Moreover, the registered mortgagee has priority over any unregistered mortgages, whether or not pre-existing the registration of the mortgage.[193]

Both the MSA 1995[194] and the 1993 Regulations[195] further strengthen the protection of the registered mortgagee by establishing that the ship's cancellation from the register[196] will not affect the entries of any undischarged mortgage on that ship or any share in it.

193. See *Black & William* [1895] 1 Ch 408, a case decided under the MSA 1894. See A.R.M. Fogarty, *Merchant Shipping Act 1995* (2nd edn, Lloyd's of London Press 2004), [1.112]. Also, for a view on the ranking of registered mortgages with regards to maritime liens, statutory liens and possessory liens, see further [1.115]–[1.117]. Concerning the latter, see the recent High Court of New Zealand decision in *Babcock Fitzroy Ltd v The ship m/v Southern Pasifika* [2012] NZHC 1254; [2012] 2 Lloyd's Rep 423. Cf. Chapter 12 pages 488–491.

194. s 16(4).

195. Reg 63.

196. See reg 56 of 1993 Regulations for circumstances giving rise to the termination of a ship's registration.



CHAPTER 3

# INTERNATIONAL TRADE AND SHIPPING DOCUMENTS

Filippo Lorenzon



## 1. INTRODUCTION: SHIPPING AND INTERNATIONAL TRADE

Thousands of commercial vessels sail daily across the oceans, operated by companies incorporated in different jurisdictions, under charterparties and bills of lading imposing duties and liabilities on all parties concerned. These vessels are built by hundreds of shipbuilding facilities and have to comply with a multitude of international, regional and national regulations in order to call safely at a worldwide network of commercial ports. The shipping industry as a whole employs millions of people worldwide and feeds a great number of service providers and public servants. However, the purpose of the world's commercial fleet, the main reason why vessels are built, registered,

chartered and insured is not *maritime* at all: vessels sail to carry goods bought in one market to be sold in another. The real purpose of the entire commercial shipping industry and its regulatory and contractual framework is to make *international trade* possible, safe and efficient.

This chapter will give a brief overview of the basic concepts of international commercial sales on shipment terms in order to provide the reader with the commercial background to understand shipping law as a whole better.

## 2. INTERNATIONAL COMMERCIAL SALES ON SHIPMENT TERMS

International trade law is a specialist area of commercial law dealing with the sale of goods for commercial purposes. Contracts for the international sale of goods may be further divided into three main groups depending on the mode and place of delivery of the consignment sold: *E terms*[1] (or *ex works* contracts), *D terms*[2] (destination/arrival or delivered contracts) and *shipment terms*.[3] Broadly speaking, the delivery of the goods is made at the seller's premises in *EX terms*, at the buyer's premises in *D terms* and generally on board a vessel at the loading port in *shipment terms*. The following pages are dedicated to the identification of the main features of this latter type of commercial sale, where the link between the sale contract and the shipping documents becomes more complex.[4]

### (a) The Contract and its Terms

In current commercial practice, sale contracts are concluded by exchanges of short e-mails, faxes or telexes, *confirmation notes* focusing mainly on the description of the goods to be sold and the main delivery and payment terms. Very often though, these *notes* provide for express incorporation of one of the Incoterms[5] and/or longer and considerably more detailed standard forms such as the ones provided by trade associations like GAFTA[6] and FOSFA.[7] These forms – when correctly incorporated by reference – constitute a second layer of contractual clauses with an equally binding effect between seller and buyer. It is not uncommon for these forms to incorporate further terms from other standard forms or in-house models, rules and/or procedures which

1. EXW in Incoterms 2010 language, see fn 16 of this chapter. Common in practice are also "*ex store*" and "*ex warehouse*".
2. The current Incoterms D terms are as follows: DAT (Delivered At Terminal), DAP (Delivered At Place) and DDP (Delivered Duty Paid). The terms DAF (Delivered At Frontier), DES (Delivered Ex Ship), DEQ (Delivered Ex Quay), DDU (Delivered Duty Unpaid) as they appear in Incoterms 2000 have in fact been replaced by the new DAT and DAP above. Incoterms 2000 can still be used if the parties to the contract choose to incorporate them.
3. C.i.f., c.&f. and f.o.b. contracts; in Incoterms 2010 language the shipment sales for maritime transport are CIF (Cost Insurance and Freight), CFR (Cost and FReight), and FOB (Free On Board); for other means of transport FCA (Free CArrier), CPT (Carriage Paid To) and CIP (Carriage and Insurance Paid to) should be used.
4. See in general F. Lorenzon, *C.i.f. and f.o.b. Contracts* (5th edn, Sweet & Maxwell 2012) (hereinafter "Lorenzon").
5. See page 95.
6. The Grain and Feed Trade Association.
7. The Federation of Oils, Seeds and Fat Associations Ltd.





will come to form a third layer of contractual clauses.[8] In this *millefoglie* of contractual clauses, identifying the exact terms agreed upon by the parties may not be straightforward.[9]

The importance of the correct ascertainment of the parties' intentions is, however, paramount since it is essential at the very early stages of any claim to establish – for example – the correct law applicable to the contract and the correct forum where the claim should be brought.[10] Because of the number of contractual layers forming the agreement of the parties, it is not unusual to have clauses in the confirmation note interacting with clauses in one or more of the standard forms or rules incorporated by reference. In these circumstances it becomes crucial to identify correctly the relationship between the various layers of the contract. The basic principle here is that the arbitrator or judge will try to identify the intention of the parties as it appears from the contract.[11] Hence, if the contract contains a clear hierarchy clause making one layer prevail over the others, the clause will be given full effect.[12] Where no hierarchy clause is drawn up, the principle is that where there is clear conflict between two clauses,[13] specially negotiated terms would prevail over standard terms and conditions of sale.[14] The rule is apparently simple but when, as often happens, the confirmation note incorporates general terms and conditions of sale which in turn incorporate standard additional clauses containing ad hoc amendments, the relationship between the various layers of the contract may become less straightforward. Occasionally the courts have refused to uphold the validity of the incorporation of unusual[15] or unreasonable[16] clauses, but – it is submitted – this string of authorities should be read cautiously and with reference to the special circumstances of the cases concerned.

It may be worth at this stage discussing the incorporation of the International Chamber of Commerce's (ICC) *Official Rules for the Interpretation of Trade Terms* (more commonly known as the *Incoterms*[17]) and the effect of their incorporation into the contract. The Incoterms (2010, in their latest edition) are a set of standard trade terms compiled by the ICC. They are not, nor are they meant to be, an international convention and are regarded – at any rate under English law – as just another set of standard forms. From this it follows that under English law the mere agreement that a contract is fixed "on c.i.f. terms" is not enough to trigger the application of the Incoterms and that, once correctly incorporated, they become just another layer of the contract to

8. E.g. FOSFA 54 ll 31–33.
9. See *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209; [2010] 1 Lloyd's Rep 357; and *Claxton Engineering Services Ltd v TXM Olaj-és Gázkutató KFT* [2010] EWHC 2567 Comm; [2011] 1 Lloyd's Rep 252. See also *Proton Energy Group SA v Orlen Lietuva* [2013] EWHC 2872 (Comm); [2014] 1 Lloyd's Rep 100.
10. See Chapter 1.
11. *Charles Robert Leader and Henrietta Ada Leader v Duffey and Amyatt Edmond Ray* [1888] 13 App Cas 294 (HL).
12. *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 2 Lloyd's Rep 342.
13. English courts, however, will seek to construe every contract as a whole and if a reasonable commercial construction of the whole could reconcile two provisions (whether typed or printed) then such a construction could and should be adopted; *Bayoil SA v Seawind Tankers Corp (The Leonidas)* [2001] 1 Lloyd's Rep 533.
14. *Indian Oil Corporation v Vanol Inc* [1991] 2 Lloyd's Rep 634.
15. *OK Petroleum A.B. v Vitol Energy S.A.* [1995] 2 Lloyd's Rep 160.
16. *Ceval Alimentos SA v Agrimpex Trading Co Ltd (The Northern Progress) (No 2)* [1996] 2 Lloyd's Rep 319.
17. International Chamber of Commerce, *Incoterms 2010: ICC Rules for the Use of Domestic and International Trade Terms* (ICC 2009), ICC publication n. 715E; in force from 1 January 2011.

which the ordinary rules of construction discussed above apply.[18] It is therefore crucial for the parties who intend to make use of Incoterms not only to incorporate expressly the right Incoterm[19] of the right vintage,[20] but also to draft a detailed confirmation note to record the special terms agreed between them for the particular transaction at stake.

### (b) C.i.f. and f.o.b. Contracts and Carriage Arrangements

Once the terms and conditions of the agreement between the parties are located and identified, it becomes necessary to illustrate the key features of commercial sales on shipment terms. First of all it must be made clear that both c.i.f. and f.o.b. sales are *shipment* contracts where the duty of the seller as to the delivery of the cargo is fulfilled by shipping goods on board a vessel (or procuring goods shipped on board a vessel) rather than by handing them over to the buyer at the port of discharge. But whereas the duty to procure the cargo always rests with the seller, the duty to fix a vessel suitable to carry the cargo from the port of loading to the port of discharge does not always follow. Generally speaking, in c.i.f. (or c.&f.) agreements it is the seller who is under the obligation to fix the vessel whereas in bare (or straight) f.o.b. sales such duty falls on the buyer. Particular care, however, should be taken with regard to f.o.b. contracts where – in practice – such default position is often amended by way of contractual variations the most common of which is often referred to as "f.o.b. of the classic type".[21] In its "classic" form the f.o.b. contract provides for the seller to conclude a contract of carriage as an agent for the buyer, at all material stages the original party to the contract of carriage with the carrier; the commodity will be still invoiced by the seller at f.o.b. rate but a commission for the fixture is usually added as a separate item. Another common alternative may be referred to as "f.o.b. with additional carriage services" where the seller fixes the contract of carriage with the carrier in his own name and then transfers its contractual position by endorsing the bill of lading. In this case again the commodity is invoiced at f.o.b. rate and freight and commission are charged separately or specifically itemised. Distinguishing between c.i.f. sales and the various sub-types of f.o.b. terms is crucial both for (i) understanding the apportionment of the risk of market fluctuations between seller and buyer and (ii) for the identification of the terms of the contract of carriage governing the cargo claim in case of loss of or damage to the cargo.[22]

#### *(i) The risk of market fluctuations*

Because of the timing of international commercial transactions – where sale contracts (and price) may be agreed upon long before or indeed long after the actual date of shipment – and the high volatility of the freight and insurance markets, selling on c.i.f.

18. For a case of construction where CIP Incoterms 2000 were incorporated together with a set of rules for the specific trade concerned see *Stora Enso Oyj v Port of Dundee* [2006] CSOH 40; [2006] 1 CLC 453. It must be noted that this approach to the Incoterms is not necessarily followed in some civil law jurisdictions where contracting on c.i.f. basis alone may be deemed to be enough to incorporate the CIF Incoterm in its entirety.
19. In case of carriage by air on CIF terms, for example, it would be advisable to incorporate the CIP Incoterms 2010 rather than the CIF term, specifically designed for maritime transport.
20. Incorporation of CIF Incoterm may in fact not be enough to prefer Incoterms 2010 over Incoterms 2000 whereas – it is suggested – reference to the "CIF Incoterm in force at the date of the conclusion of the contract" would indeed suffice.
21. See Lorenzon (fn 4), [9-001] and ff.
22. See Chapter 5.





terms means retaining the risk of fluctuations of effectively three separate markets (the commodity, the freight and the insurance) whereas opting for an f.o.b. solution leaves fluctuations in the freight and insurance markets for the buyer to bear. This is particularly significant when comparing a sale on "f.o.b. terms with additional carriage services" with a c.&f. contract: both arrangements see the seller providing the fixture and paying for it as agreed with the carrier; however, where the c.&f. contract involves an all-in quote by the seller who carries the risk of any increase (and the benefit of any reduction) in the cost of carriage, the f.o.b. seller would be immune from any such fluctuations: he may well have negotiated and paid for the contract of carriage but the risk and the benefits of variations in the freight market would clearly be for the buyer's account.[23]

#### *(ii) The parties to the contract of carriage*

Identifying correctly which of the parties to the sale contract is also a party to the carriage contract allows for the correct identification of the terms on which this contract is concluded, i.e. the terms on which the carrier may eventually be sued to recover losses which have arisen in transit.[24] From what we have seen above it follows that in c.i.f. and c.&f. contracts the seller is the original party to the carriage contract – e.g. a voyage charterparty, a contract of affreightment or liner booking – and the terms of its agreement with the carrier will always be found in that original contract.[25] However, as soon as a negotiable bill of lading is transferred by the seller to the buyer in exchange for payment, the buyer acquires rights of suit under the contract evidenced by the bill.[26] In this situation both seller and buyer will have an enforceable contract with the carrier but the terms of such contract will be contained in different documents, the seller's agreement being recorded in the charterparty (or other agreement arrived at between them) and the buyer's in the bill of lading. The situation changes considerably when the sale contract is concluded on f.o.b. terms. In case of bare f.o.b. contracts, where the charterparty is negotiated and fixed by the buyer as charterer, the buyer is and will always be the carrier's original contractor and the terms of the agreement between buyer and carrier will be – at all material times – contained in the charterparty, whether or not a bill of lading is issued and tendered.[27] The situation remains factually unaltered in f.o.b. classic arrangements when the charterparty is concluded by the seller as agent for the buyer. However, if additional carriage services are added to the f.o.b. seller's duty the situation is reversed and the buyer – non-charterer – will only become a party to a contract of carriage through transfer of the bill of lading and on the terms of such bill.[28]

23. *Scottish & Newcastle Int Ltd v Othon Ghalanos Ltd* [2008] HKHL 11; [2008] 1 Lloyd's Rep 462, [35].
24. See again Chapter 5.
25. *Rodocanachi, Sons & Co v Milburn Brothers* [1887] LR 18 QBD 67.
26. See Carriage of Goods by Sea Act 1992 ("COGSA 1992"), s 2(1)(a) and Chapter 5. See also *Tate & Lyle, Ltd v Hain Steamship Company Ltd* [1936] 2 All ER 597 and *Brandt v Liverpool Brazil & River Plate Steam Navigation Co Ltd* [1924] 1 KB 575. Where a "straight consigned bill of lading" or a seawaybill is issued the buyer acquires rights of suit under that contract at the time of issue by virtue of being identified as the consignee by the document itself and transfer of the document may only be necessary for the purposes of obtaining delivery *if* the contract so provides; see COGSA 1992, s 2(1)(b).
27. *President of India v Metcalfe Shipping Ltd (The Dunelmia)* [1970] 1 QB 289.
28. COGSA 1992, s 2(1).

## 3. THE PASSING OF RISK AND PROPERTY IN THE GOODS

The parties to every sale contract have an interest in the quality and condition of the goods they trade in but – when the sale at stake is an international one – there is a further cause for concern: to reach their buyers the goods sold have to be carried across international, political and geographical boundaries. It may well happen that such goods are shipped in lorries at the producers' plant, transhipped on to barges or lighters, transhipped again on a seagoing vessel to be discharged at destination, several weeks after they have left the seller. While carried, the goods are in the control of a network of carriers, independent contractors working neither as agents of the seller nor for the buyer. But what happens if the goods are damaged or lost in transit? Although both the carrier (or its liability insurer) and the cargo insurer will provide compensation for transit losses, within the framework discussed elsewhere in this work,[29] the identity of the party which will have suffered the loss depends on the answer to a rather different question: who bears the risk of loss of or damage to the goods while in transit?

According to the maxim *res perit domino* only the owner of the cargo can suffer an actual loss as a result of its cargo being lost or damaged. And in fact section 20 of the Sale of Goods Act 1979[30] clearly states that: "Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer." However, when goods are sold on shipment terms the situation is more elaborate and risk and property are very seldom transferred at the same time.

### (a) Risk Passes On or As From Shipment

Given the key importance of risk in international trade transactions it may happen that the parties expressly clarify the allocation of transit risks in their contracts with ad hoc clauses saying e.g. that "risk … shall pass to Buyers at the loading port or terminal as the oil passes the loading vessel's permanent hose connection". In such cases it is clear that risk of transit loss will pass to the buyer at that very precise moment in time. On the other hand, if the parties have not given special consideration to the issue of risk, risk will pass according to the type of contract stipulated by the parties.

In *ex works* contracts the duty of the seller is to place the goods at the disposal of the buyer at the agreed point, if any, at the named place of delivery (e.g. seller's warehouse) not yet loaded on any collecting vehicle,[31] whereas the buyer has the duty to take delivery of them and bears all risks of loss of or damage to the goods from the time they have been so delivered.[32] The main consequence of this is that the risk of transit loss rests with the buyer from the point of collection at seller's premises onwards.[33] At the opposite end of the spectrum, in contracts concluded on *D terms* the seller undertakes to arrange the carriage of the goods to the agreed point, if any, at the named destination in the country of import, whereas the buyer has to take delivery only if the goods it receives at destination are as agreed in the contract. From this it follows that the risk for

29. See Chapters 5 and 12.
30. Ch 54. The Act covering the sale of goods in the UK.
31. Incoterms 2010 EXW, A4. The risk term is actually A5 which reads: "the seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4".
32. Ibid., B4 and B5.
33. Ibid., A5 and B5.





transit damage to, or loss of, the goods whilst being carried rests squarely with the seller.[34] If the sale is concluded on *shipment terms* either the seller (in c.i.f. and c.&f./CFR sales) or the buyer (in f.o.b. sales) may undertake to make transport arrangements, but delivery of the goods always takes place on board the nominated vessel at the port of shipment.[35] If the obligation of the seller is one to deliver the goods on board a vessel – in other words to *ship* the goods – it must follow that the risk of transit loss of such goods passes from the seller to the buyer from that moment on: i.e. across the ship's rail *on (or as from) shipment* irrespective of where the property in the goods lies.[36] If Incoterms 2010 are incorporated in the contract the exact moment in time at which risk passes to the buyer is less clear as the new terms have done away with the concept of ship's rail altogether and state that under CIF, CFR and FOB terms risk passes when "the goods have been delivered in accordance with A4".[37] A4 in turn provides that delivery may take place by (a) placing the goods on board or by (b) procuring the goods to be so placed.[38] The effect of the changes appears twofold: (i) a container dropped on board a vessel during the loading operation would still be at the risk of its seller as it had not been placed on board at the time of the damage or loss;[39] and – perhaps more worryingly – (ii) the seller of goods in a string may not be able to pass the risk on to its buyer retroactively from shipment anymore as risk appears to be transferred on the action of "procuring the goods so delivered" rather than on the physical act of delivery. Whenever the moment of transfer, the fact that the buyer bears such a significant risk is balanced by some degree of control over the goods through the documents which the seller has delivered to it: by holding a bill of lading which gives constructive possession of the goods, the buyer can ask the carrier for the goods and sell them on; by becoming a party to the contract of carriage with the carrier, it acquires title to sue the carrier in case the goods are damaged in transit[40] and finally by being the beneficiary under the contract of insurance, the buyer has recourse against the insurer for transit loss.[41]

The common law rule that risk in goods sold on c.i.f., c.&f. and f.o.b.[42] terms passes on or *as from shipment* also responds to the commercial reality that a seller might have

34. E.g. "Ex Ship deliveries: The risk and property in the crude oil delivered under the agreement shall pass to the Buyer as the crude oil passes the Vessel's permanent hose connection at the Discharge Port." See also Incoterms 2000 DES, A5 and B5. In Incoterms 2010 this term together with the DAF, DEQ and DDU terms has been replaced by the DAT and DAP terms – see fn 2 of this chapter.
35. Incoterms 2010 CIF, A4, CFR, A4 and FOB, A4. It must be noted that under Incoterms 2010 CIF, CFR and FOB A4 the seller may deliver the goods in two ways: (i) by placing them on board the vessel or (ii) by procuring them to be so placed.
36. *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Limitada (The Julia)* [1947] 1 All ER 118; Incoterms 2000, CIF, CFR and FOB, A5; the presumption made by s 20(2) of the Sale of Goods Act 1979 (hereinafter "SOGA 1979") that the risk passes together with property, being defeated by the express choice of the parties of contracting on shipment terms. The retroactivity of the passage of risk appears less obvious under Incoterms 2010. For the same statement as to the rule on passage of risk see Lorenzon (fn 4), [2-010], approved by the High Court of Singapore in *Profindo Pte Ltd v Abani Trading Pte Ltd (The M/V Athens)* [2013] SGHC 10; [2013] 1 Lloyd's Rep 370, [39].
37. Incoterms 2010, A5.
38. Incoterms 2010, CIF, CFR and FOB, A4.
39. A similar issue may present itself with liquid cargo where the concept of "placement" is often associated with that of the "settlement" of the product on board the tanker, clearly well after any contamination may have occurred.
40. See COGSA 1992 and Chapter 5.
41. See Chapter 11.
42. On which see specifically *Soufflet Negoce SA v Bunge SA* [2009] EWHC 2454 (Comm); [2010] 1 Lloyd's Rep 718, per Steel J, [16]. Affd [2010] EWCA Civ 1102; [2011] 1 Lloyd's Rep 531.

shipped goods before it has reached a binding agreement with a buyer or situations where a trader might have sold goods it has yet to buy. In these cases, if the goods are lost or damaged in transit prior to the conclusion of the contract of sale, it is still the buyer who bears the risk for such loss retroactively[43] and its duty to pay the seller against conforming documents remains unaffected. But what if a buyer of goods in transit, with knowledge that the goods have perished, sells on to another buyer? Does this on-buyer inherit retroactively a risk which has already materialised in a loss? It is suggested that whether the seller's duty is one to ***ship*** *goods of the contract description* or one to *procure the same goods* ***shipped*** *as promised*, the obligation of the seller under a sale contract on shipment terms is one to ***ship*** the goods never one to deliver them at destination. Hence, in order to understand whether the risk has passed to the buyer, the right questions to be asked should be: (a) did the seller procure goods that – *at the time of shipment* – conformed to the requirements set in the sale contract? (b) Do the documents tendered evidence that goods of the contract description were in fact shipped? Were both questions to be answered in the affirmative the seller has performed its duty and risk lies with the buyer.[44]

### (b) The Exceptions to the Rule

The rule that risk passes on or as from shipment is not without exceptions which – if triggered – would relieve the buyer from bearing all or part of the risk of transit loss or damages. Such exceptions may be divided into two main categories: (i) the *contractual exceptions* arising out of express agreement between the parties and (ii) the *legal exceptions*, where they find their source in statutory provisions or in the common law.[45] They will be dealt with in turn.

#### *(i) Contractual exceptions*

In the exercise of their freedom of contract the parties may well decide to allocate the risks associated with the carriage of the goods sold as they see fit. In practice this is usually done with specifically drafted *out turn* clauses commonly related to the quantity,[46] quality or condition[47] of the cargo at the port of discharge. Such clauses usually provide for an adjustment in price in case the commodity reaches destination falling short – in quantity, quality or condition as the case may be – of the contract specifications with the effect of reversing the risk of such losses back on to the seller's

43. For doubts on the position under Incoterms 2010, see above.
44. *Manbre Saccharine Co v Corn Products Co* [1919] 1 KB 198; *C Groom Ltd v Barber* [1915] 1 KB 316. For the same conclusion see C. Debattista, *Bills of Lading in Export Trade* (3rd edn, Tottel Publishing 2008), (hereinafter "Debattista"), ch 4; and D.M. Sassoon, *C.i.f. and f.o.b. Contracts* (4th edn, Sweet & Maxwell 1995), (hereinafter "Sassoon"), [253]. *Contra*, for cases of total loss in c.i.f. contracts only see *Couturier v Hastie* [1856] 5 HLC 673. See also E. Mckendrick (ed.), *Goode on Commercial law* (4th edn, LexisNexis Butterworths 2009), (hereinafter "Goode"), at p 1047; and M. Bridge (ed.), *Benjamin's Sale of Goods* (8th edn, Sweet & Maxwell 2010), (hereinafter "Benjamin"), [19-114].
45. See also Lorenzon (fn 4), [2-018] and ff.
46. For example, providing for the *out turn* quantity "to be settled at the market price of the last day of discharge of the last ship to arrive", FOSFA 54, cl 16, l 171.
47. Typically providing for a discount proportionate to the deterioration in the quality or condition of one or more items of the description; e.g. GAFTA 119, cl 5.





shoulders.[48] *Out turn* clauses are interpreted strictly *contra proferentem* by the courts and hence do not cover the total loss of the consignment.[49]

#### *(ii) Legal exceptions*

Whether or not the contract contains specific clauses on the reallocation of risks, both the Sale of Goods Act 1979 and the common law provide for a limited number of exceptions to the rule that risk passes on or as from shipment. The legal exceptions are five: (i) where delivery has been delayed through the fault of the seller any loss which might not have occurred but for such fault is for the seller's account;[50] (ii) where the seller acts as bailee or custodian of the goods, losses caused by breach of the duty to take reasonable care of such goods is for the seller's account;[51] (iii) where the seller has failed to make a reasonable contract of carriage for the benefit of the buyer, the loss of or damage to the goods is also for the seller to bear;[52] (iv) if the seller has failed to pass on information to enable the buyer to insure goods during their sea transit, again the goods will be at the seller's risk during such sea transit;[53] and finally (v) if the consignment gets damaged or lost in transit because its condition at the time of shipment was such as to make it unlikely to withstand normal sea transit, they will be at seller's rather than at buyer's risk.[54]

### (c) Property Passes when Intended to Pass

Although the transfer of risk is certainly a more significant issue to traders, there are circumstances in which it may be important to establish where property in the goods lies, the most obvious being where it is necessary to start a tortious action against the carrier[55] or where either of the parties becomes insolvent. The default position under the Sale of Goods Act 1979 is that property will pass at such time as the parties to the contract intend it to be transferred,[56] such intention to be ascertained having regard to

48. The seller at this stage has probably lost its title to sue the carrier under s 2(5) of COGSA 1992 and care should be taken to ensure the *out turn* clause provides expressly for an assignment back of the buyer's action against the carrier.
49. *Soon Hua Seng Co Ltd v Glencore Grain* [1996] 1 Lloyd's Rep 398 (QBD), at p 405 (Mance J):

> If the goods covered by the shipping documents and invoice are lost in transit and do not arrive at all, the risk of loss remains on the buyers and no question of any adjustment to the payment due against the commercial invoice can arise.

50. SOGA 1979, s 20(2) and *Gatoil International Inc v Tradox Petroleum Ltd (The Rio Sun)* [1985] 1 Lloyd's Rep 350.
51. SOGA 1979, s 20(3).
52. Ibid., s 32(2); see also F. Lorenzon, "When is a CIF Seller's Carriage Contract Unreasonable? Section 32(2) of the Sale of Goods Act 1979" (2007) 13 JIML 241.
53. SOGA 1979, s 32(3).
54. *Mash & Murrell v Joseph I Emanuel Ltd* [1961] 2 Lloyd's Rep 326 (CA). See also *Navigas Ltd v Enron Liquid Fuels Ltd* (unreported, 22 May 1998, Colman J) and *KG Bominflot Bunkergesellshaft für Mineraloele mbH & Co v Petroplus Marketing AG (The Mercini Lady)* [2010] EWCA Civ 1145; [2011] 1 Lloyd's Rep 442.
55. *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785; [1986] 2 Lloyd's Rep 1 (HL).
56. SOGA 1979, s 17(1).

the terms of the contract, the conduct of the parties and the circumstances of the case.[57]

So, where the contract makes it clear that the property in the goods shall only pass on payment of the price or on delivery of the relevant shipping document then the situation is clear. In case the contract is silent about the transfer of property, it will be necessary to refer to section 18 of Sale of Goods Act 1979 which provides a series of rebuttable presumptions, the most relevant for international commercial sales being that where there is a contract for the sale of unascertained or future goods by description, and the goods are unconditionally appropriated to the contract through delivery to a carrier, the property in the goods passes to the buyer at the time of delivery to such carrier.[58]

## 4. PERFORMANCE OF THE CONTRACT

The Sale of Goods Act 1979 states very clearly that a sale contract is an agreement by which the seller undertakes to deliver the goods in accordance with the terms of the contract of sale.[59] However, in international commercial sales on shipment terms *physical* delivery of the goods is not enough to discharge the seller's duty as to delivery: he has also a *documentary* duty to tender the documents agreed upon in the contract.[60] The duties to deliver goods and documents are separate and independent from each other[61] and will be dealt with in turn.

### (a) The Seller's Physical Duties

On the physical side the seller must (a) ship *contractual goods* (b) *as agreed* in the sale contract. What the expression "*contractual goods*" actually means under English law and how accurately it needs to follow the shipping instructions agreed in the contract will be the subject of the following paragraphs.

#### *(i) Shipping contractual goods...*

The most obvious obligation imposed on the seller by any sale contract is the duty to ship *exactly* the goods it has promised. However, the extent of precision with which the seller has to perform this basic obligation and the remedies of the buyer for breach of such duty vary according to the *nature* of the contractual term at stake. Under English law, contractual terms relating to the goods are in fact considered either by express choice of the parties, by the relevant market and/or by the law as being so crucial to the trade concerned that their breach gives the buyer the option of rejecting the goods and terminating the contract.

57. Ibid., s 17(2). For a full and recent account of the rules relating to passage of property under English law see C. Debattista in A. Von Ziegler, C. Debattista, A.B.K. Plegat and J. Windahl (eds), *Transfer of Ownership in International Trade* (2nd edn, Kluwer Law 2011), at p 134 and ff.
58. Ibid., s 18, r 5(1). For goods shipped commingled see rr 5(3) and 5(4). See *Lorenzon* (fn 4) [2-040] and ff.
59. Ibid., s 27.
60. *Arnhold Karberg & Co v Blythe, Green, Jourdain & Co* [1916] 1 KB 495 (CA).
61. *Kwei Tek Chao & Others v British Traders and Shippers Ltd* [1954] 2 QB 459; [1954] 1 Lloyd's Rep 16.





Traditionally contractual clauses have been classified in three different categories: (a) *warranties*, the breach of which entitles the innocent party to a claim in damages; (b) *conditions*, the breach of which gives the innocent party the further option to bring the contract to an abrupt end; and (c) *intermediate* (or *innominate*) terms, whose breach may afford the innocent party the right to terminate provided it can prove that the breach in question went to the root of the contract concerned. Since this classification has very powerful effects on the life itself of the transaction it is crucial for both buyer and seller to be able to identify which terms of their contract are conditions and which are not. The test to be applied here has been authoritatively summarised in *Chitty on Contracts*[62] and approved by Waller LJ in the Court of Appeal in *The Seaflower*[63] as follows:

> a term of a contract will be held to be a condition:
>
> (i) If it is expressly so provided *by statute*;
> (ii) If it has been so categorised as the result of *previous judicial decision* [...];
> (iii) If it is so designated *in the contract* or if the consequences of its breach, that is, the right of the innocent party to treat himself as discharged, are provided for expressly in the contract; or
> (iv) If the nature of the contract of the subject-matter or the circumstances of the case lead to the conclusion that *the parties must, by necessary implication, have intended that the innocent party would be discharged* from further performance of his obligations in the event that the term was not fully and precisely complied with.[64]

If a term in a contract falls within any of the four limbs of this, which we may call the "*Waller Test*", then the parties' rights and liabilities are sharp and clear.

*Conditions by contract*. Limbs (iii) and (iv) above may be collectively defined as *conditions by contract* on the ground that they find their source in the freedom of the parties to determine the terms of their agreement although it must be said that judges are increasingly reluctant to imply conditions under limb (iv). The bottom line here is that if a particular feature of the goods to be shipped is of crucial importance to the buyer it should be proactive and draft a clause in its contract whereby delivery of goods without such feature would give it the right to reject the consignment.

*Conditions by law*. On the other hand, clauses falling within limbs (i) and (ii) of the test may be collectively classified as *conditions by law* as they find their source either in statutory provisions or in the common law. Under English law the Sale of Goods Act 1979 implies three types of conditions into all sale contracts.

*(1) Terms describing the goods*. Section 13 of the Sale of Goods Act 1979 states that where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description. The key here is that the contract prevails and that if the parties have agreed to allowances and/or price adjustments in their agreements the courts will infer that that particular item of the description was not regarded by the parties as a condition at all. However, where the contract is silent, the court will make its decision on the basis of evidence from the market as to whether the description of the goods in the contract went to the *identity* of the commodity sold.[65]

62. H.G. Beale (ed.), *Chitty on Contracts* (30th edn, Sweet & Maxwell 2008), (hereinafter "Chitty"), [12-040].
63. *B S & N Ltd (BVI) v Micado Shipping Ltd (Malta) (The Seaflower) (No 1)* [2001] 1 Lloyd's Rep 341.
64. Ibid., [42].
65. *Tradax Internacional S.A. v Goldschmidt S.A.* [1977] 2 Lloyd's Rep 604.

*(2) The goods must be of satisfactory quality*. Section 14 of the Sale of Goods Act 1979 further provides that where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of a satisfactory quality[66] and that this implied term is a condition.[67] In the attempt to clarify what is intended by satisfactory quality, the Act regards as satisfactory the quality of goods meeting "the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances".[68] Moreover the quality of the goods is said to include their state, condition, fitness for all the purposes for which goods of the kind in question are commonly supplied, appearance and finish, freedom from minor defects, safety and durability.[69]

*(3) The case of goods sold by sample*. The third implied condition established by the Sale of Goods Act 1979 relates to the special case of goods sold by sample. A contract of sale is a contract for sale by sample where there is an express or implied term in the contract to that effect.[70] In this case there is an implied condition that the bulk will correspond with the sample in quality[71] and that the goods will be free from any qualitative defect which would not be apparent on reasonable examination of the sample.[72]

Having examined the three conditions implied by the Act, the next question to be addressed is whether any breach – however slight – of these terms entitles the buyer to terminate the contract or whether, together with the term, the law implies also a leeway: the current position is not entirely clear. Section 15A of the Act,[73] provides that where the buyer has the right to reject goods by reason of a breach on the part of the seller of a term implied by section 13, 14 or 15 of the Act but the breach is so slight that it would be unreasonable for the buyer to reject them[74] (burden of proof on the seller),[75] the breach may be treated as a breach of warranty.[76] If the discrepancy falls within the known *de minimis* allowance implied by the common law the buyer would not be allowed to reject the goods.[77] It is, however, clear that section 15A is an attempt to broaden considerably the scope of the *de minimis* allowance to avoid so-called technical rejections. On the other hand, this section only applies unless a contrary intention appears in, or is to be implied from, the contract[78] and this is almost invariably the case in commodity sales where allowances and adjustments are commonly catered for or incorporated by reference.

66. SOGA 1979, s 14(2). For a recent detailed discussion on the scope of the term implied by s 14(2) see *KG Bominflot Bunkergesellshaft für Mineraloele mbH & Co v Petroplus Marketing AG (The Mercini Lady)* [2010] EWCA Civ 1145; [2011] 1 Lloyd's Rep 442.
67. SOGA 1979, s 14(6).
68. Ibid., s 14(2A).
69. Ibid., s 14(2B); on durability in the context of shipment sale as to capability to withstand normal sea transit see again *Mash & Murrell v Emanuel* [1961] 2 Lloyd's Rep 326, fn 54 and the discussion in Lorenzon (fn 4), [2-033]–[2-035].
70. SOGA 1979, s 15(1).
71. Ibid., s 15(2)(a).
72. Ibid., s 15(2)(c).
73. Inserted by the Sale and Supply of Goods Act 1994, s 4(1).
74. SOGA 1979, s 15A(1)(a).
75. Ibid., s 15A(3).
76. Ibid., s 15A(1)(b).
77. *Arcos Ltd v E A Ronaasen & Son* [1933] 45 Ll L Rep 33, [1933] AC 470, at p 479 (Lord Atkin): "No doubt there may be microscopic deviations which business men and therefore lawyers will ignore."
78. SOGA 1979, s 15A(2).





Apart from the Sale of Goods Act 1979 itself, the common law has also made substantial contributions to the categorisation of terms in sale contracts. So terms about the time[79] and place[80] of shipment and the quantity[81] of the goods to be shipped have traditionally been considered as part of the description of the goods and as such held to be conditions now covered by section 13 of the Act. As far as the quantity of the goods is concerned the Sale of Goods Act 1979 (in its amended version) softened the harshness of the buyer's remedy by adding that it may not reject the whole consignment for short or excess delivery if such shortfall or excess is so slight that it would be unreasonable for it to do so.[82] This subsection being subject to any usage of trade, special agreement or course of dealing between the parties[83] – it is submitted – should not ordinarily apply to c.i.f. and f.o.b. sales.

### *(ii) … as agreed in the sale contract*

Selecting the goods for shipment represents only one part of the physical duties owed by the seller to its buyer: such goods must also be *delivered as agreed* in the sale contract. This obviously *physical* duty in shipment sales – both on c.i.f. and f.o.b. terms – is performed by loading the goods on board the vessel fixed by the seller or buyer respectively. Section 32(1) of the Sale of Goods Act 1979 in fact provides that where the seller is required to send the goods to the buyer, delivery of the goods to a carrier for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer.[84] Two issues are crucial here: (i) this is and remains at all material times a *physical* duty to load and stow the cargo in the manner and on the vessel agreed in the sale contract; and (ii) the remedy available to the buyer for breach of such duty will depend entirely on the terms of the sale contract.

As already discussed the duty to make transport arrangements may fall on either the seller or the buyer depending on the terms on which the shipment sale has been concluded. In f.o.b. sales where the contract of carriage is concluded directly by the buyer, the physical duties relating to the choice of the vessel, her route and – often – the details of the loading operations will be agreed upon by the buyer itself at the outset and are unlikely to cause any disputes, at any rate between the parties to the sale contract. On the other hand, where the shipping and carriage arrangements are made by the seller, it ought to comply with the prescriptions contained in the purchase agreement. The seller's duties with regards to the terms of the contract of carriage, at any rate when English law applies to such contract, are to be found in the contract of sale itself (or in the letter of credit) and in section 32(2) of the Sale of Goods Act 1979.

*The sale contract*. Naturally the buyer is entitled to carriage arrangements it has stipulated for in the contract of sale. So if the sale contract provides for a vessel of a given class or tonnage, imposes restrictions on previous cargos or flag, reefer temperatures or any other specific requirements, the seller shall make the transport arrangement it promised. The fact that the promise is contained in the confirmation note or any of the

79. *Bowes v Shand* [1876–77] LR 2 App Cas 455 (HL).
80. *Petrograde Inc. v Stinnes Handel GmbH* [1995] 1 Lloyd's Rep 142.
81. *In Re an Arbitration between Keighley Maxted & Co and Bryan Durant & Co* [1893] 1 QB 405.
82. SOGA 1979, s 30(2A).
83. Ibid., s 30(5).
84. Ibid., 1979, s 32(1). In the context of f.o.b. sales, see *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2008] UKHL 11; [2008] 1 Lloyd's Rep 462.

## 8. THE CLAIMANT'S POTENTIAL LIABILITY TOWARDS THE CARRIER

It may seem strange to end a chapter on cargo claims against the carrier with a brief consideration of claims by the carrier against cargo interests. The carrier may be owed freight; the carrier may wish to recover for, say, warehousing charges where the receiver fails to collect; or for damage to the ship caused by the cargo, whether prohibited, dangerous[31] or neither. Now there are two types of cargo interest that are never beyond the reach of a carrier for these types of losses. First, a charterer from the carrier will always be open to attack by the carrier: that charterparty survives any transfer of a bill of lading by or to the charterer. Second, even where there is no charterparty, a carrier never loses its rights of suit against the original shipper with whom the carrier first contracted, again despite the fact that the shipper may have transferred the bill of lading to a third party. The problem arises when a carrier wishes to pursue a claim not against either of these two parties, a charterer or a shipper, but against a lawful holder of a bill of lading, a person named as consignee on a sea waybill or a person to whom a carrier acknowledges a right of delivery under a ship's delivery order. Does the fact that these cargo interests have rights of suit against the carrier mean that the carrier can pursue them under the relevant document? If the answer to this question was yes, difficulties would be caused to banks: a bank named in any of these capacities on any one of the three documents mentioned above would be a likely and attractive defendant for carriers and the result would be that bills of lading and associated shipping documents would become unattractive security documents for banks extending a line of credit to buyers through letters of credit. Section 3 of the Carriage of Goods by Sea Act 1992 consequently makes it clear that for a carrier to have rights of action against a lawful holder of a bill of lading, a consignee named as such on a sea waybill and a party to whom the carrier acknowledges a right of delivery on a ship's delivery order, that person must do one of the following: it must either take or demand delivery of any of the goods to which the document relates or make a claim under the contract of carriage to which the document relates. This means that for the cargo interest to expose itself to liability towards the carrier, the cargo interest needs first to activate liability by exercising its own rights under the 1992 Act. An unintended consequence follows from this: a cargo interest can simply avoid any liabilities towards the carrier under the carriage contract through the simple expedient of failing to receive goods in which it has, for some reason or other, lost interest under the sale contract.

31. For a definition of what goods are "dangerous" for the purposes of the Hague–Visby Rules, see *Bunge SA v ADM do Brasil Ltda & Ors. (The Darya Radhe)* [2009] EWHC 845 (Comm); [2009] 2 Lloyd's Rep 175.



# CHAPTER 6

# CARRIAGE OF PASSENGERS

Michael Tsimplis and Richard Shaw



## 1 INTRODUCTION[1]

Claims arising as a result of accidents to passengers on ships have provided a fertile field for maritime lawyers since the loss of the *Titanic* in 1912.[2] An important distinction must however be drawn between *international* and *domestic* carriage of passengers. States with extensive ferry services as part of their transport network such as Norway and Greece tend to have elaborate domestic laws governing the liabilities of their passenger carriers. These are not the principal subject of this chapter.

The carriage of passengers internationally involves two types of arrangements. First, there are ships which provide public transport to and from islands and between States. Some services in terms of food and entertainment are provided but the service is primarily one for transport. Second, there are the cruise ships in which passengers live for some periods of time. These ships provide many more services and are much more expensive. They may provide sightseeing at various ports and include several embarkations and disembarkations for each passenger.

The navigational hazards for both types of services are similar and it makes sense that they are dealt with in a unified way. However, the hazards that relate to the "living in"

1. See M. Tsimplis, "Liability in Respect of Passenger Claims and its Limitation" (2009) 15 JIML 123; P. Todd, *Carriage of Passengers by Sea: Athens Conventions and UK Implementation* (amazon.co.uk Ltd, UK, 2013) ISBN 9781494419516.
2. White Star Line sought to limit its liability in the United States to the value of the life boats which were recovered and brought to New York with the survivors on board the *Carpathia* [1912] 209 Fed Rep 501, *New York Times* 26 May 1912.

part of the transport are very different and these pose significantly higher risks for cruise ships than ordinary passenger ships.

Passengers' rights and obligations with the carrier are of a contractual nature with the contract evidenced by the issuance of the ticket. Contractual terms would then apply, but these terms are usually written by the carrier, and the passenger has little or no capability to negotiate. In the past, this has enabled carriers to reduce their liability to passengers significantly, or even exclude it entirely by inserting exemption or limitation clauses at will.[3]

The law has gradually developed extra protection for passengers who are at a disadvantage due to their lack of negotiating power. In England the Unfair Contract Terms Act 1977 deals with contractual terms excluding or restricting liability for death or personal injury (s 2(1)) or property damage (s 2(2)). Permission to restrict and exclude liability to passengers by sea is granted under section 28 of the Act. The lowest permissible standards for liability under the Unfair Contract Terms Act 1977 are those of the Athens Convention relating to the carriage of Passengers and their Luggage by Sea, 1974 (the "1974 Athens Convention"). Any further reduction of liability is void.

Carriage of passengers between different States has however been governed[4] for many years by the 1974 Athens Convention which entered into force in 1987.[5] The Convention was amended by the 2002 Athens Protocol (the "2002 Athens Convention") and this came into force on 23 April 2014.[6] The UK has not yet signed the 2002 Athens Convention. However the EU has already ratified the 2002 Athens Convention in December 2011 and has implemented its provisions through EC Regulation 32/2009 (the "Athens Regulation"). The Athens Regulation covers international voyages involving an EU Member State port as the port of departure or arrival. In addition it covers the larger ships involved in domestic voyages and will gradually be extended to cover all domestic voyages in all EU Member States. International voyages where no port of call is in an EU Member State will be covered by the 1974 Athens Convention until the UK ratifies and implements the 2002 Athens Convention. Thus, presently, the legal arrangements are in the process of being modified. In order to understand the important differences between the three systems, the 1974 Athens Convention, the 2002 Athens Convention and the Athens Regulation, these will need to be discussed separately.

## 2. THE 1974 ATHENS CONVENTION

The United Kingdom has incorporated the terms of the 1974 Athens Convention into the Merchant Shipping Act 1995 ("MSA 1995")[7] and applied its provisions, subject to increased limits, to the domestic carriage of passengers.[8] As it has the force of law its

3. *Adler v Dickson (No 1)* [1954] 2 Lloyd's Rep 267 (CA); *The Eagle* [1977] 2 Lloyd's Rep 70; *The Mikhail Lermontov* [1991] 2 Lloyd's Rep 155.

4. The Carriage of Passengers Convention 1961 and the Passenger Luggage Convention 1967 were agreed before the 1974 Athens Convention, but were not successful. The Carriage of Passengers Convention 1961 came into force on 4 June 1965 and was ratified by 11 states. The Passenger Luggage Convention 1967 was only ratified by Cuba and Algeria but never entered into force, as five ratifications were needed.

5. It has now been ratified or acceded to by 35 States (March 2014).

6. As at 24 January 2014, 14 Contracting States.

7. Schedule 6.

8. MSA 1995 Schedule 6. See the Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987 SI 1987 No 670 and also SI 1998/2917 by which the limit is now 300,000 SDRs per passenger.





application is automatic and does not depend on contractual incorporation into the carriage contract with the passenger.[9] This Convention has governed international carriage of passengers by the majority of major ship-owning nations for the last 20 years.

The 1974 Athens Convention applies[10] to international carriage onboard ships registered or flying the flag of a Contracting State. In addition it covers international carriage where either the port of departure or discharge is in a Contracting State. International carriage requires that the port of departure and the port of destination or an intermediate port are in a different State.[11]

This means that it is always applicable to British ships. For example, if a ship registered in the UK takes a passenger for a voyage between two non Contracting States to the 1974 Athens Convention then the carriage of that passenger will still be covered by the 1974 Athens Convention. However if a ship of a non-Contracting State performs a journey not involving any Contracting State and the case is decided in England the 1974 Athens Convention will be inapplicable despite having the force of law because the contract of carriage does not fulfil its requirements.

The 1974 Athens Convention covers liability to persons carried on the ship under a contract of carriage and their vehicles or luggage.[12] The application period of the Convention is different for passengers and for their luggage and cabin luggage. For passengers and their cabin luggage the Convention applies from the point the passenger "is in the course of embarkation" until it is in the course of disembarkation, and while onboard the ship.[13] Where embarkation starts or finishes is not precisely defined, and Article 1(8)(a) excludes the period of waiting in a marine terminal or port installation from passengers' period of carriage.

For the passengers' other luggage the period of carriage starts when it is delivered to the carrier until it is redelivered to the passenger, and the definition of "luggage" includes the passenger's vehicle. "Carriage" includes the period during which the passenger is transported between land and the ship and vice versa, if the transportation is part of the paid fare or provided by the carrier.

The 1974 Athens Convention arrangements are protected by Article 18 of the Convention. This article renders null and void any contractual clauses which exclude liability or provide lower limits of liability or affect the reverse burden of proof or restrict the jurisdictional options.[14]

The 1974 Athens Convention is designed to be the sole framework by which a passenger can claim against the carrier or the contractual carrier.[15]

### (a) Basis of Liability

Article 3 of the 1974 Athens Convention starts by reciting the common law position that the carrier is liable for damages caused by the death or injury of a passenger caused by the fault or neglect of its servants or agents acting within the scope of their employment.

9. See *The Lion* [1990] 2 Lloyd's Rep 144.

10. 1974 Athens Convention, art 2.

11. 1974 Athens Convention, art 1.9.

12. Persons accompanying cargo, or any live animals carried on board under a contract of carriage of goods by sea, are also included in the scope of the Convention, provided they are on board with the consent of the carrier – although cargo and animals are excluded from the regime.

13. Art 1(8)(a).

14. For example, by prescribing the only place of business for the carrier.

15. 1974 Athens Convention, art 14.

In essence the general arrangement is based on negligence by the carrier (contractual and performing) and their servants. This can be a very difficult arrangement for a claimant who needs to discharge the burden of proving fault as most of the information would be in the hands of the carrier. In order to address this problem Article 3(3) provides that such fault or neglect is *presumed* if the death or injury arose from or in connection with shipwreck, collision, stranding, explosion, fire or defect in the ship, i.e. the burden of proof is reversed. However the burden of proving that the incident causing the loss or damage occurred in the course of the carriage still lies with the claimant.[16]

Where the contracting carrier is different from the performing carrier, the Convention imposes joint and several liability on both carriers for the part of the carriage performed by the performing carrier. Thus the contracting carrier is liable for his actions for the whole of the carriage and, in addition, is liable for the actions of the performing carrier and of the performing carrier's servants or agents, with the burden of proof arrangements as described earlier and there is a right of recourse between the carriers. The defence of contributory negligence, in accordance with national law is preserved.[17]

Liability for loss or damage of valuables and money is excluded altogether, unless these effects were handed to the carrier for safekeeping. The application of the exclusion of liability for valuables depends on whether the carrier has facilities on board and does not reject a request for the depositing of valuables to its care. Thus unless the shipowner gives the passengers the option to hand over to it their valuables for safe keeping it would be unable to rely on the exclusion of liability in respect of these valuables, at least in respect of passengers who intended to deposit their valuables.[18]

Servants and agents of the carrier and the contractual carrier are covered by the limits of liability and the other defences available to the carrier, provided that they prove they were acting within the scope of their employment.[19]

### (b) Time Bar

A two-year time limit on claims is imposed. This starts at disembarkation or the time that disembarkation should have taken place in cases of death or injury during the journey and loss or damage to luggage.[20] The only exception to the two-year time bar is where personal injury occurs during the journey but death occurs after disembarkation. In such a case the time bar is two years from the day of death but not later than three years from disembarkation. Extension of and interruption to the limitation period is governed by the rules of the court hearing the case, but the overall period cannot be extended more than three years from disembarkation. The time bar also applies to arbitration.[21]

16. 1974 Athens Convention, art 3 para 2.
17. 1974 Athens Convention, art 6.
18. See *Lee and Another v Airtours Holidays Ltd and Another* [2004] 1 Lloyd's Rep 683, where there was a safe in each cabin of the ship. The passengers requested to put their valuables in the ship's safe, but were told that the cabin's safe would be sufficient. The ship was lost and the passengers claimed for the loss of their valuables. Although the case was not decided under the 1974 Athens Convention, the Central London County Court held that had the 1974 Athens Convention been applicable, art 5 would not have protected the carrier as there was no opportunity given to passengers to deposit their valuables with the carrier for safekeeping.
19. 1974 Athens Convention, art 11.
20. 1974 Athens Convention, art 16(2).
21. MSA 1995, Schedule 6 Part II, s 7.





The powers to extend the time bar period are very limited. The Limitation Act 1980 is the relevant legislation in England and section 39 does not exclude the 1974 Athens Convention from the operation of Part II of that Act.[22] However, this was of no assistance to the claimant passenger in *Higham v Stena Sealink Ltd*,[23] who relied on Article 16(3) of the 1974 Athens Convention in order to achieve a time extension in her action. The Court of Appeal considered that section 33 of the Limitation Act 1980, which permits the discretionary extension of time in cases of personal injury or death, was not applicable in relation to Article 16(3) of the 1974 Athens Convention. This is because section 33 refers expressly to time bars set by section 11 of the Limitation Act 1980. The Court of Appeal did not decide the more general question of whether there are any sections of Part II of the Limitation Act 1980 which might assist a claimant under the 1974 Athens Convention in obtaining an extension to the two-year time bar. However Hirst LJ, who delivered the judgment, noted that although sections 28 to 32 of the Limitation Act 1980 appear to be relevant, they all make specific reference to time bars established by the Limitation Act 1980 itself and this may disqualify them.[24] Thus, it is doubtful whether any of the Limitation Act 1980 provisions may be relied upon to extend the limitation period under the 1974 Athens Convention.

### (c) Limits of Liability

Article 7 of the 1974 Athens Convention provides for a limit of the carrier's liability of 46,666 Special Drawing Rights ("SDR") per carriage.[25] The 1990 Protocol attempted to increase this to 175,000 SDR but this has not achieved any ratifications.[26] The UK has however unilaterally increased the limit per passenger to 300,000 SDR, following the *Herald of Free Enterprise* casualty. The limits of liability are shown in Table 6.1.

Article 13 provides for loss of the right to limit liability in the event of intentional harm or recklessness in terms similar to Article 4 of the 1976 Limitation Convention.[27] Thus it is extremely difficult for limitation of liability to be affected except where the master is also the owner of the ship.

Note that limitation of liability rights under other conventions are preserved.[28]

22. *Higham v Stena Sealink Ltd* [1996] 2 Lloyd's Rep 26 (CA). s 39 of the Limitation Act 1980 states that:

> This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by or under any other enactment (whether passed before or after the passing of this Act) or to any action or arbitration to which the Crown is a party and for which, if it were between subjects, a period of limitation would be prescribed by or under any such other enactment.

23. [1996] 2 Lloyd's Rep 26.
24. *Higham v Stena Sealink Ltd* [1996] 2 Lloyd's Rep 26, at p 30.
25. Equivalent of 1 SDR on 24 March 2014 is £1.0665. For latest equivalent rates see www.imf.org/external/np/fin/rates/rms_five.cfm accessed 24 March 2014.
26. This figure has been adopted by the Scandinavian countries.
27. See Chapter 7 page 286. The test in the 1974 Athens Convention is:

> *The carrier shall not be entitled to the benefit of the limits of liability prescribed in Articles 7 and 8 and paragraph 1 of Article 10, if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.*

28. 1974 Athens Convention, art 19.

*Table 6.1* Limits of liability under the 1974 Athens Convention and its Protocols
Values are expressed in SDRs

| Loss or Damage | 1974 Athens Convention | 1990 Protocol[1] | UK Carriers[2] | 2002 Athens Convention[3] |
|---|---|---|---|---|
| Life, personal injury/passenger | 46,666 | 175,000 | 300,000 | 250,000 strict<br>400,000 (or higher) if fault |
| Cabin luggage/ passenger | 833 | 1,800 | 833 | 2,250 |
| Luggage in the custody of the carrier/passenger | 1,200 (1,187)[4] | 2,700 (2,565)[4] | 1,200 (1,187)[4] | 3,375 (3,226)[4] |
| Vehicle and luggage within | 3,333 (3,216)[4] | 10,000 (9,700)[4] | 3,333 (3,216)[4] | 12,700 (12,370)[4] |

Notes
1. The 1990 Protocol never came into force.
2. Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1998 (SI 98/2917), which came into force on 1 January 1999.
3. In force 23 April 2014, not signed by the UK but applicable under the Athens Regulation after 31 December 2013.
4. Numbers in parentheses are those applicable after the optional deduction.

### (d) Jurisdictional Arrangements

The 1974 Athens Convention provides for a choice of competent jurisdictions. The choice is only available to the claimant. These are:

- the place of residence or principal place of the defendant's business;
- the contractual place of departure or destination;
- the claimant's place of domicile or permanent residency; or
- the place where the contract was made if the defendant has a place of business there and is subject to the jurisdiction of that State.

Because of the requirement that the defendant must be subject to the jurisdiction of the courts, it is suggested that these options apply at the time of the claim rather than at the time of the damage, since in between the two the carrier may have stopped operating in a particular place and may not be subject to the jurisdiction of that court.

The parties to the contract of carriage may agree, after the incident, to submit to a different jurisdiction, as permitted in Article 17(1).[29]

The various options for jurisdiction create a risk of related multiple proceedings in more than one court. The 1974 Athens Convention does not have conflict rules, nor does it say what limits of liability should be applicable in each court in such a case. To avoid difficulties, the English implementing statute provides that if the English court has jurisdiction in whole or in part over the claim of a passenger, then the court has the power to order enforcement in whole or in part and, taking into account the other proceedings, to award an amount less than the limit of liability, or to make the award conditional on the results of other proceedings.[30] Conflicts with other jurisdictions may arise in this respect.

29. 1974 Athens Convention, art 17(2).
30. s 8 of Schedule 6 Part II of the MSA 1995.





## 3. THE 2002 PROTOCOL TO THE ATHENS CONVENTION

The low limits of liability, the need to prove fault and the lack of financial guarantees for the passenger made the 1974 Athens Convention unattractive to States. A diplomatic conference in 2002 adopted the Protocol to the Athens Convention 1974, which made a number of important changes to the regime. While the scope of application and the definitions of the 1974 Athens Convention were preserved, the legal basis of the regime changed from one based on fault, with a reversed burden of proof for some incidents, to one with the major part of liability now strict. A significant increase in the limits of liability for loss of life and injury to passengers accompanied with compulsory insurance and the right to sue the insurer directly makes the 2002 Athens Convention a much better regime from the point of view of the claimant.

The 2002 Athens Convention distinguishes between "shipping incidents" and other incidents. Shipwrecks, capsizes, collisions, stranding, explosions, fires and, more controversially, "defects in the ship", are all shipping incidents. The distinction separates the risks arising from the particularities of carriage by sea from those relating to the use of the ship as living premises – the "living-in" characteristics. Strict liability for loss of life and personal injury arising from such shipping incidents is limited to 250,000 SDR per passenger. Fault-based liability for loss of life or personal injury is limited to 400,000 SDR per passenger with a reversed burden of proof.

Death or personal injury which did not occur in a shipping incident is fault based only, with the burden of proving the fault falling on the claimant passenger. The "fault of the carrier" includes, in shipping as well as in other incidents, the negligence of the carrier's servants and agents acting within the scope of their employment. The limits of liability are 400,000 SDR per passenger.

The 2002 Athens Convention[31] does however allow States to provide in their national law for liability to be higher, or unlimited.

The introduction of strict liability for the carrier required the introduction of exceptions. Thus the carrier can be exonerated entirely for shipping incidents if it can show that the loss of life or personal injury was caused by acts of war, hostilities, civil war, insurrection or "acts of God".[32] Notably, terrorist attacks and piracy are not covered by this wording. However, they are arguably covered by a further exception which permits the carrier to escape liability if the incident was caused solely by intentional acts or omissions of a third party.

The 2002 Athens Protocol also contains provisions, similar to those in the Oil Pollution Liability Conventions, for compulsory liability insurance of passenger carriers and with direct action against the insurer. A Certificate of Financial Responsibility will be required for each passenger ship carrying more than 12 passengers. The insurer will always be entitled to limit its liability even if the carrier has lost such right. The insurer can avoid liability on the same exceptions as the carrier and, in addition, in cases where the incident has been caused by the wilful misconduct of the carrier. However the insurer will not be able to rely on the contract of insurance in order to avoid paying a claimant passenger. These provisions, combined with the higher limits, caused considerable

31. Art 6.
32. 2002 Athens Convention, art 3(1)(a): a natural phenomenon of an exceptional, inevitable and irresistible character.

concern in the world of marine liability insurance, particularly in the International Group of P&I Clubs.[33] The steadily increasing size of passenger ships has raised the spectre of a major accident on a ship carrying more than 3,500 passengers and 1,500 crew. At the Diplomatic Conference in 2002 a leading underwriter stated that insurance to meet the Protocol's requirements, particularly with *unlimited reinstatements after a casualty*, was simply not available on the market. At the October 2006 meeting of the IMO Legal Committee a set of guidelines was adopted which are intended to enable States to implement the Athens Convention 1974 as amended by the 2002 Protocol.[34] These purport to permit States to ratify the Protocol subject to a reservation limiting the Certificate to the level of insurance available. The Athens Regulation incorporates these Guidelines.

The jurisdictional options against the carriers (contractual and performing) remain the same as under the 1974 Athens Convention. However, these options are now made subject to the "domestic law of each State Party governing proper venue within those States with multiple forums".

The above-mentioned jurisdictions are also available for a direct action against the insurer. The parties can also agree on a different forum after the incident.

Under the 2002 Athens Convention, a final judgment of a competent court is to be recognised in all State Parties unless there was fraud, or the defendant was not given reasonable notice and fair time to prepare for the case.[35] The wording suggests that two tests should be applicable: lack of reasonable notice and deprivation of a fair opportunity to present the case. It is unclear whether the second condition should flow from the first for this exception to apply, or whether their co-existence without a direct link is sufficient.

## 4. INTERACTION BETWEEN THE 1974 ATHENS CONVENTION AND THE 1976 AND 1996 CONVENTIONS ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS

Because Article 19 of the 1974 Athens Convention does not affect the shipowner's right of limitation, it follows that the proper interpretation is that the 1976 LLMC limits will apply in addition to the limits of the 1974 Athens Convention. That is to say, the lower limits will always apply and this causes problems, in particular with the cap of 25,000,000 SDR under the 1976 LLMC. Among other problems, this doubles the difficulty of updating the limits of liability for passenger claims as they are contained in two Conventions.

The problem has been resolved under the 1996 LLMC which defines the limits of liability solely on the basis of the number of passengers authorised to be carried, multiplied by an increased value of 175,000 SDRs per passenger. Under the 1996 LLMC the limit is still global, that is, the same amount is available even if one passenger is killed or injured, whereas of course the Athens Convention imposes the limits per passenger.

The 1996 LLMC also permits the increase of the limits under the national law of the party states.[36] Thus, unlimited liability under the 1996 LLMC for loss of life and

33. See Chapter 11 page 461.
34. IMO Circular letter No 2758 dated 20 November 2006 and annexed documents at http://folk.uio.no/erikro/WWW/corrgr/13.pdf accessed 5 March 2014.
35. 2002 Athens Convention, art 17*bis*.
36. Art 6 of the 1996 Protocol to the LLMC, inserting art 15.3*bis*.





personal injury to passenger is now possible.[37] This arrangement permits the higher limits of liability under the 2002 Athens Convention to operate, and also delegates to each State party the power to decide upon the appropriate arrangements for the good operation of limitation provisions for passenger claims and under the 1996 LLMC.

For property damage, the limits under Article 6.1(b) of the 1996 LLMC apply, as well as the limits per passenger under Article 8 of the 1974 Athens Convention.

Thus, where there are no claims other than for loss of or damage to cabin luggage or luggage by passengers, the amount recovered under the 1974 Athens Convention would apply unless the total limit under the 1974 Athens Convention together with other property claims arising form an incident exceeds the 1996 LLMC Article 6.1(b) limit, which is calculated on the basis of the tonnage of the ship.

The conflicts that existed between the 1974 Athens Convention and the 1976 and 1996 LLMCs over passenger limits have been dealt with by giving options to the States party to the two conventions. Thus, when the 2002 Athens Convention comes into force, States which are party to it and which are also parties to the 1996 LLMC will have the following choices over loss of life and personal injury:

(i) Limit liability for passengers both under the 1996 LLMC and the 2002 Athens Convention. This would imply a limit of liability of 400,000 SDR per passenger under Article 7.1 of the 2002 Athens Convention, capped by an overall limit of 175,000 SDR, multiplied by the number of passengers the ship is authorised to carry (according to the ship's certificate) under Article 7.1 of the 1996 LLMC. However, this solution may restrict the strict liability of up to 250,000 SDR under Article 3.1 of the 2002 Athens Convention to 175,000 SDR per passenger (in accordance with the limit of Article 7.1 of the 1996 LLMC), if many passengers were injured.
(ii) A State could provide for unlimited liability for loss of life or personal injury under the 1996 LLMC under Article 15(3*bis*). In such a case the limits of the 2002 Athens Convention will apply alone.
(iii) A State could provide unlimited liability under the 2002 Athens Convention and permit limitation of liability under Article 7.1 of the 1996 LLMC.
(iv) A State can remove the limits of liability from both conventions and permit unlimited liability for passenger claims in respect of death or personal injury.

The UK government has already acted under Article 15(3*bis*) of the 1996 LLMC. Thus limitation of liability will be limited to the 2002 Athens Convention limits in the UK. However, for loss or damage to luggage, the 2002 Athens Convention limits prescribed under Article 8 may, in particular instances, be capped by the property-related limits of liability under Article 6(b) of the 1996 LLMC.

In the UK, until the Merchant Shipping Act 1995 applied the limitation provisions of the 1976 LLMC to vessels which are not seagoing, the provisions of the 1974 Athens Convention and 1976 LLMC did not apply to them. Thus the claims of the passengers on the Thames Cruise Boat *Marchioness*, which sank following collision with the dredger *Bowbelle* in 1989,[38] were not subject to any limitation regime.

37. See N. Gaskell, "New Limits for Passengers and Others in the United Kingdom" (1998) 2 LMCLQ 312–314, which observes that this is the contemporary trend for loss of life and personal property.
38. With the loss of 51 lives. The legal proceedings arising out of this accident were all settled out of court.

## 5. THE ATHENS REGULATION

The law applicable to passengers is presently Regulation (EC) No 392/2009, which covers voyages between EU Member States. The 2002 Athens Convention is an Appendix to the Regulation, while the main part of the Regulation determines the scope of the 2002 Athens Convention in various respects, including the ships and the voyages to which it is applicable. The IMO reservation and most of the guidelines are also included as part of the Regulation (Annex II), with binding character equal to the authentic text of the 2002 Athens Convention. The Regulation applies to ships flying the flag of an EU Member State and covers voyages where either the port of departure and/or the port of disembarkation is in an EU Member State. It also covers carriage of a passenger where the contract has been made in a Member State. Voyages between Contracting States to the 1974 Athens Convention which do not involve an EU Member State remain subject to the MSA 1995. That is why new legislation will be required to cover voyages between other Contracting States to the 2002 Athens Convention which are not EU Member States when the UK ratifies the 2002 Athens Convention.

In addition to extending the scope of the 2002 Athens Convention to ships involved in domestic carriage, and making the IMO Guidelines binding, the Athens Regulation also introduces some other novel features in the law of EU Member States. First, it provides for sufficient advance payments to be made within 15 days of the time the person entitled to damages is identified. Such payments are not considered to be an admission of liability. The advance payment provisions apply to carriers flying the flag of, or registered in, a Member State or for damages occurring within a Member State's territory. Second, the carrier will be obliged to give out information regarding the rights of passengers under the Regulation, including their rights to compensation, the limits applicable and the possibility of direct action against the insurer.[39] Finally, loss of or damage to mobility and other specific equipment belonging to a passenger with reduced mobility will be governed by Article 3.3 of the 2002 Athens Convention. The carrier's fault will be presumed if the loss is caused by shipwreck, capsizing, collision or the stranding of the ship, explosion or fire in the ship, or any defect in the ship. Compensation will correspond to the replacement value of the equipment or, where relevant, the cost of the repairs.

The Athens Regulation does not include the jurisdictional provisions of Articles 17 and 17*bis* of the 2002 Athens Convention. Jurisdictional issues are within the exclusive competence of the European Union and not that of the EU Member States. Thus these issues are to "form part of the Community legal order when the Community accedes to the Athens Convention". Article 17 and 17*bis* will fall to be implemented through the Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the "Jurisdiction Regulation" and, from 2015, the Recast Regulation.). In terms of the position that will then be applied by the Jurisdiction Regulation, Article 17*bis*(3) of the 2002 Athens Convention permits the application of the Jurisdiction Regulation between EU Member States for the recognition and enforcement of judgments, provided that judgments of courts with jurisdiction under the 2002 Athens Convention are recognised at least to the extent provided for in that Convention. For jurisdiction allocation, the provisions of the 2002 Athens Convention are therefore to prevail over the more general, existing provisions of the Jurisdiction Regulation.

39. The Athens Regulation, art 7. No penalty for non-provision of information is imposed by the Regulation.





## 6. THE COMMERCIAL REALITY

There are in fact very few reported cases of death and injury claims being pursued through the Courts. This is because such claims are invariably covered by the carrier's Protection and Indemnity ("P&I") insurance, and it is the policy of the P&I Clubs which insure virtually all the world's fleet of passenger ships to seek amicable settlement of such claims out of court. The principal value of the limitation provisions in the Athens and LLMC Conventions is therefore to curb the excess zeal of claimants' legal advisers, and to foster realistic settlements.

## 7. QUANTUM OF DAMAGES FOR DEATH AND INJURY

The English courts have always been somewhat ungenerous to death and injury claimants, particularly when compared with the awards in other jurisdictions such as the United States.

The following are the principal heads of claim available to personal injury plaintiffs in the English courts:

(a) medical expenses;
(b) pain and suffering (past, present and future);
(c) loss of amenity;
(d) lost earnings (past, present and future).

In the case of death, the claim will be made by the personal representatives of the deceased, and will include:

(a) medical, funeral and testamentary expenses, including expenses in connection with a coroner's inquest;
(b) the deceased's pain and suffering prior to death;
(c) damages under the Fatal Accidents Acts (currently £10,000) to specified dependants;
(d) dependency claims by those (e.g. spouse, children or aged parents) whom the deceased was supporting prior to death. Such claims will reflect the likely duration of such payments if the deceased had survived, taking into account their circumstances and state of health.

The level of death and injury awards in US courts (most of which are assessed by a jury) means that in any marine casualty with an international dimension the lawyers acting for death and injury claimants will always explore the possibility of pursuing their claims in the USA. The key question will be whether the accident involves a "US element" sufficient to justify the establishment of US jurisdiction.

The advantages of bringing a claim in the US from the plaintiffs' point of view include:

(a) higher levels of damages;
(b) lawyers will accept instructions on a contingency fee basis (now available in the UK in some circumstances);

CHAPTER 10

# MARINE POLLUTION FROM SHIPPING ACTIVITIES

Michael Tsimplis







## 1. INTRODUCTION

Up to the early 1970s marine pollution from ships was in essence unregulated. In the name of business efficiency ships regularly cleaned their tanks en route and discharged their residues at sea together with all rubbish overboard. This attitude was not assisted by the fact that the jurisdiction of coastal states extended only to territorial waters of, in general, three nautical miles from the coast. Pollution damage recovery for contaminated property was based on national law, in England, in tort and was not always easy to achieve.[1] Today there is an extensive legislative framework attempting to prevent or mitigate pollution[2] at sea and reduce the degradation of the marine environment.

It was the image of big tankers[3] leaking large quantities of oil, polluting extensive areas and destroying wildlife that raised public awareness about the threats to the environment posed by large scale transportation of oil by sea. Triggered by these high profile incidents the law started developing into a very distinct and separate field involving regulatory obligations coupled with penal and civil liability.[4] The shipping industry played a leading role in the development of the new law, and in several instances

1. *Esso Petroleum Co Ltd v Southport Corp* [1956] AC 218; [1955] 2 Lloyd's Rep 655.
2. It should not be assumed that shipping is the major source of oceanic pollution. Land-based activities are far more damaging not only in terms of volume of pollutants but also because most of the oceanic life is concentrated in the coastal zone. However as these are within the jurisdiction and the politics of each coastal State only "soft" international law under regional international instruments has been developed.
3. A detailed review of the history, the well known incidents or the political and financial conflicts involved is beyond the scope of this work. The interested reader is advised to read Colin de la Rue and Charles B. Anderson, *Shipping and the Environment* (2nd edn, LLP 2009) where a good summary of the history is provided.
4. It cannot be seriously argued that the shipping industry and the coastal authorities could not predict that serious pollution incidents were likely to happen. However before major pollution incidents started happening there was not much public interest in developing pollution prevention and compensation regimes. In addition the shipping industry's lobbying of various governments was probably strong enough to delay these developments.

overtook the international legal negotiations by adopting innovative private schemes. This positive attitude ensured that the solutions finally adopted were acceptable to the industry and reduced the consequences of multiple litigation and security measures when an incident occurred. The resulting legal instruments are probably the minimum common standards achievable on an international basis and do not cover the needs of all States. Most of the drafting work in creating the legal framework has been achieved within the negotiating environment of the International Maritime Organization.

Ships are, in general, regulated by the laws of the flag State but they become subject to the laws applicable to the jurisdictional zones of the States they trade to. It is the coastal State rather than the flag State which has the pressing interest to protect its coastal environment and at the same time facilitate trade. Before 1982 the rights of the coastal State were restricted to internal and territorial waters. The development of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) has improved the governance of pollution incident situations in three respects.[5] First, it extended the jurisdiction of the coastal State's rights and obligations to 200 nautical miles from the coast by accepting the exclusive economic zone (EEZ),[6] second, it imposed general duties on coastal States to protect the marine environment[7] and third, it weakened the right of innocent passage by providing that this is to be exercised subject to the protection of the marine environment.[8]

An important increase of the rights of the coastal State that comes under threat of pollution from a shipping incident has been provided under the Intervention Convention 1969 and its protocols.[9] Under Article 1 of the Intervention Convention 1969 the coastal State is entitled to take measures on the high seas which it thinks necessary in order to avoid grave and imminent pollution threats arising from shipping incidents. In the UK the government's intervention powers can be found in the Merchant Shipping Act 1995.[10]

In addition to UNCLOS other framework conventions have introduced State obligations which concern the environment in general and have an impact on shipping activities too. Examples are the Convention on Biological Diversity,[11] the Basel Convention on Hazardous Wastes 1992[12] and the United Nations Framework Convention on Climate Change 1992 and its Kyoto Protocol.[13] These conventions lay down general principles and objectives which are not necessarily directly applicable to or enforceable against ships but which affect ships though the implementation of their general principles.

5. We only refer to the three more important effects here. It should be stressed that UNCLOS has several other provisions affecting the marine environment, but these are dealt with in Chapter 11.
6. Part V of UNCLOS.
7. Part XII of UNCLOS.
8. Art 21 of UNCLOS. However, legislation regarding the construction of ships has to be based on international agreement rather than national standards art 21(2).
9. International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, came into force 6 May 1975. The original convention covered only some types of oil but its 1973 Protocol extended to other substances. The list of substances has further been revised in 1991, 1996 and 2002 with successive protocols modifying the list of substances to which the convention applies.
10. Schedule 3A was introduced under Schedule 1 of the Marine Safety Act 2003.
11. Signed at the Rio Earth Summit in 1992 by 150 government leaders, and dedicated to promoting sustainable development. Entered into force on 29 December 1993. It presently has 194 Parties (on June 15th, 2014). The convention establishes the role of biological diversity for people, food security, medicines, fresh air and water, shelter, and a clean and healthy environment. The convention covers all biological diversity including the marine environment.
12. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. Adopted adopted on 22 March 1989, entered into force on May 5th, 1992. It has 181 Parties (June 15th, 2014).
13. UN Framework Convention on Climate Change 1992 The Convention entered into force on March 21, 1994. The Kyoto Protocol was adopted in Kyoto, Japan, on 11 December 1997 and entered into force on 16 February 2005. There are 195 Parties to the Convention and 192 Parties to the Kyoto Protocol (on June 15th, 2014).





Overall, international policy regarding the protection of the marine environment has been unfocused and in some respects inconsistent. Part-solutions to pressing problems have been developed, but the legal framework is, as will become evident, a labyrinth starting with good intentions and ending in incomplete parts or dead ends.

However the development of environmental law in relation to shipping has by no means stopped. Environmental pressures increase with time and widen in scope. Atmospheric pollution and greenhouse gas emissions from ships are now important problems that need to be resolved together with the transportation of alien species by ships, the effects noise has on mammals and the collisions between ships and particular marine species. Due to its international character the shipping industry requires uniformity of environmental measures and regulations for ships to the greatest extent possible as otherwise it may become subjected to unilateral legal provisions and demands by each coastal State. At the same time the needs of the coastal States differ with developed States more concerned for their environment and developing States focused on economic development. The principle of sustainable development is the one balancing the conflicting economic, societal and environmental considerations.

Environmentally safe shipping requires prevention of shipping incidents and pollution alike. This is achieved by developing five equally important tools. First, by improving the construction and maintenance standards for ships so that the carriage of pollutants is more resilient to the dangers of the sea and to human fault. Second, by improving training standards for crew members so that the risk of human fault is reduced. Third, by establishing management systems for the ships, ports and the shipping companies which ensure early identification and minimisation of risks taken, or, in the case of an accident, confirmation of the causes of the pollution accident and appropriate attribution of responsibility. Fourth, by establishing liability regimes which ensure that pollution victims will be compensated and that the polluting industry, in other words shipowners, cargo owners, insurers and importers, will strive to avoid pollution because of the imposed liability. The final tool in the legal framework is the imposition of criminal liability and fines for pollution incidents.

## 2. SHIP STANDARDS IN CONSTRUCTION OPERATION AND MANNING

Standards for the ship's safety are contained in the International Convention for the Safety of Life at Sea 1974 (SOLAS),[14] which specifies minimum standards for the construction, equipment and operation of ships, compatible with their safety. SOLAS is the cornerstone of a technical and managerial framework ensuring the safety of ships which in turn also impacts on marine pollution.[15] Flag and port State control are utilised as methods of implementation and enforcement and in addition the International Safety Management Code contained in Chapter IX and the International Ship and Port Facilities Security Code (ISPS Code) contained under Chapter XI-2 of SOLAS indicate the breadth of issues covered.

Standards for the operation of ships and the reduction of accidental and operational pollution are dealt with under the International Convention for the Prevention of

14. Which entered into force on 25 May 1980.
15. See Chapter 9.

Pollution from Ships 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78).[16] MARPOL 73/78 has been extended and modified by several successive protocols. It contains regulations for prevention of oil pollution (Annex I), prevention of pollution by hazardous and noxious substances in bulk (Annex II) and harmful substances in packaged form (Annex III), sewage and garbage pollution from ships (Annex IV and V), as well as air pollution from ships (Annex VI).[17] Only the first two annexes are compulsory for Contracting States.[18]

Contracting States undertake to develop criminal liability and disciplinary procedures for violations of MARPOL and SOLAS. MARPOL 73/78 is also implemented in European Law by the EU Ship Source Pollution Directive.[19] The Directive uses the same definition of illegal, operational or accidental discharges as MARPOL.[20] However, the Directive provides for criminal sanctions when caused intentionally, recklessly or by "serious negligence"[21] which is in contrast to the similar test under MARPOL which refers to "the owner or the master" acting "either with intent to cause damage or recklessly and with knowledge that damage would probably result".[22] The lower threshold applies[23] to discharges in the territorial sea.[24] In addition criminal liability under the Directive is not restricted to the owner and the master of the ship but extends to "any other person involved" which would include many other entities, for example charterers, classification societies and operators not presently covered under MARPOL. The Directive applies[25] not just to territorial waters but also EEZs and the high seas.[26] A distinction between minor and other cases of pollution is created by the Directive. The

16. MARPOL 1978 which also includes the 1973 MARPOL entered into force on 2 October 1983 (along with Annexes I and II).

17. The air pollution regulations relate to sulphur oxide and nitrogen oxide emissions from ship exhausts and prohibit deliberate emissions of ozone depleting substances. Special emission areas are designated and lower emissions than the global cap of 4.5 per cent on the sulphur content of fuel oil are established for such areas (1.5 per cent). Greenhouse gases from shipping which are probably between 1.5 and 3.0 per cent of the global emissions are not regulated under any international or national instrument yet and are excluded under art 2.2 of the Kyoto Protocol 1997 from the general counting of greenhouse gas emissions. Annex VI provides that the IMO should seek to regulate such emissions. But see s 25 of the UK Draft Climate Change Bill where power is granted to the Secretary of State to count such emissions in this respect.

18. The UK is a signatory to all annexes. General authority to issue orders in this respect is granted under s 128 of the MSA 1995. Note also that the International Convention for the Control and Management of Ships Ballast Water and Sediments was adopted by consensus at a Diplomatic Conference at IMO in London on 13 February 2004. The latest Annex VI is the lowest in ratification with 62 countries covering approximately 85 per cent of the world tonnage. Thus the non-obligatory character of the annexes has not prevented extensive ratification. However the major concern is the enforcement of the various measures.

19. Directive 2005/35/EC. See also Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements.

20. The Directive does not apply to pollution from warships and in cases where the ship or human life is in danger.

21. Art 4 EU Ship Source Pollution Directive 2005/35/EC amended by Directive 2009/123/EC art 4.

22. Annex I Regulation 11(b) of MARPOL 73/78.

23. Arguably "gross negligence" includes breach of pollution or other shipping regulations thus it broadens the scope of criminal liability significantly.

24. Art 5 of the original Directive has been amended by Directive 2009/123/EC to ensure consistency with MARPOL.

25. The Directive has been transposed into English law by Statutory Instrument 2009 No 1210, as the Merchant Shipping (Implementation of Ship-Source Pollution Directive) Regulations 2009 which came into force on 1 July 2009. The relevant provisions have been inserted in the Merchant Shipping (Prevention of Oil Pollution) Regulations 1996 (SI 1996 No 2154). Note that the UK implementation protects persons connected with a ship's business and this is defined under Regulation 11C(d) to owner, master, seafarer, cargo owners and the classification society.

26. Directive 2005/35/EC, art 3.





Directive imposes criminal liability even for minor cases of pollution when committed with intent, recklessly or with serious negligence in the territorial waters or internal waters of a Member State.[27] Otherwise minor cases which do not individually and, if repeated, collectively affect "the quality of water"[28] are not infringements under the Directive.[29]

## 3. LIABILITY FOR OIL POLLUTION FROM SHIPS

### (a) Civil Liability for Oil Pollution

Civil liability for oil pollution is covered by various international conventions. Tankers are treated differently from other ships because they have a higher risk of causing extensive pollution. For tankers compensation for pollution damage is provided by the shipowner up to a limit and in addition by a specially formed legal entity called the International Oil Pollution Compensation Fund (IOPCF) funded from money collected from oil importers.

The 1969 Civil Liability Convention (1969 CLC)[30] establishes strict but limited liability for the shipowner, coupled with compulsory insurance and direct action against the insurer. The 1969 CLC has been updated by a 1976 Protocol and, in some States including the UK, by the 1992 Protocol which forms the 1992 Civil Liability Convention (1992 CLC).[31] The 1969/1992 CLC are each supplemented by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (IOPC Fund) 1971[32]/1992 respectively. However, the 1971 Fund Convention ceased to be in force on 24 May 2002. Thus only the 1992 IOPC Fund is presently active. The role of the IOPC Fund is twofold. First, it provides additional compensation to victims of oil pollution in cases where compensation cannot be

27. Directive 2009/123/EC, art 4.1.

28. Note that the Directive does not specify this term. There are several EU instruments which affect the water quality in general. It is not clear whether the intention is that criminal liability will only be established if the quality of water is affected under one of these instruments or whether the term is to be interpreted in a more general way.

29. Directive 2009/123/EC, art 5.

30. International Convention on Civil Liability for Oil Pollution Damage, Brussels, 29 November 1969 which came into force on 19 June 1975. The Protocol to the International Convention on Civil Liability for Oil Pollution Damage, London, 19 November 1976, which came into force on 8 April 1971, has been used as an interim solution to increase the low limits of liability agreed within the 1969 CLC. The US has its own system of compensation for oil pollution damage which contains a tonnage rather than a value limit system, in contrast to the US approach to issues of global limitation.

31. International Liability Convention on Civil Liability for Oil Pollution Damage, London, 2 December 1992, which is created by the modification of the 1969 CLC in a 1992 Protocol to the 1969 CLC: see art 11(2) of the 1992 Protocol and also art 12(5). There was a not too dissimilar 1984 Protocol to the 1969 CLC also, which, despite being ratified by various major trading nations (e.g. France, Germany and Australia), was ratified by insufficient countries for it to be in force anywhere and its provisions have largely been included in the 1992 CLC. The 1992 Protocol came into force on 30 May 1996.

32. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), adopted 18 December 1971, entered into force 16 October 1978. Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 27 November 1992. While the 1971 Fund Convention is not in force any more, it continues to exist because of outstanding claims. An effort to wind up the Fund has been stalled by a freezing order, see Assuranceforeningen Gard Gjensidig vs The International Oil Pollution Compensation Fund 1971, Neutral Citation Number: [2014] EWHC 1394 (Comm). For the claimant the efforts of the IOPCF not to honour the sharing of oil pollution liability in the case of the Nissos Amorgos incident denotes a significant breach of the general principles underlying the oil pollution compensation regime.

received under the CLC because the shipowner's liability is exempted or where the shipowner and its insurer are financially unable to provide for compensation. In addition it provides compensation to marine pollution victims to limits of liability higher than those available against the shipowner. The CLC/IOPCF system has been very successful as shown by the wide ratification of the 1992 CLC by 132 States and the 1992 IOPCF, by 114 States.[33] A Protocol to IOPC Fund 1992 was agreed on 27 May 2003 for the creation of a voluntary third tier of liability for oil pollution. This third tier came into force in 2005, currently has 29 Contracting States[34] and is available only in those States which are party to it. It was produced following recognition that, in spite of successive increases in the limits of liability for oil pollution, the "maximum compensation afforded by IOPCF 1992 might be insufficient to meet compensation needs in certain circumstances in some Contracting States to that Convention".[35] The *rationale* for the Supplementary Fund is that it provides higher levels of compensation in States which choose to become parties, while enabling States which do not wish to burden their oil importers with the higher levels of contribution involved to remain outside. Oil spill damage from bunkers and lubrication oils from ships not employed for the carriage of oil are covered by the 2001 Bunker Oil Pollution Convention (2001 BOPC)[36] which establishes strict but limited liability for the shipowner and other persons associated with the running of the ship coupled with compulsory insurance and direct action against insurers. However unlike the CLC/FUND/Supplementary Fund system, the 2001 BOPC does not provide for a separate "stand-alone" limitation fund but preserves existing rights to limit liability whether under national or international law.[37]

In the UK, the Merchant Shipping Act 1995 rewrites the 1992 CLC (in Chapter III)[38] and the Fund Convention (in Chapter IV) into English law.[39] The 2003 Supplementary Fund has been enacted in the UK through the Merchant Shipping (Oil Pollution Compensation Limits) Order 2003.[40] The 2001 BOPC is implemented through the Merchant Shipping (Oil Pollution) (Bunkers Convention) Regulations 2006.

33. See the status of International Maritime Organization Conventions at www.imo.org/ (accessed 20 March 2014).
34. As at 14 June 2014.
35. IMO LEG/CONF.14/20 the Preamble to the Supplementary Fund. The development of the 2003 Supplementary Fund to the IOPCF was initiated as a response to a European Union White Paper on Environmental Liability (Brussels, 9 February 2000, COM (2000) 66), a Communication from the Commission to the European Parliament and the Council on the Safety of the Seaborne Oil Trade (COM (2000), 142 final) which found the liability regime for oil pollution to be unsatisfactory in two respects. First, the limits were considered to be too low and second, the right of the shipowner to limit liability was considered to be almost unbreakable. The Communication suggested (1) an EU-wide solution which would involve establishing a third-tier Fund, supported by the industry, with an overall ceiling of one billion euros, (2) strict liability for the person who causes pollution (i.e. not only for the sea carriers) and (3) sanctions for gross negligence imposed on the negligent party and payable to the State where the pollution occurs. The 2003 Supplementary Fund was created to avoid unilateral measures by the EU. As concluded, the European Directive 2004/35/CE of 21 April 2004 excludes from its application all major maritime conventions included in its Annex IV. The whole regime will be reviewed in 2013–2014.
36. Adopted on 23 March 2001 in London. Closed to signature on 30 September 2002. It came into force on 21 November 2008. 77 Parties, as at June 15, 2014.
37. 2001 BOPC, art 6. In other words, while the CLC produced new money from the shipowners to pay out for pollution damage the 2001 BOPC does not do so but relies on the general limitation of liability fund.
38. ss 152–172 as amended by the Merchant Shipping (Oil Pollution) (Bunkers Convention) Regulations 2006, SI 2006 No 1244. These Regulations came into force on 21 November 2008.
39. ss 173–181.
40. By replacing the limits of liability for the Fund under s 157 of the MSA 1995.





### (b) The Civil Liability Convention 1992

The 1992 CLC and Fund Conventions apply to oil pollution damage caused in the territory, including the territorial sea, of a Contracting State,[41] and to damage caused within 200 miles from the coast.[42] It also covers the costs of preventive measures "wherever taken".[43]

Thus it does not matter where the incident that caused the pollution has taken place but rather where the pollution damage occurred. Even where the incident has taken place within the waters of a non-Contracting State or on the high seas, if a Contracting State has suffered oil pollution damage in its EEZ or territorial waters, the 1992 CLC will apply and will cover preventive measures undertaken in the jurisdictional zones of the coastal State or the high seas. Note also that the application of the 1992 CLC does not depend on whether the polluting ship is registered in a Contracting State or not.

The 1992 CLC/Fund defines oil as any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, whether carried on board a ship as cargo or in the bunkers of a ship.[44] However, the 1992 CLC wording does not define precisely which types of oil are persistent and thus included within the scope of the convention.[45]

The difficulty of defining the scope of the 1992 CLC is resolved partly by the express reference to some types of oil within the oil definition[46] and partly by the development of a definition of non-persistent oils by the International Oil Pollution Compensation (IOPC) Fund.[47] Under this definition non-persistent oil is that which

> at the time of shipment, consists of hydrocarbon fractions, (a) at least 50 per cent of which, by volume, distils at a temperature of 340°C and (b) at least 95 per cent of which, by volume, distils at a temperature of 370°C when tested by the ASTM Method D86/78 or any subsequent revision thereof.[48]

All oils that do not fall within the non-persistent oil definition are persistent oils and thus subject to the CLC/Fund system. This working definition is more accurate

41. However there is no requirement that the damage should be only in one Contracting State. See also *Landcatch Ltd v International Oil Pollution Compensation Fund* [1999] 2 Lloyd's Rep 316, at p 328.
42. That is either an EEZ of a Contracting State, established in accordance with international law, or, if the State has not established such a zone, an area beyond and adjacent to the territorial sea of that State extending no more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured – 1969 CLC, art II. MSA 1995 ss 152–170 refer to damage and measures in the territory of the UK (s 153(1)) and to damage and measures in the territory of another CLC State. In turn the UK territory consists of the territorial sea and the British Fishery limits set out under the Fishery Limits Act 1976 and the territorial waters and the EEZs (or 200 mile zones) of other CLC States (s 170(4)).
43. 1992 CLC, art II(b). Which must be taken for the purpose of preventing damage to a Contracting State.
44. Art I(5).
45. s 170(1) of the MSA 1995 specifies "oil" as persistent hydrocarbon mineral oil. This excludes the examples given in the 1992 CLC definition. However, it does not appear to produce a different result as the term is the same and must be interpreted by reference to the 1992 CLC. The Merchant Shipping (Oil Pollution) (Bunkers Convention) Regulations 2006 amend the term to read as: "oil" except in the term "bunker oil" means persistent hydrocarbon mineral oil. No practical change is made by this modification.
46. 1992 CLC, art I(5).
47. See for example Caryn Anderson, "The International Tanker Owners Pollution Federation Limited (ITOPF) Persistent vs Non-Persistent Oils: What You Need to Know", article in: "Beacon" (Skuld Newsletter) July 2001, available at www.itopf.com/_assets/documents/persistent.pdf where damage to paint coatings in marinas and harbours and to marine organisms are suggested as potential damage arising from non-persistent oils. Atmospheric pollution can also be an issue although it has not at the moment been considered as a consequence that should create civil liability.
48. Ibid.

than that included in the 1992 CLC.[49] However the working definition[50] cannot be considered binding on any national court because it does not legally carry the weight of a definition within the meaning of the convention.

The establishment of liability for pollution damage only for persistent oils arises from their evident impact on wildlife, beaches and ecosystems. When the 1969 CLC was developed it was, and still is, assumed that non-persistent oils will dissipate rapidly through evaporation into the atmosphere thus not causing significant damage or clean-up costs.[51] However, it would be wrong to assume that there is no pollution impact from incidents involving non-persistent oils.[52]

### (c) What Types of Vessel are Covered?

The 1992 CLC covers ships defined[53] as "any sea-going vessel and any seaborne craft of any type whatsoever". There is no definition of "seagoing", "vessel", "seaborne" or "craft" in the convention. The 1992 CLC does not apply to warships and other government ships used for non-commercial activities.[54]

The 1992 CLC further restricts its application to ships "constructed or adapted for the carriage of oil in bulk as cargo",[55] thus giving emphasis to the requirements of approval of ships as physically suitable for the carriage of oil.[56] The 1992 CLC applies always to ships which are only capable of carrying oil in bulk. In addition the 1992 CLC extends[57] the scope of coverage to oil spillage from Oil/Bulk/Ore ships (OBOs) which arguably fulfil the requirement to be constructed for the carriage of oil provided that these vessels are laden with oil or that they are on their first voyage after the carriage of oil and they have oil residues from the previous voyage on board.[58]

Oil pollution damage arising from barges without steering and propulsion, or floating storage units (FSU) as well as floating production, storage and offloading units (FPSO) also raises the question of applicability of the 1992 CLC.[59] While for barges with no

49. However, it presents difficulties as it cannot be applied to non-mineral oils because they cannot tolerate the distillation process. These have to be distinguished on the basis of their mineral character. Caryn Anderson (fn 48).
50. Liquefied natural gas (LNG) and liquefied petroleum gas (LPG) as well as other gas products, gasolines, kerosenes and light distillates are non-persistent oils and are therefore not covered by the CLC/Fund framework.
51. In this context the distinction is not necessary as any claim for damage arising from non-persistent oil would have been difficult to prove.
52. Caryn Anderson (fn 47).
53. The enactment of the 1992 CLC into English law employs the same definition, s 170 MSA 1995.
54. 1969 and 1992 CLC, art XI.
55. There is no definition of what "in bulk" may mean but the whole term arguably focuses on the words "as cargo". Thus, any quantity of oil carried under a contract of carriage of goods should trigger the application. By contrast, where oil is not part of the cargo but, for example, is contained in tanker trucks which are then carried on a ship (whether capable of carrying oil or not) the 1969 and the 1992 CLC will arguably not be applicable, irrespective of the amount of oil transported.
56. The corresponding restrictions in the definition of ship can be found in s 153(3) of the MSA 1995.
57. 1992 CLC, art I.I, see also s 153(3) and (4) of the MSA 1995.
58. Oil residues may be pumpable or non-pumpable oil mixtures caused by contamination of the oil by seawater or chemicals or simply by reduction in the oil temperature.
59. In the UK as part of the licence approval procedures operators of offshore oil and gas installations and pipelines must become members of the voluntary scheme Offshore Pollution Liability Association Limited (OPOL) or provide alternative liability coverage of the same value. Strict liability under the Agreement is limited to $120 million per incident and $240 million aggregate is imposed. Clean-up costs claimed by public authorities and "pollution damage" (cl 15 of OPOL agreement) means only direct loss or damage by direct contamination from a discharge of oil. Claimants are clearly not precluded from seeking compensation in courts. FPSOs and FSUs used in the production process as well as when temporarily removed from their normal station are covered by this agreement.





propulsion or steering it is, under English law, well established that these are to be treated as ships, such an answer is not obvious for the other types of craft and is to be decided on a case by case basis.

The application of the 1992 CLC will also turn upon whether the structure under discussion is "carrying oil in bulk as cargo".[60] The notion of carriage usually involves transportation rather than containment thus making it strongly arguable that where the intention is storage rather than carriage the 1992 CLC would be inapplicable. While this interpretation is literally consistent with the wording of Article I(1) it would practically mean that pollution damages from such structures used for storage would require further legislation to achieve the same coverage as under the CLC.[61]

The IOPCF is presently discussing the possibility of expanding its coverage after the Greek Supreme Court held that the *Slops*,[62] a decommissioned tanker used for storage of oil, was covered by the definition of ship.[63]

Notably, all structures that fall under the definition of ship in Article I(1) would be subject to the 1992 CLC irrespective of their size. However, compulsory insurance is only required for vessels larger than 2,000 grt.[64] For vessels smaller than 2,000 grt no compulsory insurance and no direct action against the insurer is available but the same type of liability is imposed as with larger vessels.

### (d) Who is Liable?

The 1992 CLC imposes strict liability on the owner of the ship causing pollution damage.[65] Strict liability in this context means the claimant needs only to prove that the pollution damage suffered was caused by an oil covered by the convention which came from a ship covered by the convention. There is no need to prove fault of the shipowner. The shipowner can avoid liability only under some limited exceptions. Strict liability does not prevent the shipowner from claiming against the party responsible for the pollution damage, nor does it remove the defence of contributory negligence by any victim of pollution damage. In essence it provides an obligation to pay out the claims by third party claimants thus channelling the claims, making the payment of compensation easier and quicker, reducing the litigation and minimising or excluding the possibility of security measures against the shipowner's property.

60. As required under art I(1) of the 1992 CLC.
61. The oil contained in such craft is not included in the tonnage of imported oil on the basis of which contributions to the IOPC Fund are levied. In 2006 the Greek Supreme Court held that the *Slops*, a former tanker from which the propeller and main machinery had been removed, was a "ship" for the purpose of the 1992 Fund Convention, although the Executive Committee of the Fund had decided that it was not. See IOPC Fund document 92FUND/EXC.34/7 at http://documentservices.iopcfunds.org/meeting-documents/download/docs/2867/lang/en/ (accessed 20 March 2014).
62. See fn 62.
63. See IOPC/MAY14/8/1 for an update of the unresolved debate which has been going on for a significant period of time.
64. Art VII(1).
65. Art III(1). s 153 of the MSA 1995 makes reference to the "owner" defined as the "registered owner" under s 170(1). The amendment by the Merchant Shipping (Oil Pollution) Bunkers Convention) Regulations 2006, SI 2006 No 1244, replaces the word "owner" with the term "registered owner" and also amends s 170(1) to point to the new section 153A(7) which states "In this Chapter (except in section 170(1) 'owner' except when used in the term 'registered owner', means the registered owner, bareboat charterer, manager and operator of the ship".