise excluding any goods of a dangerous, injurious, flammable or corrosive nature unless carried in accordance with the requirements or recommendations of the competent authorities of the country of the Vessel's registry and of ports of shipment and discharge and of any intermediate countries or ports through whose waters the Vessel must pass. Without prejudice to the generality of the foregoing, in addition the following are specifically excluded: livestock of any description, arms, ammunition, explosives, nuclear and radioactive materials,

(b) If IMO-classified cargo is agreed to be carried, the amount of such cargo shall be limited to tons and the Charterers shall provide the Master with any evidence he may reasonably require to show that the cargo is packaged, labelled, loaded and stowed in accordance with IMO regulations, failing which the Master is entitled to refuse such cargo or, if already loaded, to unload it at the Charterers' risk and expense.

5. **Trading Limits**

The Vessel shall be employed in such lawful trades between safe ports and safe places within

excluding

as the Charterers shall direct.

6 **Owners to Provide**

The Owners shall provide and pay for the insurance of the Vessel, except as otherwise provided, and for all provisions, cabin, deck, engine-room and other necessary stores, including boiler water; shall pay for wages, consular shipping and discharging fees of the crew and charges for port services pertaining to the crew; shall maintain the Vessel's class and keep her in a thoroughly efficient state in hull, machinery and equipment for and during the service, and have a full complement of officers and crew.

7. **Charterers to Provide**

The Charterers, while the Vessel is on hire, shall provide and pay for all the bunkers except as otherwise agreed; shall pay for port charges (including compulsory watchmen and cargo watchmen and compulsory garbage disposal), all communication expenses pertaining to the Charterers' business at cost, pilotages,

towages, agencies, commissions, consular charges (except those pertaining to individual crew members or flag of the Vessel), and all other usual expenses except those stated in Clause 6, but when the Vessel puts into a port for causes for which the Vessel is responsible (other than by stress of weather), then all such charges incurred shall be paid by the Owners. Fumigations ordered because of illness of the crew shall be for the Owners' account. Fumigations ordered because of cargoes carried or ports visited while the Vessel is employed under this Charter Party shall be for the Charterers' account. All other fumigations shall be for the Charterers' account after the Vessel has been on charter for a continuous period of six months or more.

The Charterers shall provide and pay for necessary dunnage and also any extra fittings requisite for a special trade or unusual cargo, but the Owners shall allow them the use of any dunnage already aboard the Vessel. Prior to redelivery the Charterers shall remove their dunnage and fittings at their cost and in their time.

8. **Performance of Voyages**

(a) The Master shall perform the voyages with due despatch, and shall render all customary assistance with the Vessel's crew. The Master shall be conversant with the English language and (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency; and the Charterers shall perform all cargo handling, including but not limited to loading, stowing, trimming, lashing, securing, dunnaging, unlashing, discharging, and tallying, at their risk and expense, under the supervision of the Master.

(b) If the Charterers shall have reasonable cause to be dissatisfied with the conduct of the Master or officers, the Owners shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

9. **Bunkers**

(a) The Charterers on delivery, and the Owners on redelivery, shall take over and pay for all fuel and diesel oil remaining on board the Vessel as hereunder. The Vessel shall be delivered with: long/metric* tons of fuel oil at the price of per ton; tons of diesel oil at the price of per ton. The vessel shall be redelivered with: tons of fuel oil at the price of per ton; tons of diesel oil at the price of per ton.

** Same tons apply throughout this clause.*

(b) The Charterers shall supply bunkers of a quality suitable for burning in the Vessel's engines and auxiliaries and which conforms to the specification(s) as set out in Appendix A.

The Owners reserve their right to make a claim against the Charterers for any damage to the main engines or the auxiliaries caused by the use of unsuitable fuels or fuels not complying with the agreed specification(s). Additionally, if bunker fuels supplied do not conform with the mutually agreed specification(s) or otherwise prove unsuitable for burning in the Vessel's engines or auxiliaries, the Owners shall not be held responsible for any reduction in the Vessel's speed performance and/or increased bunker consumption, nor for any time lost and any other consequences.

10. **Rate of Hire/Redelivery Areas and Notices**

The Charterers shall pay for the use and hire of the said Vessel at the rate of $ U.S. currency, daily, or $ U.S. currency per ton on the Vessel's total deadweight carrying capacity, including bunkers and stores, on summer freeboard, per 30 days, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month, hire shall continue until the hour of the day of her redelivery in like good order and condition, ordinary wear and tear excepted, to the Owners (unless Vessel lost) at

unless otherwise mutually agreed.

The Charterers shall give the Owners not less than days notice of the Vessel's expected date and probable port of redelivery.

For the purpose of hire calculations, the times of delivery, redelivery or termination of charter shall be adjusted to GMT.

11. **Hire Payment**

(a) *Payment*

Payment of Hire shall be made so as to be received by the Owners or their designated payee in [illegible] in currency, or in United States Currency, in funds available to the Owners on the due date, 15 days in advance, and for the last month or part of same the approximate amount of hire, and should same not cover the actual time, hire shall be paid for the balance day by day as it becomes due, if so required by the Owners. Failing the punctual and regular payment of the hire, or on any fundamental breach whatsoever of this Charter Party, the Owners shall be at liberty to withdraw the Vessel from the service of the Charterers without prejudice to any claims they (the Owners) may otherwise have on the Charterers.

At any time after the expiry of the grace period provided in Sub-clause 11 (b) hereunder and while the hire is outstanding, the Owners shall, without prejudice to the liberty to withdraw, be entitled to withhold the performance of any and all of their obligations hereunder and shall have no responsibility whatsoever for any consequences thereof, in respect of which the Charterers hereby indemnify the Owners, and hire shall continue to accrue and any extra expenses resulting from such withholding shall be for the Charterers' account.

(b) *Grace Period*

Where there is failure to make punctual and regular payment of hire due to oversight, negligence, errors or omissions on the part of the Charterers or their bankers, the Charterers shall be given by the Owners clear banking days (as recognised at the agreed place of payment) written notice to rectify the failure, and when so rectified within those days following the Owners' notice, the payment shall stand as regular and punctual.

Failure by the Charterers to pay the hire within days of their receiving the Owners' notice as provided herein, shall entitle the Owners to withdraw as set forth in Sub-clause 11(a) above.

(c) *Last Hire Payment*

Should the Vessel be on her voyage towards port of redelivery at the time the last and/or the penultimate payment of hire is/are due, said payment(s) is/are to be made for such length of time as the Owners and the Charterers may agree upon as being the estimated time necessary to complete the voyage, and taking into account bunkers actually on board, to be taken over by the Owners and estimated disbursements for the Owners' account before redelivery. Should same not cover the actual time, hire is to be paid for the balance, day by day, as it becomes due. When the Vessel has been redelivered, any difference is to be refunded by the Owners or paid by the Charterers, as the case may be.

(d) *Cash Advances*

Cash for the Vessel's ordinary disbursements at any port may be advanced by the Charterers, as required by the Owners, subject to 2½ percent commission and such advances shall be deducted from the hire. The Charterers, however, shall in no way be responsible for the application of such advances.

12. **Berths**

The Vessel shall be loaded and discharged in any safe dock or at any safe berth or safe place that Charterers or their agents may direct, provided the Vessel can safely enter, lie and depart always afloat at any time of tide.

13. **Spaces Available**

(a) The whole reach of the Vessel's holds, decks, and other cargo spaces (not more than she can reasonably and safely stow and carry), also accommodations for supercargo, if carried, shall be at the Charterers' disposal, reserving only proper and sufficient space for the Vessel's officers, crew, tackle, apparel, furniture, provisions, stores and fuel.

(b) In the event of deck cargo being agreed, the Owners are to be paid the Charterers for any loss and/or damage and/or liability of whatsoever nature caused to the Vessel as a result of the carriage of deck cargo and which would not have arisen had deck cargo not been loaded.

14. **Supercargo and Meals**

The Charterers are entitled to appoint a supercargo, who shall accompany the Vessel at the Charterers' risk and see that voyages are performed with due despatch. He is to be furnished with free accommodation and same fare as provided for the Master's table, the Charterers paying at the rate of per day. The Owners shall victual pilots and customs officers, and also, when authorised by the Charterers or their agents, shall victual tally clerks, stevedore's foreman, etc., Charterers paying at the rate of per meal for all such victualling.

15. **Sailing Orders and Logs**

The Charterers shall furnish the Master from time to time with all requisite instructions and sailing directions, in writing, in the English language, and the Master shall keep full and correct deck and engine logs of the voyage or voyages, which are to be patent to the Charterers or their agents, and furnish the Charterers, their agents or supercargo, when required, with a true copy of such deck and engine logs, showing the course of the Vessel, distance run and the consumption of bunkers. Any log extracts required by the Charterers shall be in the English language.

16. **Delivery/Cancelling**

If required by the Charterers, time shall not commence before and should the Vessel not be ready for delivery on or before but not later than hours, the Charterers shall have the option of cancelling this Charter Party.

Alternative of Cancelling

If the Owners warrant that, despite the exercise of due diligence by them, the Vessel will not be ready for delivery by the cancelling date, and provided the Owners are able to state with reasonable certainty the date on which the Vessel will be ready, they may, at the earliest seven days before the Vessel is expected to sail for the port or place of delivery, require the Charterers to declare whether or not they will cancel the Charter Party. Should the Charterers elect not to cancel, or should they fail to reply within two days or by the cancelling date, whichever shall first occur, then the seventh day after the expected date of readiness for delivery as notified by the Owners shall replace the original cancelling date. Should the Vessel be further delayed, the Owners shall be entitled to require further declarations of the Charterers in accordance with this Clause.

17. **Off Hire**

In the event of loss of time from deficiency and/or default and/or strike of officers or crew, or deficiency of stores, fire, breakdown of, or damages to hull, machinery or equipment, grounding, detention by the arrest of the Vessel, (unless such arrest is caused by events for which the Charterers, their servants, agents or subcontractors are responsible), or detention by average accidents to the Vessel or cargo unless resulting from inherent vice, quality or defect of the cargo, drydocking for the purpose of examination or painting bottom, or by any other similar cause preventing the full working of the Vessel, the payment of

time and overtime, if any, shall cease for the time thereby lost. Should the Vessel deviate or put back during a voyage, contrary to the orders or directions of the Charterers, for any reason other than accident to the cargo or where permitted in lines 207 to 208 hereunder, the hire is to be suspended from the time of her deviating or putting back until she is again in the same or equivalent position from the destination and the voyage resumed therefrom. All bunkers used by the Vessel while off hire shall be for the Owners' account. In the event of the Vessel being driven into port or to anchorage through stress of weather, trading to shallow harbors or to work or ports with bars, any detention of the Vessel and/or expenses resulting from such detention shall be for the Charterers' account. If upon the voyage the speed be reduced by defect in, or breakdown of, any part of her hull, machinery or equipment, the time so lost, and the cost of any extra bunkers consumed in consequence thereof, and all extra proven expenses may be deducted from the hire.

18. **Sublet**

Unless otherwise agreed, the Charterers shall have the liberty to sublet the Vessel for all or any part of the time covered by this Charter Party, but the Charterers remain responsible for the fulfilment of this Charter Party.

19. **Drydocking**

The Vessel was last drydocked

*(a) The Owners shall have the option to place the Vessel in drydock during the currency of this Charter at a convenient time and place, to be mutually agreed upon between the Owners and the Charterers, for bottom cleaning and painting and/or repair as required by class or dictated by circumstances.

*(b) Except in case of emergency no drydocking shall take place during the currency of this Charter Party.

* *Delete as appropriate*

20. **Total Loss**

Should the Vessel be lost, money paid in advance and not earned (reckoning from the date of loss or being last heard of) shall be returned to the Charterers at once.

21. **Exceptions**

The act of God, enemies, restraint of princes, rulers and people, and all dangers and accidents of the seas, rivers, machinery, boilers, steam navigation and errors of navigation throughout this Charter, always mutually excepted.

22. **Liberties**

The Vessel shall have the liberty to sail with or without pilots, to tow and to be towed, to assist vessels in distress, and to deviate for the purpose of saving life and property.

23. **Liens**

The Owners shall have a lien upon all cargoes and all sub-freights and/or sub hire for any amounts due under this Charter Party, including general average contributions, and the Charterers shall have a lien on the Vessel for all monies paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once.

The Charterers will not directly or indirectly suffer, nor permit to be continued, any lien or encumbrance which might have priority over the title and interest of the Owners in the Vessel. The Charterers undertake that during the period of this Charter Party, they will not procure any supplies or necessaries or services, including any port expenses and bunkers, on the credit of the Owners or in the Owners' time.

24. **Salvage**

All derelicts and salvage shall be for the Owners' and the Charterers' equal benefit after deducting Owners' and Charterers' expenses and crew's proportion.

25. **General Average**

General average shall be adjusted according to York-Antwerp Rules 1974, as amended 1990, or any subsequent modification thereof, in and settled in currency.

The Charterers shall procure that all bills of lading issued during the currency of the Charter Party will contain a provision to the effect that general average shall be adjusted according to York-Antwerp Rules 1974, as amended 1990, or any subsequent modification thereof and will include the "New Jason Clause" as per Clause 31.

Time charter hire shall not contribute to general average.

26. **Navigation**

Nothing herein stated is to be construed as a demise of the Vessel to the Time Charterers. The Owners shall remain responsible for the navigation of the Vessel, acts of pilots and tug boats, insurance, crew, and all other matters, same as when trading for their own account.

27. **Cargo Claims**

Cargo claims as between the Owners and the Charterers shall be settled in accordance with the Inter-Club New York Produce Exchange Agreement of February 1970, as amended May, 1984, or any subsequent modification or replacement thereof.

28. **Cargo Gear and Lights**

The Owners shall maintain the cargo handling gear of the Vessel which is as follows:

providing gear (for all derricks or cranes) capable of lifting capacity as described. The Owners shall also provide on the Vessel for night work lights as on board, but all additional lights over those on board shall be at the Charterers' expense. The Charterers shall have the use of any gear on board the Vessel. If required by the Charterers, the Vessel shall work night and day and all cargo handling gear shall be at the Charterers' disposal during loading and discharging. In the event of disabled cargo handling gear, or insufficient power to operate the same, the Vessel is not to be considered to be off hire to the extent that time is actually lost to the Charterers and the Owners to pay stevedore stand-by charges occasioned thereby, unless such disablement or insufficiency of power is caused by the Charterers' stevedores. If required by the Charterers, the Owners shall bear the cost of hiring shore gear in lieu thereof, in which case the Vessel shall remain on hire.

29. **Crew Overtime**

In lieu of any overtime payments to officers and crew for work ordered by the Charterers or their agents, the Charterers shall pay the Owners, concurrently with the hire per month or pro rata.

30. **Bills of Lading**

(a) The Master shall sign the bills of lading or waybills for cargo as presented in conformity with mates or tally clerk's receipts. However, the Charterers may sign bills of lading or waybills on behalf of the Master, with the Owner's prior written authority, always in conformity with mates or tally clerk's receipts.

(b) All bills of lading or waybills shall be without prejudice to this Charter Party and the Charterers shall indemnify the Owners against all consequences or liabilities which may arise from any inconsistency between this Charter Party and any bills of lading or waybills signed by the Charterers or by the Master at their request.

(c) Bills of lading covering deck cargo shall be claused: "Shipped on deck at Charterers', Shippers' and Receivers' risk, expense and responsibility, without liability on the part of the Vessel, or her Owners for any loss, damage, expense or delay howsoever caused."

31. Protective Clauses

This Charter Party is subject to the following clauses all of which are also to be included in all bills of lading or waybills issued hereunder.

(a) CLAUSE PARAMOUNT
"This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, the Hague Rules, or the Hague-Visby Rules, as applicable, or such other similar national legislation as may mandatorily apply by virtue of origin or destination of the bills of lading, which shall be deemed to be incorporated herein and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said applicable Act. If any term of this bill of lading be repugnant to said applicable Act to any extent, such term shall be void to that extent, but no further."

and

(b) BOTH-TO-BLAME COLLISION CLAUSE
"If the ship comes into collision with another ship as a result of the negligence of the other ship and any 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, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the other or non carrying ship or her owners insofar as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier.

The foregoing provisions shall also apply where the owners, operators or those in charge of any ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect to a collision or contact."

and

(c) NEW JASON CLAUSE
"In the event of accident, danger, damage or disaster before or after the commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequences of which, the carrier is not responsible, by statute, contract, or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods.

If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if salving ship or ships belonged to strangers. Such deposit as the carrier or his agents may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery."

and

(d) U.S. TRADE - DRUG CLAUSE
"In pursuance of the provisions of the U.S. Anti Drug Abuse Act 1986 or any re-enactment thereof, the Charterers warrant to exercise the highest degree of care and diligence in preventing unmanifested narcotic drugs and marijuana to be loaded or concealed on board the Vessel.

Non-compliance with the provisions of this clause shall amount to breach of warranty for consequences of which the Charterers shall be liable and shall hold the Owners, the Master and the crew of the Vessel harmless and shall keep them indemnified against all claims whatsoever which may arise and be made against them individually or jointly. Furthermore, all time lost and all expenses incurred, including fines, as a result of the Charterers' breach of the provisions of this clause shall be for the Charterer's account and the Vessel shall remain on hire.

Should the Vessel be arrested as a result of the Charterers' non-compliance with the provisions of this clause, the Charterers shall at their expense take all reasonable steps to secure that within a reasonable time the Vessel is released and at their expense put up the bail to secure release of the Vessel.

The Owners shall remain responsible for all time lost and all expenses incurred, including fines, in the event that unmanifested narcotic drugs and marijuana are found in the possession or effects of the Vessel's personnel."

and

(e) WAR CLAUSES

"(i) No contraband of war shall be shipped. The Vessel shall not be required, without the consent of the Owners, which shall not be unreasonably withheld, to enter any port or zone which is involved in a state of war, warlike operations, or hostilities, civil strife, insurrection or piracy whether there be a declaration of war or not, where the Vessel, cargo or crew might reasonably be expected to be subject to capture, seizure or arrest, or to a hostile act by a belligerent power (the term "power" meaning any de jure or de facto authority or any purported governmental organization maintaining naval, military or air forces)

(ii) If such consent is given by the Owners, the Charterers will pay the provable additional cost of insuring the Vessel against hull war risks in an amount equal to the value under her ordinary hull policy but not exceeding a valuation of In addition, the Owners may purchase and the Charterers will pay for war risk insurance on ancillary risks such as loss of hire, freight disbursements, total loss, blocking and trapping, etc. If such insurance is not obtainable commercially or through a government program, the Vessel shall not be required to enter or remain at any such port or zone.

(iii) In the event of the existence of the conditions described in (i) subsequent to the date of this Charter, or while the Vessel is on hire under this Charter, the Charterers shall, in respect of voyages to any such port or zone assume the provable additional cost of wages and insurance properly incurred in connection with master, officers and crew as a consequence of such war, warlike operations or hostilities.

(iv) Any war bonus to officers and crew due to the Vessel's trading or cargo carried shall be for the Charterers' account."

32. War Cancellation

In the event of the outbreak of war (whether there be a declaration of War or not) between any two or more of the following countries

either the Owners or the Charterers may cancel this Charter Party. Whereupon, the Charterers shall redeliver the Vessel to the Owners in accordance with Clause 10; if she has cargo on board, after discharge thereof at destination, or, if delayed under this Clause from reaching or entering it, at a near open and safe port as directed by the Owners; or, if she has no cargo on board, at the port at which she then is; or, if at sea, at a near open and safe port as directed by the Owners. In all cases hire shall continue to be paid in accordance with Clause 11 and except as aforesaid all other provisions of this Charter Party shall apply until redelivery.

33. Ice

The Vessel shall not be required to enter or remain in any icebound port or area, nor any port or area

where lights or lightships have been or are about to be withdrawn by reason of ice, nor where there is risk that in the ordinary course of things the Vessel will not be able on account of ice to safely enter and remain in the port or berth or to get out after having completed loading or discharging. Subject to the Owners' prior approval the Vessel is to follow ice breakers when reasonably required with regard to her size, construction and ice class.

34. Requisition

Should the Vessel be requisitioned by the government of the Vessel's flag during the period of this Charter Party, the Vessel shall be deemed to be off hire during the period of such requisition, and any hire paid by the said government in respect of such requisition period shall be retained by the Owners. The period during which the Vessel is on requisition to the said government shall count as part of the period provided for in this Charter Party.
If the period of requisition extends [illegible] months, either party shall have the option of cancelling this Charter Party and no consequential claim may be made by either party.

35. Stevedore Damage

Notwithstanding anything contained herein to the contrary, the Charterers shall pay for any and all damage to the Vessel caused by stevedores provided the Master has notified the Charterers and/or their agents in writing as soon as practical but not later than 48 hours after any damage is discovered. Such notice to specify the damage in detail and to invite Charterers to appoint a surveyor to assess the extent of such damage.

(a) In case of any and all damage(s) affecting the Vessel's seaworthiness and/or the safety of the crew and/or affecting the trading capabilities of the Vessel, the Charterers shall immediately arrange for repairs of such damage(s) at their expense and the Vessel is to remain on hire until such repairs are completed and if required passed by the Vessel's classification society.

(b) Any and all damage(s) not described under point (a) above shall be repaired at the Charterers' option, before or after redelivery concurrently with the Owners' work. In such case no hire and/or expenses will be paid to the Owners except and insofar as the time and/or the expenses required for the repairs for which the Charterers are responsible, exceed the time and/or expenses necessary to carry out the Owners' work.

36. Cleaning of Holds

The Charterers shall provide and pay extra for sweeping and/or washing and/or cleaning of holds between voyages and/or between cargoes provided such work can be undertaken by the crew and is permitted by local regulations, at the rate of per hold.

In connection with any such operation, the Owners shall not be responsible if the Vessel's holds are not accepted or passed by the port or any other authority. The Charterers shall have the option to re-deliver the Vessel with unclean/unswept holds against a lumpsum payment of in lieu of cleaning.

37. Taxes

Charterers to pay all local, State, National taxes and/or dues assessed on the Vessel or the Owners resulting from the Charterers' orders herein, whether assessed during or after the currency of this Charter Party including any taxes and/or dues on cargo and/or freights and/or sub-freights and/or hire (excluding taxes levied by the country of the flag of the Vessel or the Owners).

38. Charterers' Colors

The Charterers shall have the privilege of flying their own house flag and painting the Vessel with their own markings. The Vessel shall be repainted in the Owners' colors before termination of the Charter Party. Cost and time of painting, maintaining and repainting these changes effected by the Charterers shall be for the Charterers' account.

39. **Laid up Returns**

The Charterers shall have the benefit of any return insurance premium receivable by the Owners from their underwriters as and when received from underwriters by reason of the Vessel being in port for a minimum period of 30 days if on full hire for this period or pro rata for the time actually on hire.

40. **Documentation**

The Owners shall provide any documentation relating to the Vessel that may be required to permit the Vessel to trade within the agreed trade limits, including, but not limited to certificates of financial responsibility for oil pollution, provided such oil pollution certificates are obtainable from the Owners' P & I club, valid international tonnage certificate, Suez and Panama tonnage certificates, valid certificate of registry and certificates relating to the strength and/or seaworthiness of the Vessel's gear.

41. **Stowaways**

(a) (i) The Charterers warrant to exercise due care and diligence in preventing stowaways in gaining access to the Vessel by means of secreting away in the goods and/or containers shipped by the Charterers.

(ii) If, despite the exercise of due care and diligence by the Charterers, stowaways have gained access to the Vessel by means of secreting away in the goods and/or containers shipped by the Charterers, this shall amount to breach of charter for the consequences of which the Charterers shall be liable and shall hold the Owners harmless and shall keep them indemnified against all claims whatsoever which may arise and be made against them. Furthermore, all time lost and all expenses whatsoever and howsoever incurred, including fines, shall be for the Charterers' account and the Vessel shall remain on hire.

(iii) Should the Vessel be arrested as a result of the Charterers' breach of charter according to subclause (a)(i) above, the Charterers shall take all reasonable steps to secure that, within a reasonable time, the Vessel is released and at their expense put up bail to secure release of the Vessel.

(b) (i) If, despite the exercise of due care and diligence by the Owners, stowaways have gained access to the Vessel by means other than secreting away in the goods and/or containers shipped by the Charterers, all time lost and all expenses whatsoever and howsoever incurred, including fines, shall be for the Owners' account and the Vessel shall be off hire.

(ii) Should the Vessel be arrested as a result of stowaways having gained access to the Vessel by means other than secreting away in the goods and/or containers shipped by the Charterers, the Owners shall take all reasonable steps to secure that, within a reasonable time, the Vessel is released and at their expense put up bail to secure release of the Vessel.

42. **Smuggling**

In the event of smuggling by the Master, Officers and/or crew, the Owners shall bear the cost of any fines, taxes, or imposts levied and the Vessel shall be off hire for any time lost as a result thereof.

43. **Commissions**

A commission of percent is payable by the Vessel and the Owners to

on hire earned and paid under this Charter, and also upon any continuation or extension of this Charter.

44. **Address Commission**

An address commission of percent is payable to

on hire earned and paid under this Charter.

45. **Arbitration**

(a) NEW YORK
All disputes arising out of this contract shall be arbitrated at New York in the following manner, and subject to U.S. Law:

One Arbitrator is to be appointed by each of the parties hereto and a third by the two so chosen. Their decision or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the court. The Arbitrators shall be commercial men, conversant with shipping matters. Such Arbitration is to be conducted in accordance with the Rules of the Society of Maritime Arbitrators Inc.

For disputes where the total amount claimed by either party does not exceed US $ ** the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators Inc.

(b) LONDON
All disputes arising out of this contract shall be arbitrated at London and, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic Mercantile & Shipping Exchange and engaged in Shipping, one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire. No award shall be questioned or invalidated on the ground that any of the Arbitrators is not qualified as above, unless objection to his action be taken before the award is made. Any dispute arising hereunder shall be governed by English Law.

For disputes where the total amount claimed by either party does not exceed US $ ** the arbitration shall be conducted in accordance with the Small Claims Procedure of the London Maritime Arbitrators Association.

**Delete para (a) or (b) as appropriate*

*** Where no figure is supplied in the blank space this provision only shall be void but the other provisions of this clause shall have full force and remain in effect.*

If mutually agreed, clauses ~~recited~~ to , both inclusive, as attached hereto are fully incorporated in this Charter Party.

Draft Copy

APPENDIX "A"

To Charter Party dated
Between Owners
and Charterers

Further details of the Vessel:

BPTIME3

TIME CHARTERPARTY

PRODUCED IN ASSOCIATION WITH
THE BALTIC AND INTERNATIONAL MARITIME COUNCIL (BIMCO)

1st Edition - February 2001

INDEX TO CLAUSES - BPTIME3

Codenamed for this Charterparty
"BPTIME3"

TIME CHARTERPARTY

Date

PREAMBLE

It is this day agreed between

of
("Owners") being owners/disponent owners of the motor/steam tank vessel (delete as applicable) called
("Vessel")
and
of

("Charterers") that the service for which provision is herein made shall be subject to the terms and conditions of this Charter which comprises this PREAMBLE, PART 1 and PART 2, together with the OCIMF Vessel Particulars Questionnaire current at the date hereof and the BPTIME3 Questionnaire (together referred to as the "Questionnaire") as attached hereto.

Unless the context otherwise requires, words denoting the singular include the plural and vice versa.

In the event of any conflict between the provisions of PART 1 and PART 2 of this Charter, the provisions of PART 1 shall prevail.

In the event of any conflict between the provisions of PART 1 or PART 2 of this Charter and any provisions in the Questionnaire, the provisions of PART 1 or PART 2 of this Charter shall prevail.

PART I

A. Name of Vessel:

B. Charter Period:

C. Laydays/Cancelling:

Commencing: 0001 hours local time on ("Commencement Date")
Cancelling: 1600 hours local time on ("Cancelling Date")

D. Place of Delivery:

E. Vessel shall be delivered with the following cargo history:

F. Place of Redelivery:

G. Bunkers on Delivery and Redelivery:

H. Rate of Hire:

I. Owners' Payment Details:

J. Bunker Specifications:

K. Permitted Cargoes:

L. Trading Limits:

75

76

77

78 **M. Additional Clauses:**

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PART 2

COMMERCIAL PROVISIONS

1. DELIVERY AND CHARTER PERIOD

1.1 Owners agree to let and Charterers agree to hire the Vessel from the time of delivery for a Charter Period as set out in PART 1, Section B. The Vessel shall be placed at the disposal of Charterers at the Place of Delivery as set out in PART 1, Section D. The Vessel shall not be delivered to Charterers prior to the Commencement Date.

1.2 Upon delivery the Vessel shall be tight, staunch, strong, in every way fitted for service, with cargo spaces, facilities and equipment ready to receive, carry and deliver cargo, and with a full complement of Master, officers and crew fully competent, certified and experienced to perform the services contracted for, and in all material respects meeting the description of the Vessel set out in the Questionnaire. Without prejudice to the aforesaid, upon delivery Owners, Master, officers, crew and all documents shall conform in all parts and in all material respects with the responses submitted in the Questionnaire.

2. CANCELLATION

2.1 If the Vessel is not ready in accordance with Clause 1 and at Charterers' disposal by the Cancelling Date (which term shall for the purposes of this Clause include any new Cancelling Date determined under this Clause 2) Charterers shall have the option of cancelling this Charter within forty-eight (48) hours after the Cancelling Date.

2.2 Owners undertake to notify Charterers promptly if at any time Owners or the Master foresee that the Vessel may not be delivered in accordance with Clause 1 by the Cancelling Date. Such notification is to be in writing and shall state the date and time that Owners expect the Vessel to be ready to be delivered.

2.3 If at any time it appears to Charterers that the Vessel will not be delivered in accordance with Clause 1 by the Cancelling Date, Charterers may require Owners to state in writing the date and time that they expect the Vessel to be ready to be delivered, such statement to be given within ninety-six (96) hours of Charterers' request.

2.4 If the date and time notified by Owners pursuant to sub-clauses 2.2, 2.3 or 4.1 falls after the Cancelling Date then Charterers shall have the option of cancelling this Charter within one hundred and twenty (120) hours of receipt of the said notice from Owners or within forty-eight (48) hours after the Cancelling Date, whichever is earlier.

If Charterers do not exercise their option to cancel this Charter then the new Cancelling Date for the purpose of this Clause 2 shall be twelve (12) hours after the date and time notified by Owners pursuant to sub-clause 2.2 or 2.3, or such other date and time as may be mutually agreed.

2.5 If Owners fail, or fail reasonably, to respond in writing to Charterers when required to do so under sub-clause 2.3, Charterers shall have the option of cancelling this Charter within one hundred and twenty (120) hours after the period allowed for Owners' response under sub-clause 2.3, or within forty-eight (48) hours after the Cancelling Date, whichever is earlier.

3. REDELIVERY

3.1 The Vessel shall be redelivered to Owners at the Place of Redelivery stipulated in PART 1, Section F on the expiry of the Charter Period, on completion of its final voyage on dropping last outward bound pilot, or as may otherwise be agreed.

3.2 Notwithstanding the provisions of sub-clauses 1.1 and 3.1 hereof, should the Vessel at the expiry of the Charter Period be on a ballast voyage to the Place of Redelivery or on a laden voyage (which for the purposes of this Clause shall be deemed to have commenced at the end of the sea passage to the first loadport), then Charterers shall have the use of the Vessel at the same rate and conditions for such extended time as may be necessary for the completion of the voyage on which

127 at its engaged and, where required, its ballast voyage to the Place of Redelivery

128 **4. NOTICES OF DELIVERY AND REDELIVERY**

129 4.1 The below notices shall be given by Owners to Charterers in the case of delivery, and by
130 Charterers to Owners in the case of redelivery

131 4.1.1 One calendar month prior to delivery / redelivery, notice shall be given specifying the
132 anticipated date for delivery / redelivery.

133 4.1.2 Fifteen days prior to delivery / redelivery, notice shall be given specifying the firm date
134 and estimated time of delivery / redelivery.

135 4.1.3 Thereafter seven, three, two and one day(s) prior to delivery / redelivery, notice shall be
136 given reconfirming or advising of any adjustment to the date and time given in
137 accordance with sub-clause 4.1.2. In addition, during the last fourteen days prior to
138 delivery / redelivery, prompt notice shall be given of any variation of more than six (6)
139 hours in the estimated time of delivery / redelivery.

140 4.2 If the Charter grants Owners or Charterers an option for the Place of Delivery or Redelivery,
141 notice of the anticipated Place of Delivery / Redelivery shall be given one calendar month before
142 delivery / redelivery, and firm nomination of the Place of Delivery / Redelivery shall be given
143 fifteen days before delivery / redelivery.

144 **5. BUNKERS ON DELIVERY AND REDELIVERY**

145 5.1 The Vessel shall be delivered with about the quantity of fuels stated in PART 1, Section C and
146 shall be redelivered with about the same quantity.

147 5.2 Charterers shall accept and pay for all fuels on board at the time of delivery and Owners shall
148 accept and pay for the fuels on board at redelivery (or, failing the end of the Charter hereof or
149 upon termination of the Charter for other reasons), all at the prices paid (net of all discounts and
150 rebates) as substantiated by such documents as may reasonably be required. Charterers' payment
151 for fuels on board at the time of delivery shall be made together with the first payment of hire.
152 Charterers shall be entitled to deduct from the last payment of hire the value of fuels anticipated
153 to be on board at redelivery

154 **6. CARGOES**

155 6.1 Charterers shall have the right to ship all lawful cargoes falling within the description set out in
156 PART 1, Section K

157 6.2 Charterers shall not ship, nor permit to be shipped, any cargo dangerous to the Vessel

158 **7. TRADING LIMITS**

159 The Vessel shall be employed in lawful trades within Institute Warranty Limits and within the Trading
160 Limits set out in PART 1, Section L.

161 **8. HIRE**

162 8.1 Charterers shall pay hire per day or pro rata for part of a day from the time the Vessel is delivered
163 to Charterers until its redelivery to Owners in the currency and at the rate stated in PART 1,
164 Section H. All calculations of hire shall be by reference to Universal Time Co-ordinated (UTC)

165 8.2 The first payment of hire shall be made on or about the date of delivery, paying the hire in
166 advance up to, but not including, the first day of the succeeding month. All subsequent payments
167 of hire shall be made monthly in advance on the first day of each calendar month to the account
168 stipulated in PART 1, Section I in funds available to Owners on the due date. If, however, in a
169 given month the due date is a non-banking day in the United States (if hire is to be paid in US
170 Dollars) or in the country stated in PART 1, Section I, then the subject month's hire shall be paid
171 on the next banking day.

172 8.3 Hire for the month in which the anticipated date for redelivery falls shall be made up to and
173 including the anticipated date of redelivery. Any necessary adjustments shall be made by payment

by Owners to Charterers or by Charterers to Owners, as the case may be, within twenty eight (28) days after redelivery.

8.4 Where there is a failure to pay hire by the due date, Owners shall notify Charterers in writing of such failure. Within five (5) banking days of receipt of such notification Charterers shall pay the amount due, failing which Owners shall have the right to suspend the performance of any or all of their obligations under this Charter and/or to withdraw the Vessel. If Owners elect to suspend performance of the Charter in respect of a particular late payment, they may still, notwithstanding that suspension of performance, withdraw the Vessel from the Charter in respect of that late payment provided they give a further twenty four (24) hours' notice in writing of their intention to withdraw. Under no circumstances shall the act of suspending performance be construed as a waiver by Owners of the right to withdraw in respect of the continuing failure to pay hire or any subsequent late payment of hire under this Charter. Throughout any period of suspended performance under this Clause, the Vessel is to be and shall remain on hire. Charterers undertake to indemnify Owners in respect of any liabilities incurred by Owners under the bill of lading or any other contract of carriage as a consequence of Owners' proper suspension of and/or withdrawal from any or all of their obligations under this Charter.

8.5 On production of supporting vouchers, Charterers shall be entitled to deduct from hire any expenditure incurred on behalf of Owners which is for Owners' account under this Charter as well as any other sums and expenses due to Charterers which this Charter entitles them to deduct from hire. Charterers shall be entitled to a commission of 2.5% on expenditure settled on behalf of Owners.

8.6 Charterers may, at any time during the three months prior to the end of the Charter Period set out in PART 1, Section B, deduct from hire any amount which they reasonably estimate will be due to them at the end of the Charter Period in respect of expenditure on behalf of Owners, bunkers purchased, anticipated performance of duties and any other similar claim Charterers may have against Owners.

OWNERS' RIGHTS AND OBLIGATIONS

9. OWNERS' OBLIGATIONS

9.1 Without prejudice to Clause 1, Owners shall exercise due diligence to maintain the Vessel in, or restore the Vessel to, the condition required pursuant to Clause 1 throughout the Charter Period.

9.2 Owners undertake that from the date of entering into this Charter the classification society, flag, ownership, management (whether technical or commercial) and P&I Insurers of the Vessel shall not change without Charterers' prior consent. Without prejudice to any other right that Charterers may have, a breach of this provision will entitle Charterers to terminate this Charter, whereupon Owners shall reimburse Charterers with any hire paid in advance and not earned. Should Charterers withhold consent under this Clause, then Owners may require Charterers to promptly identify to them an alternative acceptable to Charterers.

9.3 Owners undertake that from the date of entering into this Charter the amount of Hull and Machinery insurance on the Vessel shall not change without Charterers' prior consent, which shall not be unreasonably withheld.

9.4 Without prejudice to Clause 1, and provided always that Owners are granted a reasonable time to perform cleaning, Owners shall throughout the Charter Period ensure that the Vessel presents for loading with its tanks, pumps and pipelines properly prepared to the satisfaction of any inspector appointed by or on behalf of Charterers and ready for loading the cargo specified by Charterers.

9.5 Owners shall remain responsible for the navigation of the Vessel, acts of pilots, tug boats and crew, same as when trading for their own account. Owners undertake that throughout the period of this Charter they will, at their own expense, comply with the regulations in force from time to time so as to enable the Vessel to pass through the Suez and Panama Canals by day and by night without delay.

9.6 Without limitation to the foregoing, Owners shall provide and pay for:

9.6.1 provisions, wages (including overtime), discharging fees and all other expenses related to

the Master, officers and crew; and

9.6.2 cabin, deck, engine room and other necessary stores, including domestic water; and

9.6.3 radio traffic and other communication expenses; and

9.6.4 insurance on the Vessel fully covering 1961 rates and (without prejudice to Charterers' rights to freely trade the Vessel) standard oil pollution cover up to the level customarily offered by the International Group of P & I Clubs (currently US$1,000 million), Hull and Machinery and basic War Risks in accordance with the information set out in the Questionnaire; and

9.6.5 all documentation required to permit the Vessel to trade within the Trading Limits set out in PART I, Section L, including but not limited to the certificates and documentation confirmed by Owners in the Questionnaire to be in place and such documentation shall be maintained in force during the currency of the Charter.

10. MASTER AND CREW

10.1 The Master, although appointed by Owners, shall throughout the Charter Period be under the orders and directions of Charterers as regards employment, agency or other arrangements and shall render Charterers all reasonable assistance with the officers, crew and equipment (including but not limited to connecting and disconnecting hoses for loading and discharging, verifying fuel samples and the procedure associated with the delivery of fuel) and supply Charterers with such information and documentation as they may from time to time require (including but not limited to logs, noon sheets, safety performance information and certification relating to officers, crew or Vessel).

10.2 The Master shall throughout the Charter Period, operate the Vessel and carry out the duties in a manner consistent with good seamanship, complying with the recommendations set out in the latest edition of ISM Code, and maintaining the safety of the Vessel, the crew, the cargo and the environment, and shall prosecute all voyages with due despatch.

10.3 The Master shall observe regulations and recommendations as to traffic separation and routeing as issued, from time to time, by responsible organisations or regulatory authorities, or as promulgated by the State of the flag of the Vessel or the State in which management of the Vessel is exercised.

10.4 If Charterers are dissatisfied with the conduct of the Master or any officer or crew member, Owners shall on receiving particulars of the complaint, promptly investigate the same, and, if necessary, make a change in the appointment.

11. BILLS OF LADING AND WAYBILLS

11.1 Bills of lading and waybills shall be signed as Charterers direct, without prejudice to this Charter. Charterers hereby indemnify Owners:

11.1.1 against all liabilities that may arise from the signing of bills of lading and waybills in accordance with the directions of Charterers to the extent that the terms of such bills of lading and waybills impose more onerous liabilities than those assumed by Owners under the terms of this Charter; and

11.1.2 against claims brought by holders of bills of lading and waybills against Owners by reason of any deviation ordered by Charterers.

11.2 All bills of lading and waybills issued under this Charter shall include a Clause Paramount and War Risks, New Jason, General Average, and Both to Blame Collision clauses, in the form set out in this Charter.

12. DRUGS AND ALCOHOL POLICY

12.1 Owners undertake that they have, and shall maintain for the duration of this Charter, a policy on Drugs and Alcohol Abuse applicable to the Vessel (the "D & A Policy") that meets or exceeds the standards in the OCIMF Guidelines for the Control of Drugs and Alcohol Onboard Ship 1995 as

amended from time to time.

12.2 Owners shall exercise due diligence to ensure that the D & A Policy is understood and complied with on and about the Vessel. An actual impairment, or any test finding of impairment, shall not in and of itself mean that Owners have failed to exercise due diligence.

13. DRY-DOCKING

Without prejudice to Clause 12, Owners shall have the right at their expense to take the Vessel out of service, including placing the Vessel in dry-dock. For emergency repairs this right may be exercised in accordance with Owners' discretion. For routine maintenance and surveys, the right may only be exercised at a time and place mutually agreed upon by Owners and Charterers.

14. LIEN

Owners shall have a lien upon all cargoes, hire, sub-hire, freights and sub-freights for any amounts owed by Charterers under this Charter.

CHARTERERS' RIGHTS AND OBLIGATIONS

15. CHARTERERS' OBLIGATIONS

15.1 Charterers shall furnish the Master with full and timely instructions.

15.2 Charterers shall provide and/or pay for:-

15.2.1 all fuels of a quality suitable for burning in the Vessel's engines and auxiliaries (which shall comply with the description in PART I, Section J) except for quantities of fuel consumed while the Vessel is off-hire, which shall be for Owners' account, and

15.2.2 [illegible] and all other charges and expenses relating to loading and discharging, and

15.2.3 agency fees for normal ship's husbandry at all places or ports of call, and

15.2.4 towage, pilotage and all mooring, loading and discharging facilities and services, provided always that Charterers shall bear no liability for the negligence or misconduct exercised by the providers of such services and facilities.

15.3 Any additional premiums charged by the providers of oil pollution cover by reason of loading or discharging at ports in the USA or USA-controlled territories shall be for Charterers' account and shall be re-imbursed to Owners together with the instalment of hire next falling due following presentation to Charterers of proper receipts evidencing payment.

15.4 Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of Owners.

16. SPACE AVAILABLE TO CHARTERERS

16.1 The whole reach, burthen and decks of the Vessel, and its passenger accommodation (including Owners' suite if any), shall be at Charterers' disposal, reserving only proper and sufficient space for the Vessel's Master, officers, crew, tackle, apparel, furniture, provisions, stores and lubricating oil.

16.2 The weight of stores and lubricating oil stored on board shall not at any time during the Charter Period, unless specifically agreed, exceed the tonnage shown in the Questionnaire.

17. LOADING AND DISCHARGE / SHIP-TO-SHIP TRANSFERS

17.1 The Vessel shall be loaded and discharged at any port (which term for the purpose of this Charter shall include any port, berth, dock, loading or discharging anchorage or offshore location, submarine line, single point or single buoy mooring facility, alongside vessel or lighter, or any other place whatsoever as the context requires) in accordance with Charterers' instructions. Before instructing Owners to direct the Vessel to any port, Charterers shall exercise due diligence

to ascertain the safety of such port, but Charterers do not warrant the safety of any port and shall be under no liability in respect thereof except for loss or damage caused by Charterers' failure to exercise due diligence.

17.2 Charterers shall have the option of transferring the whole or part of the cargo (which shall include topping off and lightening) to or from any other vessel including, but not limited to, an ocean-going vessel, barge and/or lighter (the "Transfer Vessel").

All transfers of cargo to or from Transfer Vessels shall be carried out in accordance with the recommendations set out in the latest edition of the "ICS/OCIMF Ship to Ship Transfer Guide (Petroleum)". Owners undertake that the Vessel and its crew shall comply with such recommendations, and similarly Charterers undertake that the Transfer Vessel and its crew shall comply with such recommendations. Charterers shall provide and pay for all necessary equipment including suitable fenders and cargo hoses. Charterers shall have the right, at their expense, to appoint supervisory personnel to attend on board the Vessel, including a mooring master, to assist in such transfers of cargo.

18. PERFORMANCE OF VESSEL - SPEED AND CONSUMPTION

18.1 Unless otherwise ordered by Charterers, the Vessel shall perform all voyages at the service speed stated in the Questionnaire.

18.2 Owners warrant that the Vessel is and shall remain capable of maintaining, throughout the Charter Period, the speeds and bunker consumptions for propulsion described in the Questionnaire under normal working conditions and in moderate weather (which for the purpose of this Clause shall exclude any periods of winds exceeding Force 5 on the Beaufort Scale).Charterers shall have the right to make deductions from hire in respect of any time lost and any additional bunkers consumed by reason of the Vessel's failure to maintain the warranted capability.

19. OFF-HIRE

19.1 The Vessel shall be off-hire on each and every occasion that there is a loss of time arising out of or in connection with the Vessel being unable to comply with Charterers' instructions (whether by way of interruption or reduction in the Vessel's services, or in any other manner) on account of:-

19.1.1 any damage, defect, breakdown, deficiency of or accident to the Vessel's hull, machinery, equipment or cargo handling facilities, or maintenance thereto; or

19.1.2 any default and/or deficiency of the Master, officers or crew, including the failure or refusal or inability of the Master, officers and/or crew to perform the services required; or

19.1.3 any breach of sub-clause 9.6.3; or

19.1.4 any other cause preventing the full working of the Vessel.

Notwithstanding the aforesaid, if the total loss of time pursuant to this sub-clause 19.1 is less than three hours in any one calendar month, the Vessel shall not be off-hire.

19.2 If the Vessel deviates, unless ordered to do so by Charterers, it shall be off hire from the commencement of such deviation until the Vessel is again ready to resume its service from a position not less favourable to Charterers than that at which the deviation commenced. For the purposes of this Clause the term deviation shall include stopping, reducing speed, putting back or putting into any port or place other than that to which it is bound under the instructions of Charterers for any reason whatsoever, including for maintenance, dry-docking, taking on stores or fresh water, but shall exclude deviations made to save life or property. Should the Vessel deviate to avoid bad weather or be driven into port or anchorage by stress of weather, the Vessel shall remain on hire and all port costs thereby incurred and bunkers consumed shall be for Charterers' account. Any service given or distance made good by the Vessel while off-hire shall be taken into account in assessing the amount to be deducted from hire.

19.3 Any time during which the Vessel is off-hire under this Charter may be added, at Charterers'

option, to the Charter Period. Such option shall be declared in writing not less than one month before the expected date of redelivery, or promptly if such event occurs less than one month before the expiry of the Charter Period. If Charterers exercise their option to extend the Charter Period pursuant to this Clause, the Charter Period shall be deemed to include such extension and hire shall be payable at the rate(s) which would have been payable but for the relevant off hire event.

20. LAYING UP

Charterers shall have the option to lay up the Vessel at a place nominated by them and acceptable to Owners. Charterers shall exercise due diligence to ascertain the safety of such place but shall be under no liability in respect thereof except for loss or damage caused by Charterers' failure to exercise due diligence. If Charterers exercise the option to lay up the Vessel then the hire stipulated in PART I, Section 11 shall be adjusted to reflect any net increase in expenditure reasonably incurred (including but not limited to costs reasonably incurred in preparing the Vessel for lay up as well as restoring it to the condition in which it was immediately prior to laying up) or net saving which should reasonably be made by Owners as a result of such lay up.

21. STORAGE

Charterers shall have the option of using the Vessel for floating storage but Charterers undertake not to use the Vessel for floating storage in areas where additional premiums for War Risks Insurance are charged by the Vessel's War Risks Insurance underwriters.

22. SUB-LET

Charterers may sub-let the Vessel without prejudice to the respective rights and obligations of either party under this Charter.

23. SUPERNUMERARIES

Charterers may send supernumeraries in the Vessel's available accommodation upon any voyage made under this Charter. In such event Owners shall provide provisions and all requisites, as supplied to officers, except alcohol.

24. VESSEL/CARGO INSPECTIONS/BUNKER SURVEYS

Charterers shall be entitled to cause their representatives (which term includes any independent surveyor appointed by Charterers) to carry out inspections of the Vessel and/or observe cargo operations and/or ascertain the quantity and quality of the cargo, water and bunkers on board, including the taking of cargo samples, inspection and copying of the Vessel's logs, documents and records (which shall include but not be limited to the personal notes of the Master, officers or crew relating to the operation of the Vessel, the rough log book and computer generated data) at any loading and/or discharge port. Charterers' representative may also conduct any of the aforementioned operations at or off any other port to which Charterers may require the Master to divert the Vessel at any time after leaving any loading port. Charterers shall obtain the consent of the owners of any cargo on board at the time before requiring the Vessel to be diverted.

Charterers' representative shall be entitled to survey, and take samples from, any or all of the Vessel's cargo tanks, bunker fuel tanks and non cargo spaces at any place referred to above.

SPECIAL PROVISIONS

25. CLAUSE PARAMOUNT

Charterers undertake that all bills of lading and waybills issued under this Charter shall contain the following:

"CLAUSE PARAMOUNT"

(1) This Bill of Lading shall have effect subject to any national law making the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on 25th August 1924 (The Hague Rules) or the Hague Rules as amended by the Protocol signed at Brussels on 23rd

February 1968 (The Hague/Visby Rules) compulsorily applicable to this Bill of Lading. If any term of this Bill of Lading be repugnant to that legislation to any extent, such term shall be void to that extent but no further. Neither the Hague Rules nor the Hague/Visby Rules shall apply to this Bill of Lading where the goods carried hereunder consist of live animals or cargo which by this Bill of Lading is stated as being carried on deck and is so carried.

(2) Save where the Hague or Hague/Visby Rules apply by reason of (1) above, this Bill of Lading shall take effect subject to any national law in force at the port of shipment or place of issue of the Bill of Lading making the United Nations Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) compulsorily applicable to this Bill of Lading in which case this Bill of Lading shall have effect subject to the Hamburg Rules which shall nullify any stipulation derogating therefrom to the detriment of the shipper or consignee.

(3) Where the Hague, Hague/Visby or Hamburg Rules are not compulsorily applicable to this Bill of Lading, the carrier shall be entitled to the benefits of all privileges, rights and immunities contained in Articles I to VIII of the Hague/Visby Rules.

(4) Nothing in this Bill of Lading shall be construed so as in any way restricting, excluding or waiving the right of any relevant party or person to limit his liability under any available legislation and/or law".

26. SALVAGE

The Master is authorised to render assistance to other vessels. All salvage and remuneration for such assistance shall be for Owners' and Charterers' equal benefit after deducting the Master's and Crew's proportion and all costs, expenses and sacrifices (including but not limited to loss of time, off hire, hire paid, repairs to the Vessel and bunker fuel consumed). Any non-contractual liability to third parties shall be for Owners' account unless it solely affects the salvage remuneration.

27. ICE

The Vessel shall not be required to enter or remain in any icebound port or area, nor any port or area where lights, lightships, markers or buoys have been or are about to be withdrawn by reason of ice, nor where on account of ice there is, in the Master's sole discretion, a risk that, in the ordinary course of events, the Vessel will not be able safely to enter and remain at the port or area or to depart after completion of loading or discharging. The Vessel shall not be obliged to force ice but, subject to Owners' prior approval, may follow ice-breakers when reasonably required, with due regard to its size, construction and class. If, on account of ice, the Master in his sole discretion considers it unsafe to proceed to, enter or remain at the place of loading or discharging for fear of the Vessel being frozen in and/or damaged, he shall be at liberty to sail to the nearest ice-free place and there await Charterers' instructions.

28. REQUISITION

Should the Vessel be requisitioned by any government, *de facto* or *de jure*, during the period of this Charter, the Vessel shall be off-hire during the period of such requisition, and any hire paid by such government and costs incurred in respect of such requisition shall be for Owners' account. The option granted to Charterers in sub-clause 12.3 shall not apply to periods of off hire pursuant to this Clause 28.

29. OUTBREAK OF WAR

Either party may cancel this Charter on the outbreak of war or hostilities between any two or more of the following countries: the United States of America, the Russian Federation, the United Kingdom, France and the People's Republic of China.

30. WAR RISKS

30.1 For the purpose of this Clause, the words:

30.1.1 "Owners" shall include the shipowners, bareboat charterers, disponent owners, managers or other operators who are charged with the management of the Vessel, and the Master; and

30.1.2 "War Risks" shall include any war (whether actual or threatened), act of war, civil war, hostilities, revolution, rebellion, civil commotion, warlike operations, the laying of mines

(whether actual or reputed), acts of piracy, acts of terrorism, acts of hostility or malicious damage, blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), by any person, body, terrorist or political group, or the Government of any state whatsoever, which, in the reasonable judgement of the Master and/or Owners, may be dangerous or are likely to be or to become dangerous to the Vessel, its cargo, crew or other persons on board the Vessel.

30.2 The Vessel, unless the written consent of Owners be first obtained, shall not be ordered to or required to continue to or through, any port, place, area or zone (whether of land or sea), or any waterway or canal, where it appears that the Vessel, its cargo, crew or other persons on board the Vessel, in the reasonable judgement of the Master and/or Owners, may be, or are likely to be, exposed to War Risks. Should the Vessel be within any such place as aforesaid, which only becomes dangerous, or is likely to be or to become dangerous, after its entry into it, the Vessel shall be at liberty to leave it.

30.3 The Vessel shall not be required to load contraband cargo, or to pass through any blockade, whether such blockade be imposed on all vessels, or is imposed selectively in any way whatsoever against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever, or to proceed to an area where it shall be subject, or is likely to be subject to a belligerent's right of search and/or confiscation.

30.4 Owners may effect war risks insurance in respect of the Hull and Machinery of the Vessel and their other interests (including, but not limited to, loss of earnings and detention, the crew and their Protection and Indemnity Risks), and the premiums and/or calls therefor shall be for their account.

30.5 If Owners become liable under the terms of employment to pay the crew any bonus or additional wages in respect of sailing into an area which is dangerous in the manner defined by the said terms, then such bonus or additional wages shall be reimbursed to Owners by Charterers at the same time as the next payment of hire is due.

30.6 The Vessel shall have liberty

30.6.1 to comply with all orders, directions, recommendations or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery, or in any other way whatsoever, which are given by the Government of the Nation under whose flag the Vessel sails, or other Government to whose laws Owners are subject, or any other Government, body or group whatsoever acting with the power to compel compliance with their orders or directions;

30.6.2 to comply with the orders, directions or recommendations of any war risks underwriters who have the authority to give the same under the terms of the war risks insurance;

30.6.3 to comply with the terms of any resolution of the Security Council of the United Nations, any directives of the European Community, the effective orders of any other supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which Owners are subject, and to obey the orders and directions of those who are charged with their enforcement;

30.6.4 to divert and discharge at any other port any cargo or part thereof which may render the Vessel liable to confiscation as a contraband carrier;

30.6.5 to divert and call at any other port to change the crew or any part thereof or other persons on board the Vessel when there is reason to believe that they may be subject to internment, imprisonment or other sanctions.

30.7 If in accordance with their rights under the foregoing provisions of this Clause, Owners refuse to proceed to the loading or discharging ports, or any one or more of them, they shall immediately inform Charterers.

31. GENERAL AVERAGE

General Average shall be adjusted and settled in London in accordance with the York-Antwerp Rules, 1994 or any subsequent modification thereof.

32. NEW JASON

If, notwithstanding Clause 31, General Average is adjusted in accordance with the law and practice of the USA, the following provision shall apply:

"In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible, by statute, contract or otherwise, the cargo, shippers, consignees or owners of the cargo shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the cargo.

If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if the said salving ship or ships belonged to strangers. Such deposit as the carrier or his agents may deem sufficient to cover the estimated contribution of the cargo and any salvage and special charges thereon shall, if required, be made by the cargo, shippers, consignees or owners of the cargo to the carrier before delivery".

33. BOTH-TO-BLAME COLLISION

If the liability for any collision in which the Vessel is involved while performing this Charter falls to be determined in accordance with the laws of the USA, or the laws of any state which applies laws similar to those applied in the USA in the circumstances envisaged by this Clause 33, the following provision shall apply:

"If the Vessel comes into collision with another vessel as a result of the negligence of the other vessel and any act, neglect or default of the Master, mariner, pilot or the servants of the carrier in the navigation or in the management of the Vessel, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the other or non-carrying vessel or its owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying vessel or its owners to the owners of said goods and set off, recouped or recovered by the other or non-carrying vessel or its owners as part of their claim against the carrying vessel or carrier.

The foregoing provisions shall also apply where the owners, operators or those in charge of any vessel or vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect of collision or contact."

While Charterers shall procure that all bills of lading and waybills issued under this Charter shall contain a provision in the foregoing terms, to be applicable where the liability for any collision in which the Vessel is involved falls to be determined under the preamble of this Clause 33, Charterers neither warrant nor undertake that such provision shall be effective. In the event that such provision proves ineffective Charterers shall, notwithstanding anything to the contrary herein provided, not be obliged to indemnify Owners.

34. OIL POLLUTION PREVENTION

34.1 Owners undertake that the Vessel is a tanker owned by a member of the International Tanker Owners' Pollution Federation Limited and will so remain throughout the period of this Charter.

34.2 When an escape or discharge of Oil occurs from the Vessel and causes or threatens to cause Pollution Damage, or when there is the threat of an escape or discharge of Oil (i.e. a grave and imminent danger of the escape or discharge of Oil which, if it occurred, would create a serious danger of Pollution Damage, whether or not an escape or discharge in fact subsequently occurs), then upon notice to Owners or Master, Charterers shall have the right (but shall not be obliged) to

place on board the Vessel and/or have in attendance at the incident one or more Charterers' representatives to observe the measures being taken by Owners and/or national or local authorities or their respective servants, agents or contractors to prevent or minimise Pollution Damage and to provide advice, equipment or manpower or undertake such other measures, at Charterers' risk and expense, as are permitted under applicable law and as Charterers believe are reasonably necessary to prevent or minimise such Pollution Damage or to remove the threat of an escape or discharge of Oil.

34.3 The provisions of this Clause 34 shall be without prejudice to any other rights and/or duties of Charterers or Owners whether arising under this Charter or under applicable law or under any International Convention.

34.4 In this Clause the terms "Oil" and "Pollution Damage" shall have the same meaning as that defined in the Civil Liability Convention 1969 or any Protocol thereto.

35. EXCEPTIONS

35.1 The provisions of Article III (other than Rule 8 thereof), IV, IV *bis*, VII and VIII of the Schedule to the Carriage of Goods by Sea Act 1971 of the United Kingdom shall apply to this Charter and shall be deemed to be incorporated *in extenso* herein. This Charter shall be deemed to be a contract for the carriage of goods by sea to which the said Articles apply, and no regard shall be had to Article I of the said Schedule. However, nothing in this Clause shall be deemed to modify, limit or exclude the parties' rights and obligations as set out in Clauses 1, 9, 10, 11, 18 and 19 hereof.

35.2 Where a claim for indemnity is brought under this Charter, the defending party shall be entitled to rely on all defences and limitations, whether founded on contract, tort, legislation or convention, that the claimant could have relied on as the principal action or in relation to the principal claim.

35.3 Notwithstanding the aforesaid:

35.3.1 Where a claim for indemnity relating to a claim pursued by a third party is brought under this Charter, such claim shall be extinguished unless suit is commenced within twelve (12) months of the principal claim being settled by the parties thereto or determined by the final, unappealable judgment of a competent court.

35.3.2 All other claims shall be subject to the statutory limitation period.

36. LAW

The construction, validity and performance of this Charter shall be governed by English Law. The High Court in London shall have exclusive jurisdiction over any dispute which may arise out of this Charter.

Notwithstanding the aforesaid, the parties may jointly elect to have any such dispute referred to arbitration in London pursuant to the Arbitration Act 1996 or any modification or re-enactment thereof for the time being in force and under the Terms of the London Maritime Arbitrators' Association before a tribunal consisting of three arbitrators.

In Witness Whereof the parties have caused this Charter to be executed as of the date first above written.

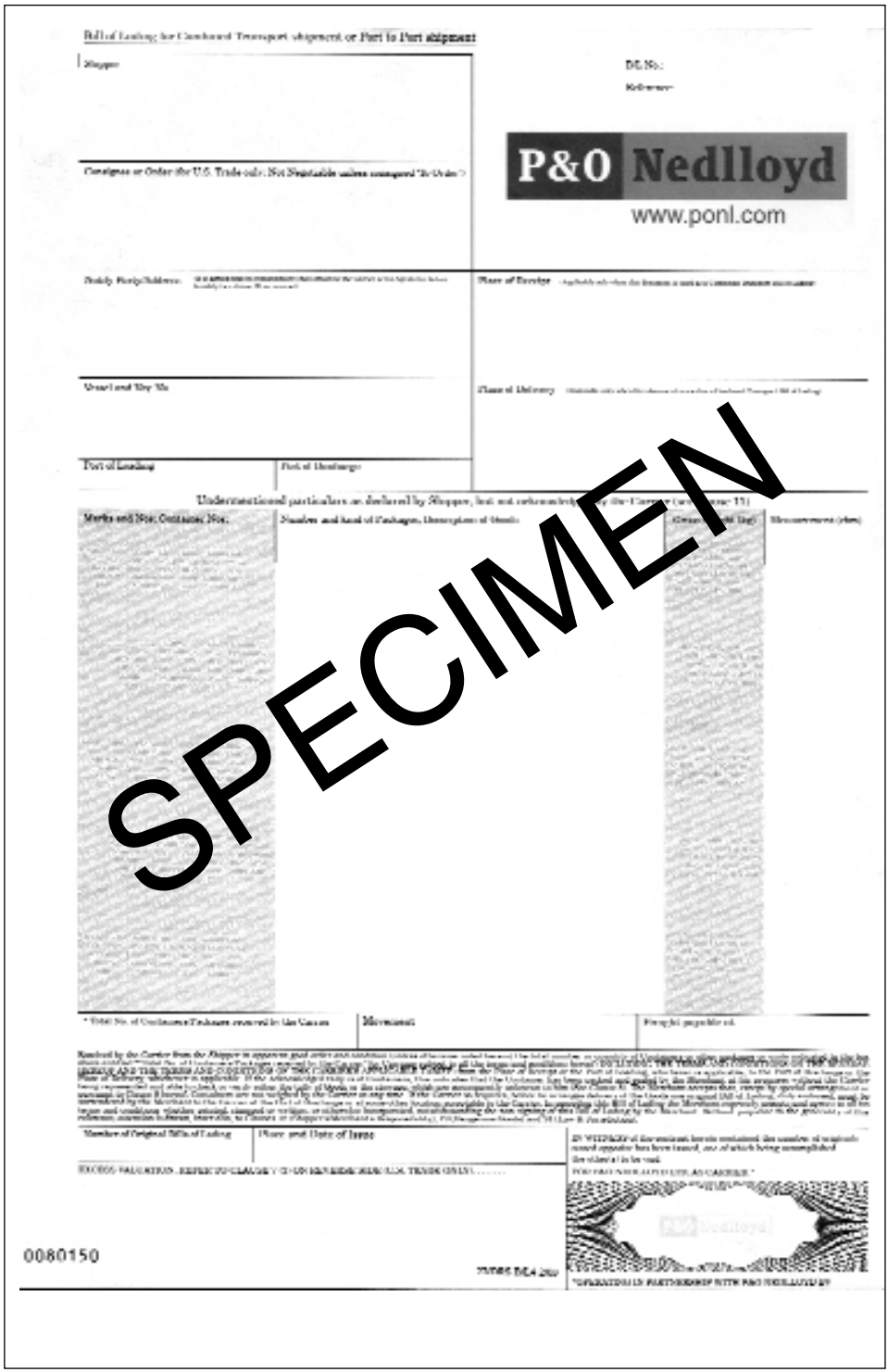
for and on behalf of

OWNERS

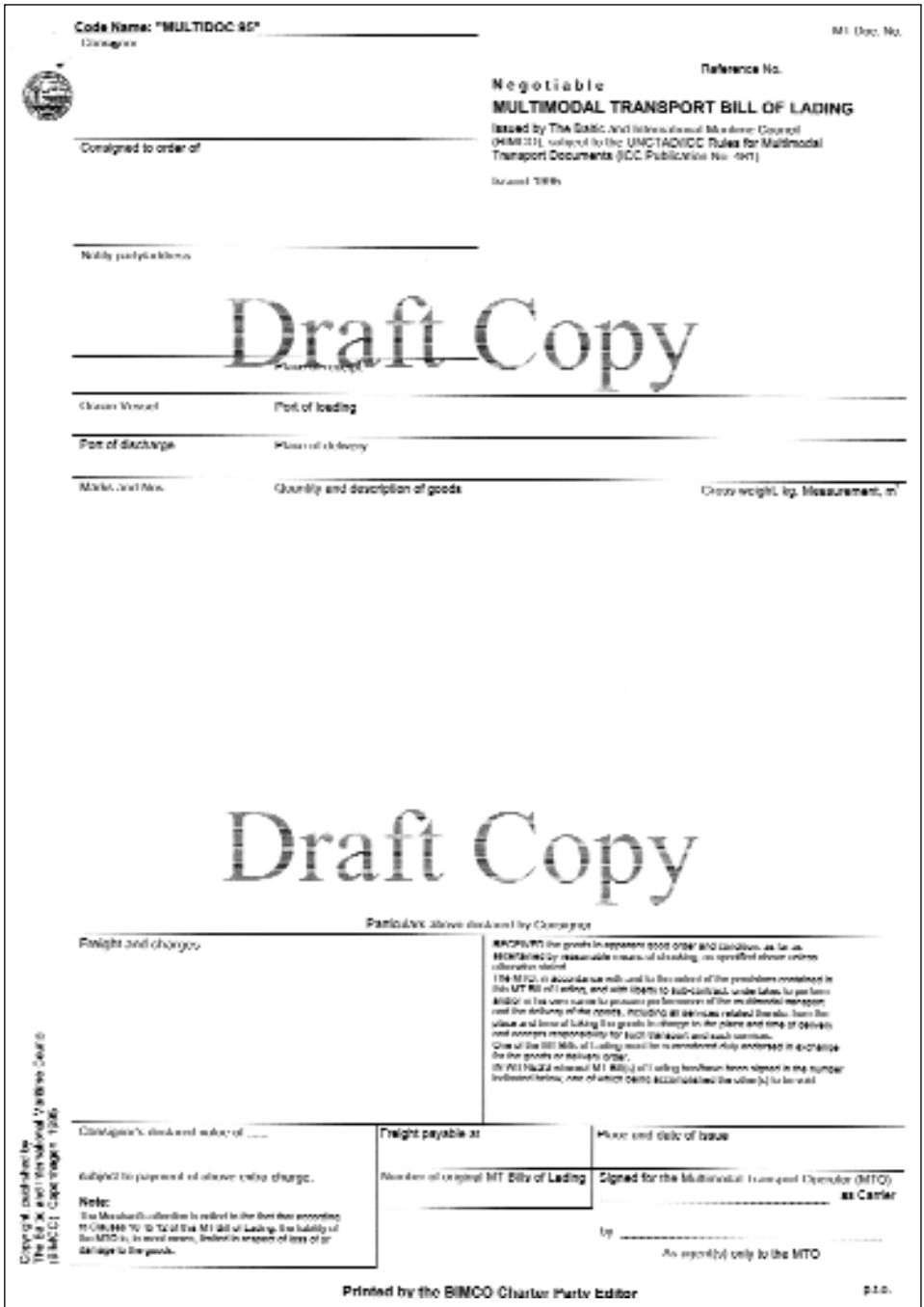
for and on behalf of

CHARTERERS

6 BILLS OF LADING




TERMS AND CONDITIONS
SPECIMEN



Code Name: "MULTIDOC 95"

MT Doc. No.

Reference No.

Negotiable

MULTIMODAL TRANSPORT BILL OF LADING

Consigned to order of

Notify party/address

Draft Copy

Ocean Vessel

Port of loading

Port of discharge

Marks And Nos.

Quantity and description of goods

Gross weight, kg. Measurement, m³

Draft Copy

Particulars above declared by Consignor

Freight and charges

Consignor's declared value of .....

Freight payable at

Place and date of issue

Number of original MT Bills of Lading

Signed for the Multimodal Transport Operator (MTO)

as Carrier

by .....

As agent(s) only to the MTO

Note:

Printed by the BIMCO Charter Party Editor

p.t.o.

MULTIMODAL TRANSPORT
BILL OF LADING

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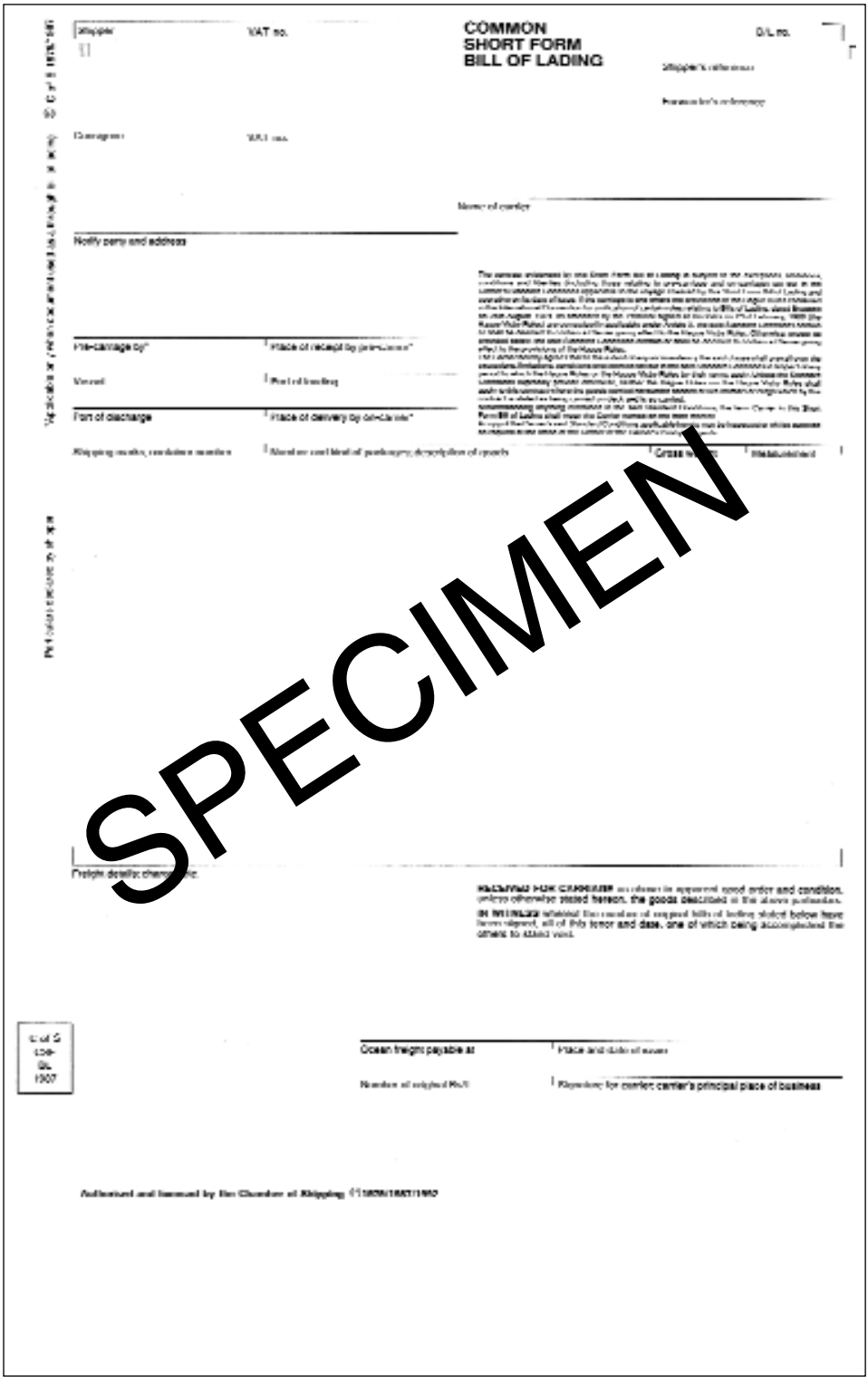
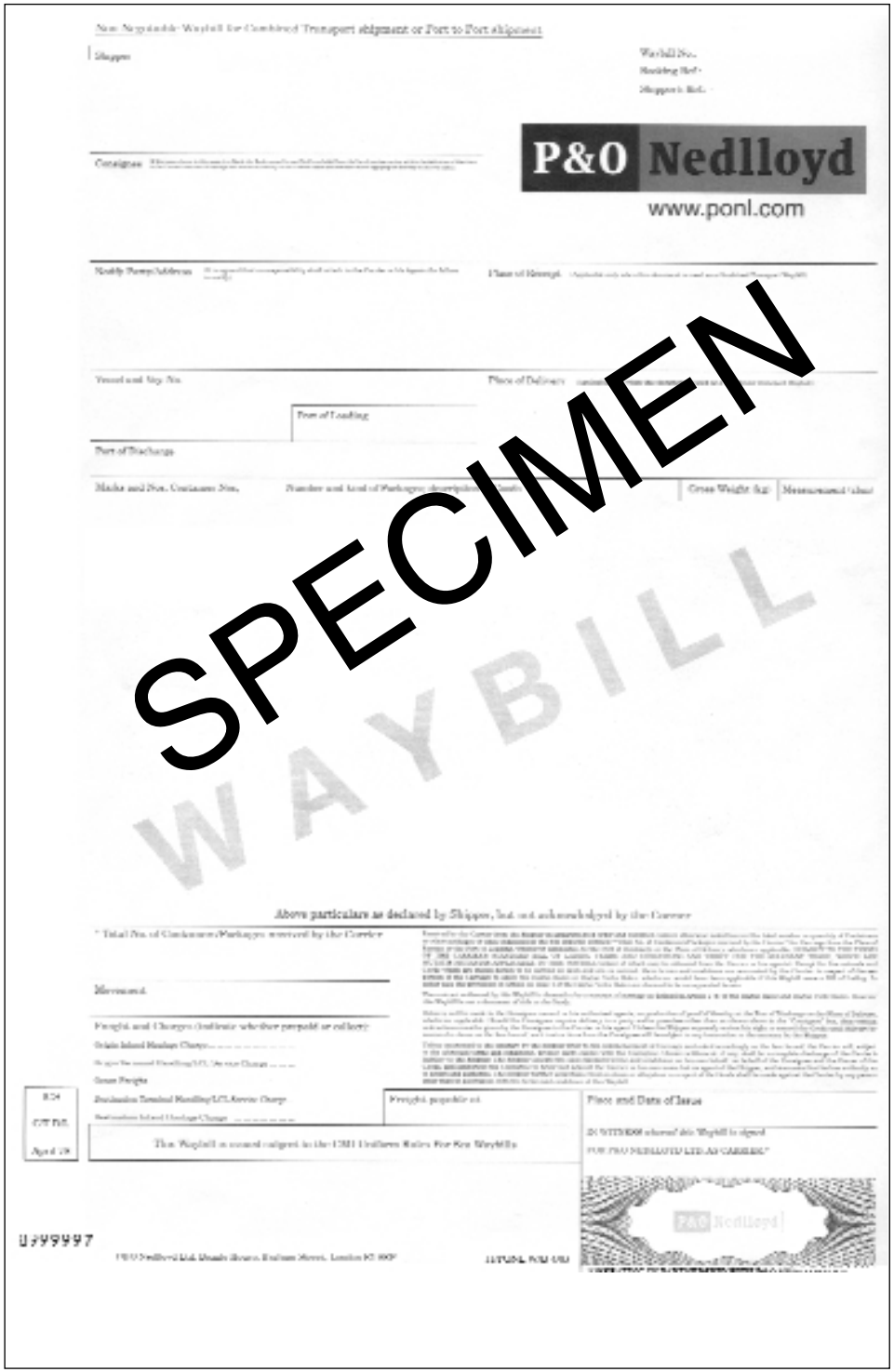
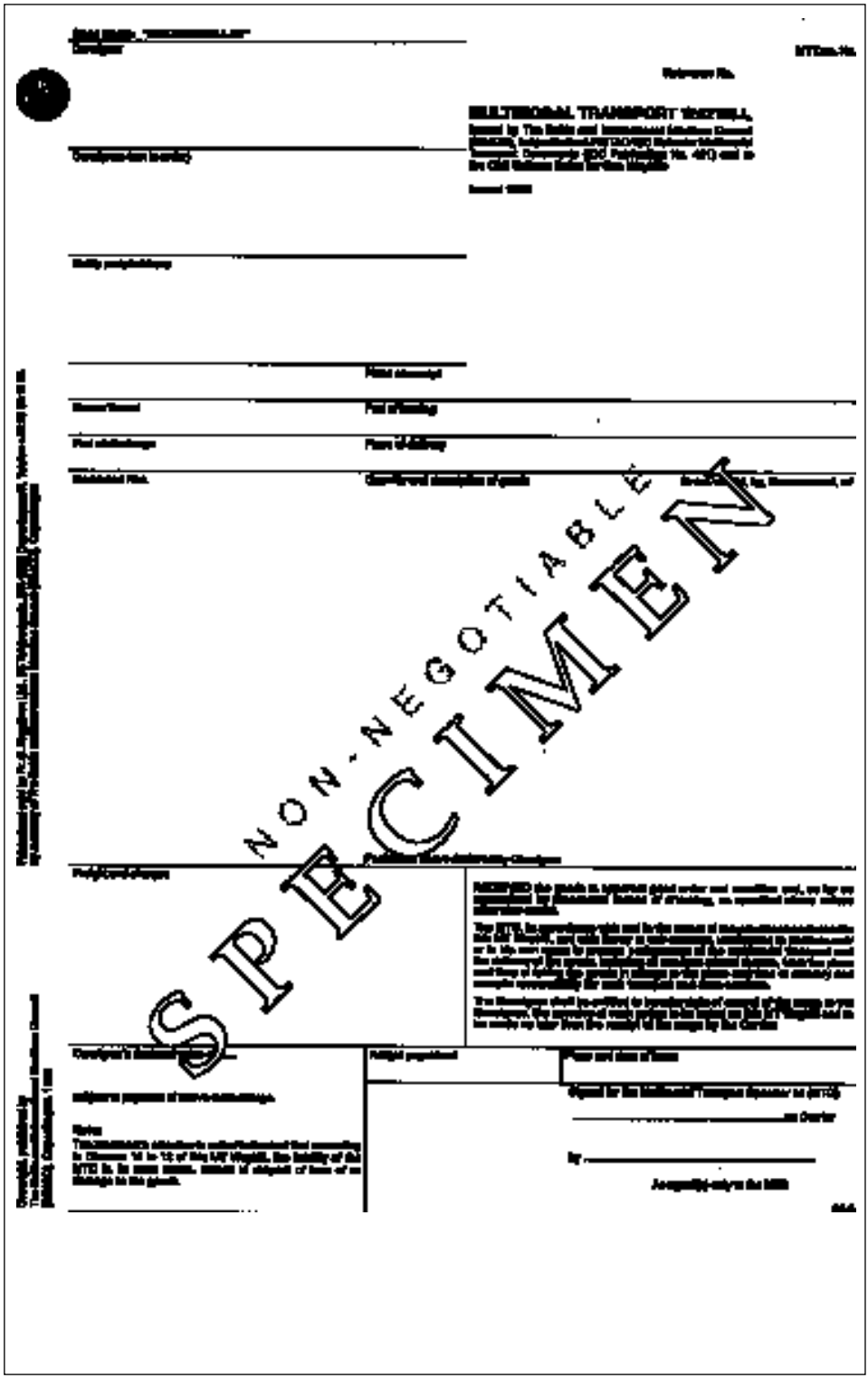
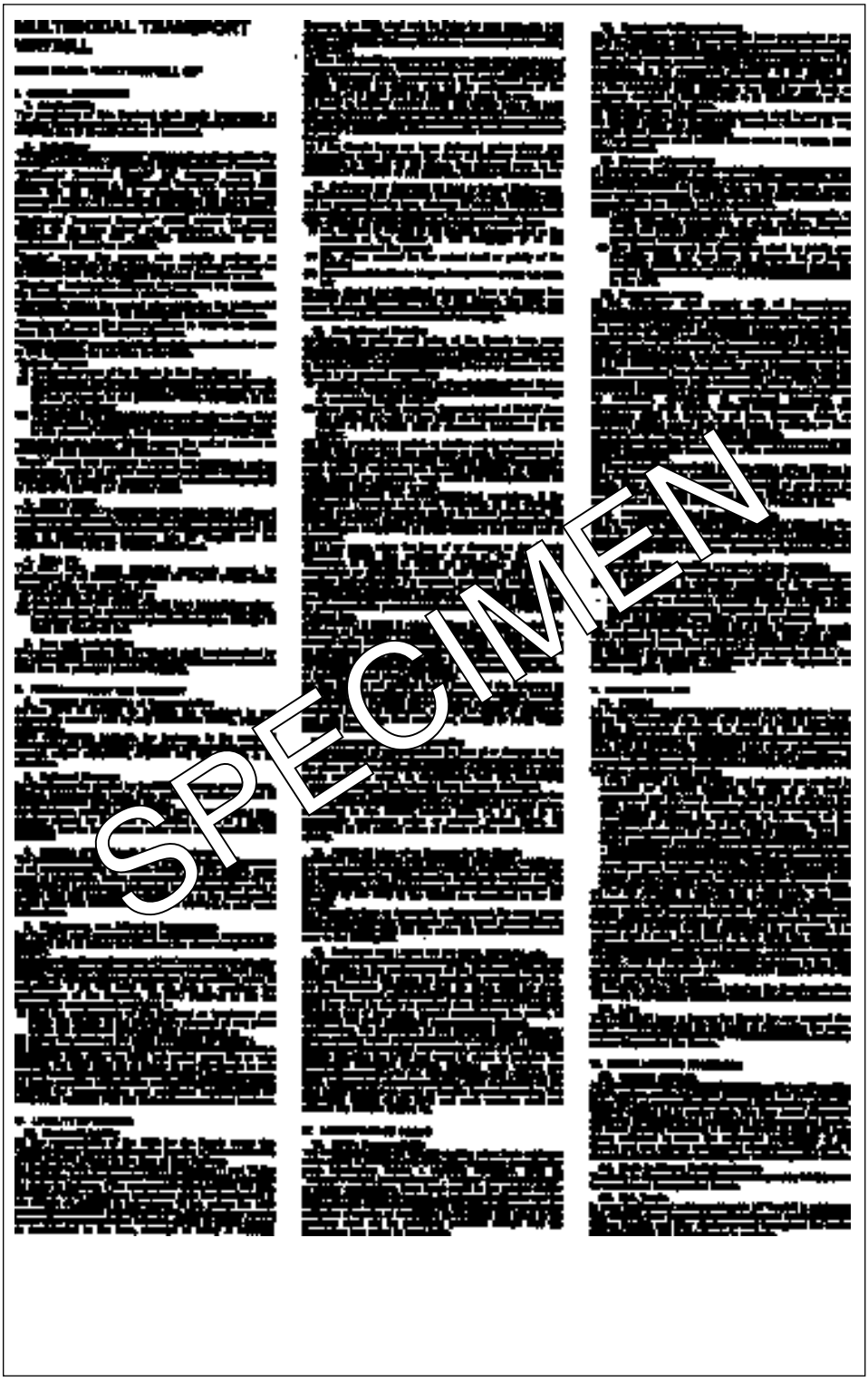

COMMON
SHORT FORM
BILL OF LADING
SPECIMEN

7 WAYBILLS




MULTIMODAL TRANSPORT
NON-NEGOTIABLE
SPECIMEN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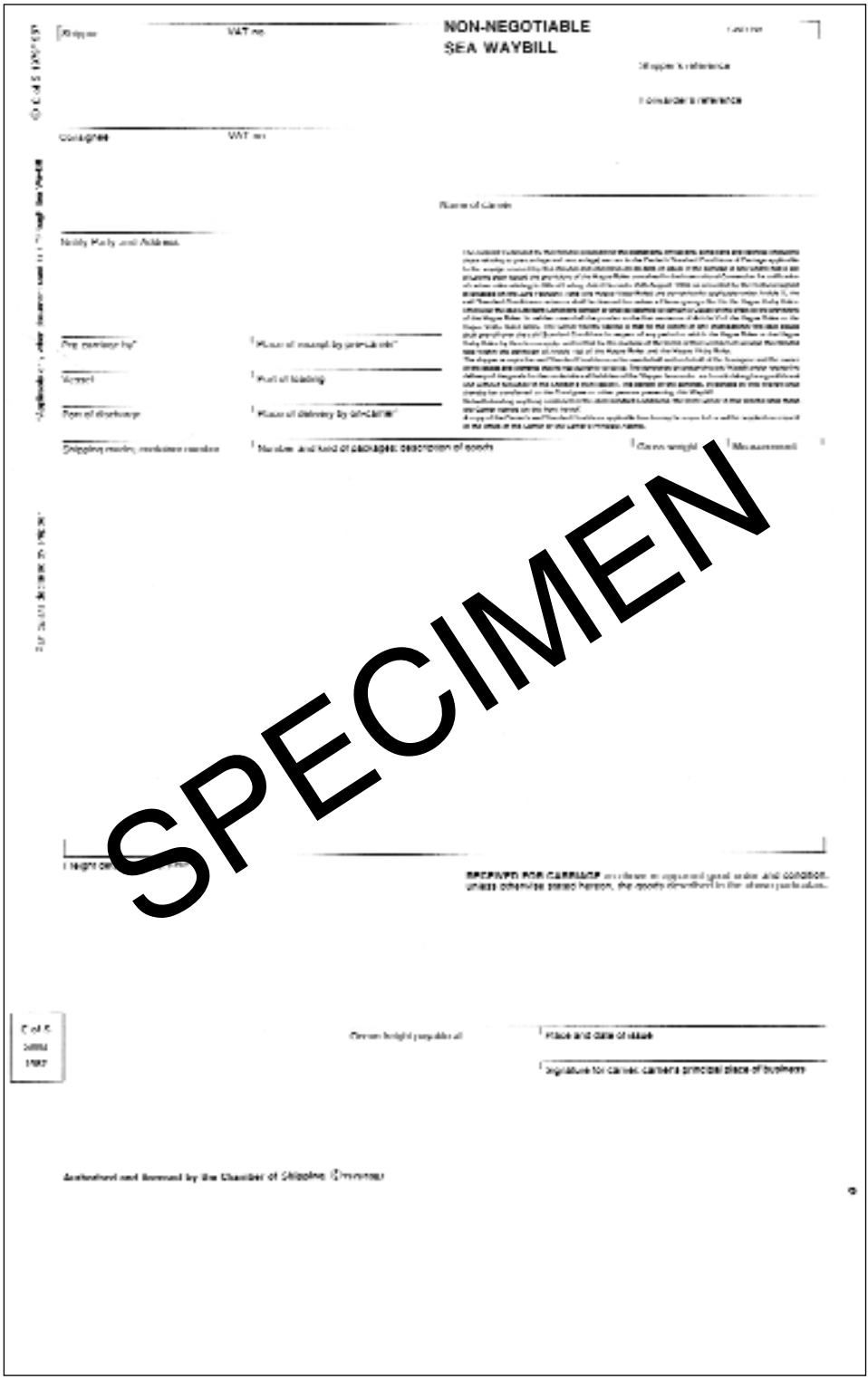
NON-NEGOTIABLE
SEA WAYBILL
SPECIMEN

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