(2) the ship is operated under a demise charter by a body corporate being a qualified person (whether or not a majority interest in the ship is owned by one or more qualified persons),

and a representative person is appointed in relation to the ship.

1.007 A ship ceases to be registrable if one of the following circumstances occurs:

(1) being a ship registered by virtue of [a major interest]; a majority interest in the ship ceases to be owned by one or more qualified persons;

(2) being a ship registered by virtue of [a demise charter] —

(a) the ship ceases to be operated under a demise charter by a body corporate being a qualified person (whether by reason of the termination of the demise charter or otherwise);

(b) the ship or any share in or part of the ship is transferred or transmitted; or

(c) the rights of the demise charterer under the demise charter are assigned under a sub-demise charter;

(3) the ship is taken in war or hostilities, as a result of which the owner or demise charterer has lost control over the operation of the ship;

(4) the ship is broken up, or is an actual or constructive total loss such that it is no longer capable of being used in navigation;

(5) the ship at the time of registration remains registered in a place outside Hong Kong;

(6) the ship subsequently becomes registered in a place outside Hong Kong; or

(7) a representative person ceases to be appointed in relation to the ship.[15]

1.008 One or more persons may be treated as owning a majority interest in a ship:

> "if there is vested in that person or in those persons, taken together, the legal title to more than one half of the shares or parts into which the property in the ship is divided for the purposes of registration, there being left out of account for this purpose any share or part which is jointly owned by a person other than a qualified person."[16]

1.009 A "qualified person" is defined by the Ordinance as follows:

(1) an individual who holds a valid identity card and who is ordinarily resident in Hong Kong;

(2) a body corporate incorporated in Hong Kong; and

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[15] Merchant Shipping (Registration) Ordinance, s.11(2).

[16] *Ibid.*, s.11(3).

1.003 The administrative institution in Hong Kong that charges ship registration directly is HKSR, which was set up in December 1990 under the Ordinance.[8] Upon reunification with the PRC in 1997, Hong Kong was authorised to maintain a separate shipping register and issue certificates using the name "Hong Kong, China." The proper flags to be flown on a Hong Kong registered ship are the national flag of PRC directly above the regional flag of Hong Kong.[9]

1.004 In *Win More Shipping Ltd v Director of Marine*,[10] a dispute arose as to whether the Hong Kong Marine Department or the Ministry of Foreign Affairs of the PRC has the authority to negotiate with a foreign authority regarding a suspected violation of the United Nations Convention on the Law of the Sea (UNCLOS) as was conducted by the owner of a vessel registered with HKSR. Chow J ruled in the case that Hong Kong is not a "flag State" under UNCLOS and has no standing or locus to make any request involving a foreign affair to a foreign authority.[11]

1.005 The Hong Kong courts have strongly dissuaded the owners from the practices of dual registration. In *The Tai Yang He*[12] where such a concern arose, Waung J reiterated the legal significance of ship registration in the following manner:

> "[N]ormally, the reason for registration is you fly a particular flag and you fly only that flag and you sail at all times under one flag and one name. You do not go around the world changing your name nor changing your flag as you go along. It can deflag, deregister and change to a new register, but you certainly do not sail around the world flying one flag with one name while disguising under the another name and under the another ownership. That seems to me, to be a very dangerous practice, which this court certainly would discourage any ship owner from indulging in ... [A]s far as the Admiralty Court of Hong Kong is concerned, I would like to make it very clear that we do not encourage this practice and we do not find that particular kind of practice as being acceptable."[13]

3. Definition of a Ship

1.006 A ship is defined by the Ordinance as "a vessel capable of navigating in water not propelled by oars, including air-cushion vehicle."[14] The following ships are registrable under s.11(1) of the Ordinance:

(1) a majority interest in the ship is owned by one or more qualified persons; or

(2) the ship is operated under a demise charter by a body corporate being a qualified person (whether or not a majority interest in the ship is owned by one or more qualified persons),

and a representative person is appointed in relation to the ship.

1.007 A ship ceases to be registrable if one of the following circumstances occurs:

(1) being a ship registered by virtue of [a major interest]; a majority interest in the ship ceases to be owned by one or more qualified persons;

(2) being a ship registered by virtue of [a demise charter] —

(a) the ship ceases to be operated under a demise charter by a body corporate being a qualified person (whether by reason of the termination of the demise charter or otherwise);

(b) the ship or any share in or part of the ship is transferred or transmitted; or

(c) the rights of the demise charterer under the demise charter are assigned under a sub-demise charter;

(3) the ship is taken in war or hostilities, as a result of which the owner or demise charterer has lost control over the operation of the ship;

(4) the ship is broken up, or is an actual or constructive total loss such that it is no longer capable of being used in navigation;

(5) the ship at the time of registration remains registered in a place outside Hong Kong;

(6) the ship subsequently becomes registered in a place outside Hong Kong; or

(7) a representative person ceases to be appointed in relation to the ship.[15]

1.008 One or more persons may be treated as owning a majority interest in a ship:

> "if there is vested in that person or in those persons, taken together, the legal title to more than one half of the shares or parts into which the property in the ship is divided for the purposes of registration, there being left out of account for this purpose any share or part which is jointly owned by a person other than a qualified person."[16]

1.009 A "qualified person" is defined by the Ordinance as follows:

(1) an individual who holds a valid identity card and who is ordinarily resident in Hong Kong;

(2) a body corporate incorporated in Hong Kong; and

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[8] "Hong Kong Shipping Register User's Handbook" http://www.mardep.gov.hk/en/pub_services/sec01.html (visited 3 November 2014).

[9] Hong Kong Shipping Register, https://www.mardep.gov.hk/en/pub_services/home.html (visited 30 August 2019).

[10] [2019] HKCFI 1137.

[11] [2019] HKCFI 1137, [46].

[12] (HCAJ 199/2000, [2001] HKEC 2083).

[13] (HCAJ 199/2000, [2001] HKEC 2083), [11].

[14] *See* n.8.

[15] Merchant Shipping (Registration) Ordinance, s.11(2).

[16] *Ibid.*, s.11(3).

(3) a registered non-Hong Kong company as defined by s.2(1) of the Companies Ordinance (Cap.622).[17]

1.010 A representative person is "a qualified person and the owner or part owner of the ship; or a body corporate incorporated in Hong Kong which is engaged in the business of managing, or acting as agent for, ships."[18]

4. Registration of Ship Ownership and Demise Charter

(a) General rules

1.011 A person shall not describe a registered ship by any name other than that by which the ship is for the time being registered.[19] The owner or demise charterer of a registered ship shall not change the name of the ship, or cause or permit any such change, without the previous written permission of the Registrar.[20] Every ship shall, before it is registered, be marked permanently and conspicuously to the satisfaction of the Registrar in accordance with the specific requirements under the Ordinance.[21]

1.012 An application for ship registration shall be made by the person or persons applying to be registered as owners in the following manner as prescribed by the Ordinance:

(1) in the case of one or more individuals, by that or those persons, as the case may be, or by an individual or individuals appointed to act on his or their behalf; and

(2) in the case of one or more bodies corporate, by an individual or individuals authorised to act on its or their behalf.[22]

1.013 An application for registration of a ship, which is to be registered by virtue of a demise charter, shall be made by both the demise charterer and the owner in the manner mentioned above.[23]

1.014 The interest in a ship may be divided into any number of shares or parts and any number of persons may be registered as owners of the ship or of a share in or part of the ship.[24] Any number of persons may be registered as joint owners of a ship or of any share in or part of the ship, but any such joint owner is not entitled to dispose of his interest in severalty.[25] A body corporate shall be registered as an owner by its corporate name.[26]

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17 *Ibid.*, s.11(4).
18 *Ibid.*, s.68(2).
19 *Ibid.*, s.17(1).
20 *Ibid.*, s.17(2).
21 *Ibid.*, s.18(1).
22 *Ibid.*, s.19(1).
23 *Ibid.*, s.19(2).
24 *Ibid.*, s.12.
25 *Ibid.*
26 *Ibid.*

1.015 A person shall not be entitled to be registered as an owner of a ship, which is to be registered by virtue of ship ownership, or of a share in or part of such a ship until he, or in the case of a body corporate the person authorised under s.84 of the Ordinance to make declarations on behalf of the body corporate, has made and signed a declaration of entitlement to own a ship registered in Hong Kong, in the specified form, which shall include the following:

(1) in the case of a body corporate, a statement that the declarant is authorised to make the declaration on behalf of the body corporate;

(2) in the case of an individual purporting to be a qualified person, a statement that he holds a valid identity card and is ordinarily resident in Hong Kong;

(3) in the case of a body corporate purporting to be a qualified person, a statement of the circumstances of incorporation in Hong Kong or of registration under Part XI of the predecessor Companies Ordinance (Cap.32)[27] as in force from time to time before the commencement date[28] of s.2 of Sch.9 of the Companies Ordinance[29] or under Part 16 of the Companies Ordinance,[30] as the case may be;

(4) in the case of a body corporate other than a qualified person, a statement of the circumstances of incorporation or registration of the body corporate;

(5) a statement of the number of shares in, or the fraction or percentage of, the ship in respect of which the legal title will be vested in the declarant;

(6) a statement that to the best of the declarant's knowledge and belief, a majority interest in the ship will upon registration be owned by one or more qualified persons;

(7) a statement that the general description of the ship contained in the application is correct;

(8) a statement that the ship is not registered in any place outside Hong Kong or, if it is so registered, that the declarant will secure deletion of the ship from the register in every such place; and

(9) in the case of a person other than a qualified person, a statement that the declarant consents to the ship being registered in Hong Kong.[31]

1.016 A body corporate shall not be entitled to be registered as the demise charterer of a ship, which is to be registered by virtue of a demise charter, until the person authorised under s.84 of the Ordinance — ie, a notary public or a commissioner for oaths — to make declarations on behalf of the body corporate has made and signed a declaration that shall include the following:

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27 Repealed on 3 March 2014.
28 The commencement date is 3 March 2014.
29 Schedule 9 to the Companies Ordinance is titled "Consequential and Related Amendments to Companies Ordinance (Cap.32) and its Subsidiary Legislation."
30 Part 16 of the Companies Ordinance provides "Miscellaneous" provisions.
31 Merchant Shipping (Registration) Ordinance s.20(1).

(1) a statement that the declarant is authorised to make the declaration on behalf of the body corporate;

(2) a statement of the circumstances of incorporation of the body corporate in Hong Kong or of registration under Part XI of the predecessor Companies Ordinance as in force from time to time before the commencement date of s.2 of Sch.9 to the Companies Ordinance or under Part 16 of the Companies Ordinance, as the case may be;

(3) a statement that the body corporate has entered into a demise charter-party in respect of the ship with the owner of the ship;

(4) a statement that pursuant to the terms of the demise charter-party, the body corporate is able to register the ship in its name as the demise charterer;

(5) a statement that the general description of the ship contained in the application is correct;

(6) a statement that the ship is not registered in any place outside Hong Kong or, if it is so registered, that the declarant will secure deletion of the ship from the register in every such place;

(7) a statement that a true, correct and complete copy of the demise charter-party is attached to the declaration; and

(8) a statement that the consent of the owner of the ship to registration of the ship in Hong Kong is attached to the declaration.[32]

(b) First registration

1.017 On the first registration of a ship, which is to be registered by virtue of ship ownership, a ship owner or demise charterer shall provide evidence required by s.21 of the Ordinance — mainly including those in relation to the ship, in relation to each qualified person applying to be registered as an owner and as may be specified in instructions or as the Registrar may reasonably require.

(c) The register

1.018 When the requirements of the Ordinance preliminary to registration have been complied with in relation to a ship, the Registrar shall enter in the register the following particulars relating to the ship:

(1) the name of the ship;

(2) such details specified in the certificate of survey as the Registrar considers essential for the purposes of registration;

(3) the particulars of the ship's origin as stated in the application for registration;

(4) the name, address and description of each owner including, where applicable, each owner other than a qualified person, and a statement of the

[32] *Ibid.*, s.20(2).

number of shares in or parts of the ship owned by each and the total interest in the ship;

(5) where the ship is to be registered by virtue of [a demise charter] —

(a) the name, address and description of the demise charterer; and

(b) the period of the demise charter as specified in the charter-party; and

(6) the name and address of the representative person.[33]

(d) Certificate of registry

1.019 Upon the registration of a ship, the Registrar shall grant a certificate of registry, in the specified form, containing the above particulars relating to the ship[34] and shall retain in his possession the following documents in respect of the ship:

(1) the application for registration;

(2) the certificate of survey;

(3) the certificate or declaration of marking of the ship;

(4) the declarations made under s.20(1) or 20(2),[35] as the case may be;

(5) [Repealed];

(6) any foreign certificate of deletion delivered to the Registrar whether pursuant to s.58[36] or otherwise;

(7) the copy of the condemnation (if any); and

(8) such other documents as are specified in instructions or as the Registrar may reasonably require.[37]

(e) Provisional registration

1.020 An application for provisional registration of a ship: (1) shall be made in the specified form by the person or persons applying to be provisionally registered as an owner and (as the case may be) by the demise charterer, in the manner provided in respect of an application for registration under s.19 of the Ordinance;[38] (2) shall include the declarations and consents referred to in that section; and (3) shall be accompanied by declarations made under s.20(1) or 20(2) of the Ordinance,[39] as the case may be.[40] Pertinent evidence shall be provided according to s.27 of the Ordinance.[41]

[33] *Ibid.*, s.23.
[34] *Ibid.*, s.24.
[35] Section 20 of the Ordinance is titled "Declaration by and on behalf of owners and demise charterers."
[36] Section 58 of the Ordinance is titled "Delivery of foreign certificate of deletion."
[37] *Ibid.*, s.25.
[38] Section 19 of the Ordinance is titled "Application for registration."
[39] Section 20 of the Ordinance is titled "Declaration by and on behalf of owners and demise charterers."
[40] *Ibid.*, s.27.
[41] Section 27 of the Ordinance is titled "Application for provisional registration."

1.021 Without prejudice to the provisions of ss.54–63 of the Ordinance, which address issues in relation to closure of registration, the provisional registration of a ship shall be deemed to be closed upon: (1) the registration of the ship under s.23;[42] or (2) the expiry of a period of one month commencing on the date of provisional registration, whichever first occurs.[43] The Registrar may, upon application made by the owner or demise charterer of a ship while the ship is provisionally registered, extend the period of provisional registration referred to above by one or more further periods of one month but he shall not extend the period: (1) by more than one month on any one application; or (2) in any case, unless there are special circumstances that justify the extension.[44] Upon the provisional registration of a ship, the Registrar shall grant a certificate of provisional registry.[45]

(f) Transfer of a registered ship

1.022 The transfer of a registered ship may be effected by a bill of sale, which shall:

1.023 (1) contain such description of the ship contained in the certificate of survey as is sufficient to identify the ship to the satisfaction of the Registrar; and (2) be executed by the transferor in the presence of, and be attested by, one or more witnesses.[46] Where a registered ship is transferred in accordance with s.39 or 79 of the Ordinance,[47] the transferee shall not be entitled to be registered as an owner of the ship until he or in the case of a body corporate, the person authorised under s.84 of the Ordinance — ie, a notary public or a commissioner for oaths — to make declarations on behalf of the body corporate, has made and signed a declaration of transfer in the specified form referring to the ship and containing: (1) a statement of the qualification of the transferee to own a ship registered in Hong Kong, or if the transferee is a body corporate, of such circumstances of the constitution thereof as prove it to be a qualified person; and (2) a statement that, to the best of his knowledge and belief, a majority interest in the ship will upon transfer be owned by one or more qualified persons.[48]

1.024 Upon lodgment of the bill of sale and the declaration of transfer (if required), the Registrar shall enter in the register the name of the transferee as owner of the ship and shall endorse on the bill of sale: (1) the fact of that entry having been made; and (2) the day and hour of making the entry.[49]

1.025 Where the property in a ship is transmitted to any person by any lawful means other than a transfer pursuant to s.39 or 79[50] and a majority interest in the ship remains in the ownership of one or more qualified persons, the person or persons to whom the ship is transmitted shall make and sign a declaration of transmission in the specific

[42] Section 23 of the Ordinance is titled "Entry of particulars in the register."
[43] *Ibid.*, s.29(1).
[44] *Ibid.*, s.29(2).
[45] *Ibid.*, s.30(1).
[46] *Ibid.*, s.39.
[47] Section 39 of the Ordinance is titled "Transfer of ships," and s.79 of the Ordinance is titled "Transfer of registered Government ship."
[48] *Ibid.*, s.40(1).
[49] *Ibid.*, s.41(1).
[50] *See* n.47.

form containing: (1) such description of the ship contained in the certificate of survey as is sufficient to identify the ship to satisfaction of the Registrar; (2) the statements referred to in s.40(1)(a) and 40(1)(b);[51] and (3) a statement of the manner in which and the person or persons to whom the property has been transmitted. The declaration of transmission shall be accompanied by such evidence of the transmission as may be specified in instructions or as the Registrar may reasonably require. Upon lodgment of the declaration of transmission and the evidence required, the Registrar shall enter in the register the name of the person or persons entitled under the transmission as the owner of the ship and the manner in which the property has been transmitted. Where there is more than one such person mentioned above, all such persons shall be considered as joint owners of the whole of the property transmitted.[52]

(g) Registered and beneficial ownership

1.026 Section 52 of the Ordinance is headed "Trust not recognized" and stipulates that "notice of a trust, express, implied or constructive, shall not be entered in the register or be receivable by the Registrar." Nonetheless, an equitable interest in a ship can exist in the light of s.53(1), which provides that, subject to ss.47, 51 and 52,[53] "beneficial interests may be enforced by or against the owner or mortgagee of a ship in respect of his interest in the ship in the same manner as in respect of any other personal property." Section 53(2) further clarifies that "beneficial interests" in s.53(1) includes interests arising under contract and other equitable interests. Thus, judges, in certain circumstances, may need to decide whether or not it is necessary to go behind registered ownership of a ship for her beneficial ownership where the two may be discordant with each other. One example of such circumstances premises on the exercise of admiralty jurisdiction by the High Court as prescribed by s.12B(4) of the High Court Ordinance (Cap.4) (HCO).

1.027 Section 12B of the HCO, which is headed "Mode of exercise of admiralty jurisdiction," provides in its para.4 as follows:

> "In the case of any such claim as is mentioned in section 12A(2)(e) to (q), where—
>
> (a) the claim arises in connection with a ship; and
>
> (b) the person who would be liable on the claim in an action in personam ('the relevant person') was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,
>
> an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the Court of First Instance against—
>
> (i) that ship, if at the time when the action is brought the relevant person is either the *beneficial owner of that ship as respects all the shares* in it or the charterer of it under a charter by demise; or (emphasis added.)

[51] Section 40 of the Ordinance is titled "Declaration of transfer."
[52] *Ibid.*, s.42.
[53] *Ibid.*, s.47 is headed "Mortgagees to have power of disposal," s.51 "Power of disposal by owner," and s.52 "Trust not recognized."

(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it."

1.028 The conventional view on the conclusiveness of registration in respect of beneficial ownership of a ship has been well briefed by Litton J in The Resource I as this: "in the general run of things, registration would be virtually conclusive, and it would take a wholly exceptional case for it to be otherwise."[54] This view has sustained before the Hong Kong Courts in the past decades in a number of cases such as *The Almojil* 61,[55] *The Bo Shi Ji 393*,[56] *The Convenience Container*,[57] *The Blue Bridge*[58] and *The BBG Glory*.[59]

1.029 As is also pointed out by Litton J in The Resource I:

> "[i]t is possible that registration is, as a matter of law, not conclusive on the issue of ownership; conceivably, there are circumstances where it might be shown that the registered owner was in fact not the legal and beneficial owner of all the shares in the ship: The fraudulent procurement of registration would be an example."[60]

1.030 In *The Almojil* 61,[61] one of the core issues for Lam and Kwan JJ to decide in the appeal was whether the plaintiff was entitled to rely on registered ownership and take the registered owner to be the vessel's beneficial owner "as respects all the shares in it," even though part beneficial owners may exist. Disagreeing with the contention that the plaintiff enjoyed an absolute right to do so, the judges indicated that the "compelling circumstances" that can justify an overlook of registration may not be limited to the fraudulent procurement of registration.[62]

1.031 Where the plaintiffs intend to launch an in rem action by going behind registration, their "knowledge" about the registered and beneficial ownership may be relevant for the courts to decide whether such going behind should be granted. As Clough J pondered in *The Ocean Star* 1, there should be:

> "a distinction between a party who has only particulars of registered ownership to rely on when applying for a warrant of arrest and a party who has strong evidence that A is the true beneficial owner of a ship but nevertheless alleges on oath that he believes B, the registered owner, to be the beneficial owner without disclosing that there is also evidence to show that A is the true beneficial owner."[63]

[54] (2000) 3 HKCFAR 187, 195G–196C.
[55] [2015] 3 HKLRD 598.
[56] [2015] 3 HKLRD 424.
[57] [2007] 3 HKLRD 575.
[58] [2003] 1 HKC 325.
[59] [2017] 5 HKLRD 394.
[60] See n.55.
[61] [2015] 3 HKLRD 598.
[62] *Ibid.*, [67].
[63] *Solvang Shipping Co v Owners of the Ship or Vessel "Cynthia G"* (HCAJ 367/1984, [1985] HKLY 948), [51].

1.032 Further, as shown in *The Rung Ra Do*,[64] whether or not the judges would allow the plaintiffs to go behind registration in their in rem actions also depends on how persuasively the plaintiffs have established the beneficial ownership that is alleged to be discordant with the registered ownership. In *The Blue Bridge*,[65] Waung J also maintained that:

> "[i]t is of course true that generally one looks to the register of the ship to ascertain who was the owner but there are special cases where the register is not conclusive, and this is particularly so when there are good evidence to show who was the owner at the time."[66]

1.033 In a situation where, when a writ *in rem* was issued, the vessel was registered on two registers, the judges will evaluate the reliability of each register based on the evidence submitted by the relevant parties and grant the admission of the one that provides more reliable data of ownership, as Waung J did in *The Blue Bridge*.[67]

5. Registration of Ship Mortgage

1.034 A registered ship may be made secure for any obligation by way of a mortgage under the Ordinance.[68] Upon lodgment of a mortgage instrument creating a ship mortgage, provided any consents required by the Ordinance, the Registrar shall enter in the register particulars of the mortgage and shall endorse on the mortgage instrument the date and time of registration. Mortgage instruments shall be registered in the order of their lodgment.[69]

1.035 Where two or more mortgages are registered in respect of the same ship, priority among the mortgagees shall be in accordance with the order of registration of the mortgages, irrespective of the date upon which they were made or executed and notwithstanding any express, implied or constructive notice. No mortgage instrument shall be registered except with the prior written consent of all the holders of mortgages then registered against the ship concerned. Unless the holders of all registered mortgages having priority subsequent to such mortgage otherwise agree in writing, the priority accorded to a mortgage shall extend only to those obligations expressed to be secured by the mortgage instrument or any instrument referred to in the mortgage instrument.[70]

1.036 A mortgage of a registered ship does not have the effect of the mortgagee becoming, or the mortgagor ceasing to be, the owner of the ship except to the extent necessary to make the ship available as a security under the mortgage.[71] A mortgagee of a registered

[64] [1994] 3 HKC 621.
[65] [2003] 1 HKC 325.
[66] *Ibid.*, [20].
[67] *Ibid.*
[68] Merchant Shipping (Registration) Ordinance s.44(1).
[69] *Ibid.*, s.44.
[70] *Ibid.*, s.45.
[71] *Ibid.*, s.46.

the charterers may be awarded money (usually half of demurrage), which is known as "despatch."

6.005 After the cargo is loaded, the ship then carries the goods from the loading port to the destination port, for discharge and delivery, where the goods are to be unloaded. Once the goods are unloaded, then the voyage charter is complete. Details of the various concepts associated with a voyage charterparty, the pertinent cases and any potential issues that arise in a voyage charter are discussed below.

2. An Overview of the Gencon 1994 Charterparty

(a) Introduction

6.006 Gencon is a standard form for a voyage charter drafted and recommended by BIMCO, and is commonly used by shippers and carriers as a basic template to base their voyage charter on. Gencon was drafted with the intention to cover the most general categories of goods to be carried by voyage charter. There are various other kinds of standard forms for voyage charters which can be specific to the type of cargo, such as Asbatankvoy (for oil tankers), Bimchemvoy 2008 (for chemical tankers), Cementvoy 2006 (for cement), Gasvoy 2005 (for LPG, ammonia and other kinds of gasses), among others.

6.007 Gencon was first issued in 1922 (Gencon 22), revised in 1976 (Gencon 76) and most recently in 1994 (Gencon 94). Each revision has attempted to address the previous issues that may have arisen due to the potential lack of clarity in the Gencon forms.

6.008 Gencon is divided into two main parts. Part 1 consists of a series of blank boxes to be filled in by the parties, while Part 2 contains 19 standard clauses, which form the substantive legally binding clauses agreed to by the parties. These clauses are often amended to the satisfaction of the parties, who may have different demands depending on the nature of the cargo, parties, etc., which can fundamentally change the nature of the charter.

6.009 A basic understanding of the general template of the Gencon standard form is useful because of the familiarity it provides to regular users. If certain clauses stand unamended, parties would be immediately familiar with the kinds of contractual obligations that would apply. Additionally, when there are other forms of agreement made between parties, it is also a common occurrence for there to be an incorporation of the Gencon charterparty by reference, even partially (or where applicable), into the overall charterparty.

(b) Gencon Part 1

6.010 In Part 1 of the Gencon form, there are a number of blanks to be filled in by the parties. This information sets out the basic details expected by the parties. With reference to the numbers given on the Gencon form, the boxes request the names and details of the: (1) shipbroker; (2) place and date of the agreement; (3) owners; (4) charterers; (5) the vessel's name; (6) the gross tonnage (GT) or net tonnage (NT) of the vessel; and

(7) the deadweight tonnage. The GT of a vessel is calculated using all of the enclosed space within the ship, while the NT gives the volume of all the cargo spaces on the ship. The provision of either the GT or NT is in compliance with the International Convention on Tonnage Measurement of Ships (1969).

6.011 Further, boxes: (8) the present position of the vessel (at the time of making the charterparty); (9) when the vessel is expected to be ready to load; (10) the loading port or place; (11) the discharging port or place; and (12) the cargo, all have to be provided in Part 1 of the Gencon form. The above requirements are helpful for the owners and charterers to understand the scope of the voyage charterparty, including where and when the vessel will be used.

6.012 Next, the various costs and fees are also settled on the Gencon form. The boxes ask for the: (13) freight rate; (14) freight payment, including the currency of the freight and how to pay it; (16) laytime; (20) demurrage rate; (22) the General Average to be adjusted at; (23) freight tax liability; and (24) the brokerage commission.

6.013 Due to the various liabilities that may arise in the process of loading and unloading the goods, there are a number of boxes that help determine the responsibility and liability during this operation. These boxes are namely: (15) whether the vessel's handling gear is to be used (in the loading and unloading of cargoes); (17) shippers and their place of business; (18) agents at the loading port; and (19) agents at the discharging port.

6.014 Additionally, the box (21) cancelling date should be provided, which is the latest date that the vessel can arrive at the loading port. If the vessel fails to arrive by the cancelling date, the charterers are entitled to terminate the charter, subject to a number of conditions which restrict the wide scope of this right.

6.015 Finally, the box (25) governing law and place of arbitration, and any box (26) additional clauses covering special provisions, if agreed, are also included on the Gencon form. These boxes give the opportunity to clarify the legal position of the Gencon form, and can be used to incorporate bespoke clauses for the benefit of the parties. As space under box (26) is limited, additional rider clauses are appended on extra sheets after the Gencon form.

6.016 The above categories are a convenient "fill in the blanks" form for parties to enter their pertinent details, while Part 2 of the Gencon form contains clauses which give effect to these details as agreed to by the parties. It is Part 2 of the Gencon form which most merits discussion and analysis.

(c) Gencon Part 2

6.017 Clause 1, known simply as "cl.1" and has no other name, is the general clause which defines the nature of the voyage charter, and puts into effect the "blanks" that were filled in by each of the parties in Part 1. This clause calls for the specified vessel, as soon as her prior commitments have been completed, to proceed to the loading port, "or so near thereto as she may safely get and lie always afloat," load a full and complete cargo, and then proceed to the discharging port(s), where the vessel will deliver the cargo.

6.018 The phrase "as soon as her prior commitments have been completed" is a new addition to Gencon 94, and was not present on Gencon 76. This provides some protection to the owners of the vessel, and envisions that the vessel will be approaching to the load port after a previous journey. Where there is a delay in the previous journey, the owners are still protected because they had a prior commitment which had to first be completed. The common law position is found in *Evera SA Commercial v North Shipping*,[3] where if shipowners want to make the beginning of a voyage contingent on the ending of a previous one, they must say so on clear terms. This phrase does appear now to provide for this requirement under common law.

6.019 In *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)*,[4] the word "safely" was struck out by agreement between the two parties. On this basis, the judges held that there was no implied term that the charterers had to nominate a safe port. This had important consequences, as the owners had claimed that the vessel was damaged. Because there was no duty to nominate a safe port (by amendment of cl.1 of Gencon), it was held that the charterers were not liable. As cl.1 is the underlying clause underpinning the entire voyage charterparty, care must be especially exercised in the amendment of such an important clause.

6.020 Clause 2 is the Owners' Responsibility Clause. This clause essentially limits the owners' responsibility during the period that the cargo is on board the vessel. The limit is quite clear, and skewed towards the owners' favour. The owners are responsible for making the vessel seaworthy, and keeping the vessel properly manned, equipped and supplied. The owners will only be held responsible if the charterers can prove that there was a personal act or default by the owners or their manager, or that there was a personal want of due diligence, or if the vessel is unseaworthy.

6.021 Clause 3 is the Deviation Clause, which to an extent allows the vessel to deviate from the natural or reasonable route from the loading port to the discharging port. While the wording of the clause states that "the vessel has liberty to call at any ports or ports in any order," this is of course subject to the limitation that the route must be natural, and the ports must be on the course of the voyage. This has been considered in a line of cases, discussed in *Leduc & Co v Ward*,[5] and was later considered in *Glynn v Margetson*,[6] where a shipment of oranges was damaged due to delay.

6.022 In *Glynn v Margetson*, Lord Herschell ruled that the main object and intent of the charterparty was for the carriage of oranges from Malaga to Liverpool. Instead, the owners had deviated to Burriana, another port in Spain, before going to Liverpool. Because of the extra distance and time travelled, the oranges were inevitably damaged. The judge held that this was not an acceptable deviation. If the main purpose of the charterparty was to deliver oranges from Malaga to Liverpool, delivering the oranges at any time the owners pleased would not satisfy the contract. Hence the owners could not deviate from the journey as they pleased if it would defeat the "main object" of the

[3] [1956] 2 Lloyd's Rep 367.
[4] [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep 639.
[5] (1888) 20 QBD 475.
[6] [1893] AC 351.

charterparty. In essence, the deviation clause should be construed narrowly, so as to not defeat the main purpose of the charterparty.

6.023 Further, in *Stag Line Ltd v Foscolo, Mango & Co Ltd*,[7] where the bill of lading gave the shipowners "liberty … to call at any ports in any order, for bunkering or other purposes, … all as part of the contract voyage" and the vessel was off the usual route to drop off the engineers after the tests had been completed, it was held that the words "other purposes" in the context must be construed as meaning the calling at a port for some purpose having relation to the contract voyage and found the deviation did not come within the clause.

6.024 There are of course further rights given to the owners. The vessel may call to port "for any purpose," which again should be construed narrowly such that calling to a port "for any purpose" should only be for purposes relating to the voyage. Lastly, the deviation clause gives the right for the owners to deviate from its voyage in order to rescue other vessels in distress, such as to tow and assist vessels and to save lives and property.

6.025 Clause 4, "Payment of Freight" sets out the manner of the payment of freight. Under common law, the position was for freight to be paid at the same time the cargo was delivered. However, due to regular commercial practice, it was frequently widely accepted that the payment of freight should be in advance of the delivery of cargo. The Gencon 94 gives the parties the option to agree when the payment of freight should be effected. If it is agreed that payment of freight should be prepaid, then cl.4(b) applies. If it is agreed that freight should be paid "on delivery" (reflecting the common law position), then cl.4(c) applies.

6.026 This issue at hand is a matter of the timing of when the freight should be paid. If it is agreed that the payment of freight is to be prepaid, then the freight is deemed earned and non-returnable. The charterers must pay freight as soon as the cargo is loaded. Notably, the owners are not obliged to endorse the bills of lading before the freight is paid, giving the owners even more leverage to ensure that the freight is paid before he delivers the cargo. Conversely, if the payment of freight is agreed to be "on delivery," then freight is only earned once the cargo has been delivered. This gives the owners less protection, as it is incumbent on the owners to deliver the goods before the freight is due to them. Of course, the owners are still protected by other powers such as the owners' lien as set out in cl.8 of Gencon 94.

6.027 Clause 5 sets out the loading and discharging responsibilities of the parties. Under cl.5(a), it states clearly that the charterers are responsible for the loading and unloading of the cargo. This is the classic position of a voyage charter under common law. The charterers have to take care of loading the goods on board, including bringing them into the holds, stowing and trimming the goods and lashing and securing the goods. This has the effect that if it is later found that there is damage caused by the improper loading of the goods on the vessel, it is the charterers' responsibility to bear. Additionally, cl.5(a) also calls for the charterers to be responsible for paying the cost of removing dunnage after discharge of cargo, and that time runs while the dunnage

[7] [1932] AC 328.

is removed from the vessel. Dunnage is packing material placed between cargoes to protect them and prevent them from moving, and may also serve to provide space for forklifts to manoeuvre around.

6.028 However, the charterers are not completely unaided in loading the cargo aboard the vessel. Under cl.5(b), if the vessel has cargo handling gear, and unless otherwise agreed by the parties, the owners should give the charterers free use of the handling gear, to help in the loading of goods. That said, it is the charterers' responsibility for any problems which may arise, even though the use of the vessel's handling gear may be supervised by the master, and the people operating the handling gear may be the crew of the vessel. So long as it is unamended, it is clear that charterers are responsible for the loading and unloading of the cargo onto a vessel under this standard clause in the Gencon form.

6.029 Clause 5(c) places the responsibility of the stevedores on to the charterers. That is, if the stevedores cause damage beyond ordinary wear and tear. However, there is a responsibility on the owners to notify as soon as reasonably possible by the master to the charterers that there is such damage. If so notified, then the charterers would be liable to repair any stevedore damage before the completion of the voyage. The time taken to repair the vessel is charged according to the demurrage rate. However, it remains uncertain whether this clause will have the effect that the voyage charter continues to run while undergoing repairs.

6.030 In *The Puerto Buitrago*,[8] this issue was brought to appeal before Denning MR, Orr LJ and Browne LJ. It was held that while the charterers were liable for paying for the repairs of the vessel, the charterers were also entitled to terminate the charterparty, notwithstanding that the vessel had not finished undergoing repairs. In such circumstances, the owners should allow for the termination, and sue for damages, instead of suing for specific performance. This case, as well as other authorities, casts doubt on whether this part of cl.5(c) could have the effect that the draftsmen intended.

6.031 Clause 6 is the Laytime Clause. Laytime will be explored further in a later part of this chapter, but the standard position given on the Gencon form is that laytime runs for a set duration (agreed to by the parties), and does not include Sundays and Holidays, and inclement weather when cargo cannot be loaded.

6.032 In order for laytime to start running, the vessel must give a notice of readiness (NOR), to inform the charterers that the vessel is at port. However, a situation may arise where a vessel arrives at a port, and is ready to commence loading or unloading, but because of the situation at the port, the vessel is unable to berth. Still, in this kind of situation, cl.6(c) gives power to the owners to give an NOR to commence laytime, so long as the vessel is at the port and ready to berth (even if it is unable to actually berth).

6.033 Clause 7 sets out the agreement on Demurrage. The position on the Gencon for demurrage is relatively simple. If the charterers run over time, and exceeds the agreed laytime or "free time," then demurrage is payable at the rate agreed, or pro rata for any part of the day. If the charterers then fail to pay demurrage, the owners can give

[8] [1976] 1 Lloyd's Rep 250.

written notice to the charterers, who must within 96 hours pay the demurrage. If it is not paid, the owners are entitled to terminate the charterparty and claim damages for the termination of the charterparty.

6.034 Previously, Gencon 76 had set a limit on the amount of days that could count as demurrage. In such circumstances, once the demurrage period ran out, any further delays would result in the owners being able to claim damages at large. In essence, after this period which provided for liquidated damages, further claims for damages at large would be unliquidated, and up to be assessed. However, due to the frequent amendments made to this clause on Gencon 76 form, the time limit was removed on Gencon 94. In effect, the demurrage clause applies indefinitely until the vessel is no longer detained and the ship is available to the owners.

6.035 Clause 8 is a Lien Clause, which enables the owners to hold a lien security over the cargo for freight, deadfreight, and demurrage claims. The distinction between freight and deadfreight is that freight is generally the amount of money paid to the shipowners for the carriage of cargo, while deadfreight is the amount of money payable by the charterers to the shipowners for failing to load cargo as agreed in the contract of carriage.

6.036 In the event that the owners seek to exercise its rights under this clause, while it is not expressly stipulated in the clause itself, as a matter of practice the owners should notify the shipper or sub-charterers that it is holding on to the cargo as a security for unpaid freight. This lien clause provides the owners with an additional and powerful right to hold on to the cargo until the owners get paid.

6.037 Clause 9 is a Cancelling Clause, which gives effect to Box 21. It is the date by which the vessel must arrive at the loading port. If the vessel does not arrive in time, then the charterers are entitled to terminate. In theory, this gives the charterers power to cancel the charterparty in the event that the vessel is late. However, cl.9 still provides some protection to the owners, in that if the vessel is actually late, then the owners can notify the charterers of its lateness, and within 48 hours the charterers must exercise its option to terminate or else the owners can set a new cancelling date.

6.038 In essence, this clause dampens the common law standard, as decided in *Moel Tryvan Ship Co Ltd v Andrew Weir & Co*.[9] The position is that the charterers can cancel the charter at any time after the expiry of the cancelling date, until the vessel reaches the loading port and an NOR is given. The cancelling clause is inserted for the benefit of the charterers, and for this reason, the owners are still obliged to go to the loading port, so long as the charterers do not exercise its rights. However, under cl.9 of Gencon 94, this previously powerful right has been somewhat curtailed.

6.039 Clause 10 deals with how the bills of lading should be dealt with. As BIMCO had intended the Gencon 94 to be used with Congenbill 1994, this clause makes specific reference to this standard form bill of lading to be used. In fact, it is to the effect that if this clause stands unamended, the master is not bound to sign a bill of lading which is not on the Congenbill form. The shipper is entitled to ask that the master signs the

[9] [1910] 2 KB 844.

bills of lading, although the master is of course free to clause a bill of lading where necessary. This clause also provides that if there is liability on the owners arising from the bills of lading that are beyond the liabilities as contemplated under the charterparty, then the charterers must indemnify the owners for the excess liability.

6.040 This indemnity is expressly for "all consequences or liabilities," which can include and cover all liabilities arising under the Hague/Hague-Visby rules, which states that the owners should be liable for claims founded on the bills of lading. Of course, where there is negligence on the part of the owners, for example, the failure of the master to properly clause a bill of lading to reflect any defect in the cargo carried, this negligence is not covered by the indemnity.

6.041 This was examined in *The Nogar Marin*,[10] where the cargo of wire rods in coils was to be carried from Bassin d'Heronville or Caen to Tampa. When delivered at Tampa, it was found that the cargo was rusty. The bills of lading had not reflected this damage, which had occurred before shipment. The arbitrators found that the master should have been able to recognise that the goods were damaged, and it was his neglect that the bills of lading were not properly qualified. As such, the owners could not rely on the indemnity clause in the situation.

6.042 Clause 11 is a Both-to-Blame Collision Clause, which provides that even if the owners are partially at fault in a collision with another vessel, the cargo owners shall indemnify the vessel owners for all the loss and liability payable to the other ship. This is because of the position in law where in the case of a collision between two ships, the cargo owners of one ship can recover against the owners of the other ship, which creates indirect liability for the shipowners. The both-to-blame collision clause indemnifies the ship owners in this situation, and provides an additional layer of protection.

6.043 Clause 12 is the General Average and New Jason Clause. By default the general average is adjusted according to the York-Antwerp Rules 1994, or any subsequent modification thereof- which currently would be the York-Antwerp Rules 2016. In effect, the clause states expressly that cargo owners are to split the costs by general average in the event that an accident or disaster happens to the vessel, even if the disaster may have arisen due to the fault of the owners' agents. Similarly, if the parties agree to have the general average adjusted by the laws and practice of the USA, then the New Jason clause would apply, following the same general principles as the general average under the York-Antwerp Rules.

6.044 Clause 13 is the Taxes and Dues Clause and cl.14 is the Agency Clause. These clauses are quite straightforward. Under cl.13(a), the taxes related to the vessel are to be paid by the vessel owners, while under cl.13(b), the taxes related to the cargo are to be paid by the charterers. If there are taxes on the payment of freight itself, unless otherwise agreed, the charterers are also responsible for these taxes, under cl.13(c). In terms of the agency clause, it is the responsibility of the owners to appoint agents at the loading and discharge ports. The word "shall" implies a positive duty on the owners. An agent at port makes the arrangements for the vessel to berth and unberth, makes provisions

[10] [1988] 1 Lloyd's Rep 412.

for any pilotage or any other necessary arrangements for the vessel at port. The general principles and laws of agency will also apply to the vessel owners and their agent.

6.045 Clause 15 is the Brokerage Clause. It states simply that brokerage commission is to be paid to the broker, and that if the charterparty is not executed, the defaulting party has to pay one third of the estimated amount of freight to the broker. This clause is made obviously for the benefit of the broker, as both the owners and charterers are subject to the risk of having to pay for the broker in the event that they are the defaulting party causing the voyage charterparty not to be executed.

6.046 It should also be noted that since Gencon 76, the payment of deadfreight and demurrage also forms part of the broker's commission. While the broker is named on the charterparty, this does not make it party to the contract. Under common law principles of privity of contract, this would mean that the broker cannot sue under the contract to enforce it. In the UK, this was solved with the Contracts (Rights of Third Parties) Act 1999, which, as seen in *Nisshin Shipping v Cleaves*,[11] granted substantial rights for the broker to enforce payment even as a third party. In Hong Kong, a similar ordinance known as the Contracts (Rights of Third Parties) Ordinance (Cap.623) came into effect on 1 January 2016. Whilst this Contracts (Rights of Third Parties) Ordinance does not abolish the common law doctrine of privity or affect the existing exceptions or solutions to the privity rule — and, indeed, contracting parties are free to expressly "contract out" of the legislation — it nevertheless affords the contracting parties the ability to confer a right or benefit on a third party which is directly enforceable by that third party, like its UK counterpart. Although it will not be necessary to go into great depth examining the differences between the English and Hong Kong legislation here, it is worth noting that there are notable differences between the two, in particular the provisions relating to the applicability of the "reasonableness test" for exemption clauses, exclusive jurisdiction clauses and the assignability of third party rights.

6.047 Clause 16 provides for the General Strike Clause. This clause makes provision for situations of a general strike, which prevents the vessel from being loaded or unloaded at its original nominated port.

6.048 Clause 17 is the War Risks Clause, which incorporates Voywar 1993. The war risks clause addresses any potential problems anticipated where a vessel hired under a voyage charterparty may be directed to an area where there is war, or a very real risk of war. Under cl.17(a)(ii), war risks include but are not limited to:

> "any war (whether actual or threatened), act of war, civil war, hostilities, revolution, rebellion, civil commotion, warlike operations, the laying of mines (whether actual or threatened), acts of piracy, acts of terrorists, acts of hostility or malicious damages, blockades … by any person, body, terrorist or political group or the Government of any state whatsoever, which, in the reasonable judgment of the Master and/or the Owners, may be dangerous or are likely to be or to become dangerous to the Vessel, her cargo, crew or other persons on board the Vessel."

[11] [2004] 1 Lloyd's Rep 38.

6.049 Therefore, so long as any of these risks present a danger, or is likely to present a danger to the vessel, cargo, or her crew, under the reasonable judgment of the master or the owners, then this constitutes a war risk.

6.050 In such an event where there is a war risk, the owners may by notice request the charterers to nominate a safe port for the discharge of the cargo, and if the charterers fail to do so within 48 hours of such notice, the owners will be at liberty to discharge the cargo at any safe port of their choice, in fulfilment of the voyage charterparty. Additionally, the owners would be able to recover the extra expenses from taking this action. The test is whether under the reasonable judgment of the master or the owners, there may be an exposure to war risks.

6.051 In the event that a war risk occurs on the normal and customary route, then the owners may give notice to the charterers to deviate and sail on a longer route, and the owners would be entitled to additional freight if the extra distance on the longer route exceeds 100 miles.

6.052 Finally, the war risks clause also gives the vessel the right to comply with the directions of the national government of the flag of the vessel, or any other government that the owners might be subject to. The vessel may also comply with UN Security Council regulations, and also discharge any cargo, or crew or any persons on board, at any port, where the vessel may be liable to confiscation as a contraband carrier, or the persons aboard the vessel may be subject to internment, imprisonment or other sanctions. As long as the vessel acts within the parameters of the war risks clause, the owners shall not be deemed in breach of the charterparty.

6.053 Clause 18 is the General Ice Clause, which makes provision for any conditions of ice at the port of loading and discharge which could affect the regular operations of the vessel. In effect, if the master at the loading port fears that the vessel will be frozen in, then it can leave at its liberty without loading the cargo, and the charterparty is deemed null and void. Alternatively, the vessel may choose to leave with and deliver part of the cargo, and be paid in part for the cargo delivered.

6.054 At the port of discharge, if the ice prevents the vessel from reaching the port, then the charterers can keep the vessel waiting by paying demurrage, or alternatively order the vessel to an alternative safe port. If during discharge, the master fears that the vessel will be frozen in, the vessel has the liberty to leave with the cargo still on board, and proceed to the nearest port to discharge the cargo safely. The amount of freight payable will be the same under these circumstances, but additional freight may be payable if the substituted port exceeds 100 nautical miles from the original port of discharge.

6.055 Clause 19 is the Law and Arbitration Clause of the Gencon form. This clause does merit some discussion, as in the event of dispute, the law and arbitration clause governs how a dispute would be resolved. Previously, on the Gencon 76 form, there was no choice of law or dispute resolution clause.

6.056 By default, if there are no amendments to the law and arbitration clause, and there is no election of the choice of law and arbitration, then the charterparty shall be referred to arbitration in London, under English Law (cl.19 (d)). Alternatively, parties may elect to have the choice of law and seat of arbitration in London, with English Law (cl.19(a)). In New York under US Law (cl.19(b)), or any other location with the law of that country, otherwise agreed between the parties (cl.19(c)).

6.057 This may be a seemingly simple way to decide the matter, but issues can and do arise when there are other rider clauses and documents in addition to the standard Gencon form. In *Hong Kong Arbitration 1/14*,[12] at issue in the dispute was the law and seat of arbitration given by the charter, which included a fixture note and Gencon charterparty. The fixture note provided in cl.18 that:

> "All disputes arising from the execution of, or in connection with this charterparty shall be settled through friendly negotiation. In case no settlement be reached, arbitration in Hong Kong and English law to be applied."

6.058 Gencon cl.19(a), for arbitration in London and choice of English law, was also provided. The tribunal held that the seat of arbitration was accordingly Hong Kong. Because the seat of arbitration was Hong Kong, the curial law (the law governing the dispute resolution proceedings) was also with reference to the Arbitration Ordinance of Hong Kong.

6.059 This was revisited in *Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics*,[13] where a similar issue of whether the Gencon cl.19(a) which had been incorporated into a fixture note between the two parties applied, and to what extent. Initially, at arbitration, the sole arbitrator held that since the charterparty fixture note stated in cl.23 "Arbitration to be held in Hong Kong, English law to be applied," and other terms per Gencon 94, Hong Kong was just the venue of the arbitration, but English law would be applied as the curial law. On appeal to the English court, Justice Hamblen set aside the arbitral award, and held that the arbitration under the contract was actually governed by Hong Kong law, rather than English law. In a situation almost exactly the same as the *Hong Kong Arbitration 1/14* above, because the seat of arbitration was in Hong Kong, the curial law was impliedly also Hong Kong. The "English law to be applied" portion was simply referential to the substantive law of the charterparty. In fact, it would be unusual for the law governing the arbitration to be different from the laws of the seat of arbitration.

6.060 In both of the two cases above, as the fixture notes incorporated the Gencon 94 using the language "other terms as per Gencon 1994," the terms found in the fixture notes had clear priority over the Gencon 94. So even where the Gencon specified a London seat of arbitration under cl.19(a), as this was incompatible with the terms found in the fixture note, this portion would not be incorporated.

6.061 As discussed above, parties using Gencon 94 or indeed any standard form charterparty, should always pay attention to the many amendments, deletions, and additional clauses that can potentially affect the effectiveness of the standard terms found in the Gencon form.

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[12] (2014) 911 LMLN 3.
[13] [2015] EWHC 194 (Comm), [2015] 1 Lloyd's Rep 504.

has simply not commenced, although there must be an actual change, and not merely an intention to do so which has not put into effect.[142] The operation of short provision is not as straightforward as it appears, as it conflicts with the opening words of the warehouse to warehouse clause under which cover attaches at the warehouse of origin. In *Nima SarL v Deves Insurance Plc*[143] the Court of Appeal held that the words of the statute took priority. *Nima* involved a so-called "phantom vessel." The insured cargo was removed from the warehouse and loaded onto the vessel, but the vessel failed to arrive at its destination and the Court of Appeal was satisfied that the intention of the crew had from the outset been to sail for an entirely different destination and to sell the cargo in fraud of the assured. The Court of Appeal held that in such a case the risk attached as soon as the cargo left the warehouse, but as the insured adventure had never commenced, the correct analysis was that the cover was cancelled. Clause 10.2 of the 2009 Institute Cargo Clauses partially reverses this outcome by preserving the risk despite a change in voyage other than on the part of the assured and his employees.

(c) Change of voyage

8.107 Section 45 of the MIO is in the following terms:

> "(1) Where; after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage.
>
> (2) Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs."

8.108 Two main issues arise under s.45 of the MIO: when a change of voyage is voluntary; and what amounts to a manifestation of a determination to change the voyage. The leading authority on voluntary change of voyage is *Rickards v Forrestal Land, Timber and Railways Co Ltd*,[144] in which the House of Lords ruled that the vessel had been navigated in accordance with instructions from government, so that the alteration of destination had not been voluntary. As to what constitutes a change of voyage, it was held in *Tasker v Cunningham*[145] that there can be a change of voyage which discharges the insurer before the vessel has physically departed from the route to its agreed or anticipated destination. In that case the vessel was lost while en route for the destination stated in the policy, but after the assured had determined that the vessel was to alter its destination. Proof of that determination was to be found in a series of messages between the owners and the master, and the court ruled that this was sufficient to discharge the insurers. It is clear from *Tasker v Cunningham* that, ahead

[142] *Hewitt v London General Insurance Co Ltd* (1925) 23 Ll LR 243 and *George Kallis (Manufacturers) Ltd v Success Insurance Ltd* [1985] 2 Lloyd's Rep 8.

[143] [2002] Lloyd's Rep IR 752. See also *Nam Kwong Medicine & Health Products Co Ltd v China Insurance Co Ltd* (HCCL 27/1999, [2002] HKEC 824).

[144] [1942] AC 50. See also *British and Foreign Marine Insurance Co v Samuel Sanday & Co* [1916] 1 AC 650.

[145] (1819) 1 Bligh 87.

of actual change of voyage, what is needed is some manifestation of a determination to change voyage. Where the assured has plainly intended to abandon the insured voyage, eg, by undue delay in proceeding with the voyage, the insurer will similarly be discharged, presumably from the date at which such an intention became manifest from the delay.[146] Change of voyage is largely excused by cl.10 of the Cargo Clauses: "Where, after attachment of this insurance, the destination is changed by the assured, held covered at a premium and on conditions to be arranged subject to prompt notice being given to the underwriters." In *Nima SarL v Deves Insurance Plc*[147] Andrew Smith J expressed the view that cl.10 was concerned only with change of voyage under s.45 of the MIO, and did not amount to a waiver of the provisions of s.44 of the MIO, in relation to the attachment of the risk in the first place.

(d) Deviation and delay

8.109 Section 46 of the MIO sets out the principle of deviation:

> "(1) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation; and it is immaterial that the ship may have regained her route before any loss occurs.
>
> (2) There is a deviation from the voyage contemplated by the policy —
>
> (a) Where the course of the voyage is specifically designated by the policy and that course is departed from; or
>
> (b) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.
>
> (3) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract."

8.110 Deviation may arise: (1) where the voyage is specifically designated by the policy, and that course is departed from; and (2) deviation from usual and customary route. It is immaterial that the destination is unchanged. The prohibition is not absolute, and is subject to lawful excuse, as set out in s.49 of the MIO. Unlike change of voyage, actual deviation is required before the insurer is discharged so an intention to deviate does not suffice. Thus, if the master of the vessel has the intention of deviating, but before that intention is put into effect the vessel is forced to deviate by the operation of circumstances amounting to a lawful excuse, eg, bad weather, there is no deviation.

8.111 The common law rules on the operation of deviation where the policy permits the vessel to call at a number of ports of discharge are contained in s.47 of the MIO:

> "(1) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but in the absence of any usage or sufficient

[146] *Thames and Mersey Marine Insurance Co v Van Laun* [1917] 2 KB 48.

[147] [2002] Lloyd's Rep IR 752.

cause to the contrary, she must proceed to them or such of them as she goes to, in the order designated by the policy. If she does not there is a deviation.

(2) Where the policy is to 'ports of discharge,' within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them or such of them as she goes to, in their geographical order. If she does not there is a deviation."

8.112 At common law, delay was regarded as a sub-class of deviation. Section 48 of the MIO treats delay separately from deviation but applies the same defence of lawful excuse under s.9 for both:

> "In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable dispatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable."

8.113 What is reasonable is a matter of fact;[148] and it is plain from the cases that all the surrounding circumstances must be gone into to determine whether or not a delay has been reasonable, so that it is not possible to lay down a test purely in terms of time. Even where the assured has some justification for delay, failure to resume the voyage with reasonable despatch once the cause of delay has ceased to operate will amount to a "delay" within the meaning of the section. Any amount of delay, however brief, will discharge the insurer where it has resulted from causes totally unconnected with the purpose of the voyage.

8.114 The excuses for deviation and delay are set out in s.49 of the MIO:

"(1) Deviation or delay in prosecuting the voyage contemplated by the policy is excused —

(a) Where authorised by any special term in the policy; or

(b) Where caused by circumstances beyond the control of the master and his employer; or

(c) Where reasonably necessary in order to comply with an express or implied warranty; or

(d) Where reasonably necessary for the safety of the ship or subject matter insured; or

(e) For the purpose of saving human life or aiding a ship in distress where human life may be in danger; or

(f) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or

[148] MIO s.88.

(g) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

(2) When the cause excusing the deviation or delay ceases to operate, the ship must resume her course and prosecute her voyage, with reasonable dispatch."

8.115 Waiver clauses have long been standard in marine policies. Prior to the adoption of the Institute clauses in 1983, it had long been the practice of marine insurers to grant to the assured "liberty to touch and stay at any port or place whatsoever." Clause 8.3 of the Cargo Clauses now provides that:

> "This insurance shall remain in force ... during delay beyond the control of the assured, any deviation, forced discharge, reshipment or transhipment and during any variation of the adventure arising from the exercise of a liberty granted to ship owners or charterers under the contract of affreightment."

11. Insured Perils and Excluded Perils

(a) Proximate cause

8.116 The principle of proximate cause is set out in s.55(1) of the MIO:

> "Subject to the provisions of this Ordinance; and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against."

8.117 The common law approach to causation varied as between charterparty claims and marine insurance claims. Where there was a chain of events leading to loss, marine insurance focussed on the last of them as the proximate cause. The difference was most noted where there was crew negligence leading to a casualty: the proximate cause for insurance purposes was the casualty, whereas the proximate cause for the purpose of an exclusion clause in a charterparty was crew negligence. However, it was made clear by the House of Lords in *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd*[149] that there was no general rule in favour of the last event, and that it was necessary to look to the dominant cause. In the event that it is not possible to determine which of two interdependent causes is the proximate cause, they are to be treated as concurrent: the applicable principle is that if one of the causes is insured and the other excluded then the exclusion takes priority, but if one of the causes is insured and the other uninsured (but not excluded) then there is cover: *The Cendor Mopu*.[150]

[149] [1918] AC 350.

[150] [2011] UKSC 5, [2011] 1 Lloyd's Rep 560. See also *Sheehan v Lloyds Names Munich Re Syndicate Ltd* [2017] FCA 1340.

perils of the sea and that this is not achieved by putting forward the less unlikely of two explanations; in those circumstances it is open to the trial judge to hold that no satisfactory explanation of the loss has been put forward, and to find against the assured for that reason. Subsequent cases have shown that where there is some evidence as to what occurred, and it is possible to eliminate some possible causes, then the court may conclude that the remaining potential cause on the balance of probabilities is the actual cause.[177] Secondly, the assured must prove that the loss was fortuitous, a requirement which is inherent in the definition of "perils of the sea" in Sch.1, r.7 of the MIO, as this talks of "fortuitous" events. In this respect, loss by perils of the sea differs from other insured perils.[178] Once the assured has satisfied the court that a peril of the sea had operated, he must, thirdly, go on to show that that peril was indeed the proximate cause of the loss. Consequently, if two plausible causes for a loss have been put forward, only one of which is an insured peril, the assured bears the burden of showing that the insured peril was the proximate cause of the loss. Thus, where a cargo has suffered water damage, the assured must demonstrate that the damage was caused by sea water,[179] and although where damage to a cargo is consistent both with rough seas and improper stowage, then it would seem that the assured is able to recover because the only relevant proximate cause is the former. That is the effect of *The Cendor Mopu*.

(e) Crew negligence

8.127 The common law principle, confirmed by s.55(2)(a) of the MIO, is that the negligence of the master and crew is disregarded in determining whether there has been a loss by perils of the seas,[180] and the only question is whether the loss was otherwise caused by an insured peril.[181] As seen above, if crew negligence leads to a peril of the seas, the proximate cause of the loss is the latter. By contrast, as far as the common law is concerned, if the negligence results in loss from an uninsured peril, the assured has no better rights than he would have had in the absence of negligence.[182] The Institute Clauses specifically treat negligence as an insured peril in its own right, irrespective of the nature of the loss which is inflicted by the negligence. In *The Vergina*[183] the insured vessel was found to be listing, and the list became fatal following the Chief Engineer's operation of the ballast control system. Aikens J held that his actions were the main,

[177] *Nulty v Milton Keynes BC* [2013] EWCA Civ 15 and *European Group Ltd v Chartis Insurance UK Ltd* [2012] EWHC 1245 (Comm), affirmed [2013] EWCA Civ 224.

[178] See *Schiffshypothekenbank Zu Luebeck AG v Compton (The Alexion Hope)* [1987] 1 Lloyd's Rep 60, affirmed [1988] 1 Lloyd's Rep. 311, deciding that a fire which is deliberately started is nonetheless a "fire" for the purposes of the Institute Clauses, so that the burden switches to the insurers to show that it was not fortuitous. See also *Kiriacoulis Lines SA v Compagnie d'Assurance Maritime Aerieenes et Terrestres (The Demetra K)* [2002] Lloyd's Rep IR 823.

[179] *Cobb and Jenkins v Volga Insurance Co Ltd of Petrograd* (1920) 4 Ll LR 130.

[180] Even where the master is himself the assured: *Trinder, Anderson & Co v Thames & Mersey Marine* [1898] 2 QB 114.

[181] *Mountain v Whittle* [1921] 1 AC 615. See also *Blackburn v Liverpool, Brazil and River Plate Steam Navigation Co* [1902] 1 KB 290 (water entering vessel as result of error by engineer); *Cohen, Sons & Co v National Benefit Assurance Co Ltd* (1924) 18 Ll LR 199 (water entering vessel as result of negligence by repairers); *The Popi M* [1983] 2 Lloyd's Rep 235 (collision resulting from negligence of the crew; proximate cause of loss held to be collision); *The DC Merwestone* [2013] EWHC 1666 (Comm) (water entering vessel by reason of crew negligence) and *Venetico Marine SA v International General Insurance Co Ltd* [2013] EWHC 3644 (Comm) (vessel running aground after crew had failed to notice equipment failure).

[182] *Gregson v Gilbert* (1783) 3 Doug KB 232.

[183] [2002] Lloyd's Rep IR 51.

and probably the sole, cause of the list increasing, and as there had been negligent the assured was entitled to recover under the insured peril "negligence of Master, Officers and Crew" in the Institute Clauses. If a peril of the seas has occurred, and the assured or the crew take evasive action to prevent loss but either fail to prevent the loss or make matters worse, the insurers remain liable unless the conduct is such as to break the chain of causation from the peril of the seas. Thus if steps are taken to isolate the cargo from an ingress of sea water, and as a result the cargo is damaged by overheating, the assured may still recover for loss proximately caused by perils of the seas.[184]

(f) *The Inchmaree* clause

8.128 In *Thames & Mersey Marine Insurance Co Ltd v Hamilton, Fraser & Co (The Inchmaree)*[185] the House of Lords ruled that damage to an engine resulting from a closed valve was not a peril of the sea, nor was it within the general category of any other peril. This was so because the damage was not caused by the sea, but simply chanced to occur while the vessel was at sea and had nothing to do with sea conditions. *The Inchmaree* principle, that damage which would have occurred irrespective of the incidents of a voyage is not the result of perils of the sea, is also to be found operating in a series of cases in which damage to a vessel or its cargo was caused by insects or vermin.[186] Coverage for bursting of boilers and breakage of shafts was incorporated into the Institute clauses as a result of this decision. The risk covered is loss caused by the bursting of boilers or breakage of shafts, while damage to the boiler or to the shaft itself is excluded.[187] The purpose of the exclusion is to prevent a court finding that the cost of repairing damage external to the boiler or shaft themselves which can be repaired only where the boiler or shaft is itself repaired is also covered.

8.129 *The Inchmaree* clause also covers loss or damage caused by latent defect in the machinery or hull raises two questions. The phrase "latent damage" was held by Robert Goff J in *Prudent Tankers Ltd SA v Dominion Insurance Co (The Caribbean Sea)*[188] to be one not capable of discovery during reasonable inspection by a skilled man. It was further held that clause covered both a defect in the design or manufacture of the hull and a defect in the materials used in its construction. The Hulls Clauses were held in *Promet Engineering (Singapore) Pte Ltd v Sturge (The Nukila)*[189] not to allow recovery for that the costs of putting a latent defect which became patent and which did not cause any additional damage, although if the latent defect caused any

[184] *Canada Rice Mills Ltd v Union Marine & General Insurance Co Ltd* [1941] AC 65 and *Redman v Wilson* (1845) 14 M & W 476.

[185] (1887) 12 App Cas 484. See also *Stott (Baltic) Steamers Ltd v Marten* [1916] 1 AC 304.

[186] *Rohl v Parr* (1796) 1 Esp 445 (worms damaging vessel); *Hunter v Potts* (1815) 4 Camp 203 (rats damaging vessel) and *Lavemni v Drury* (1852) 8 Ex 166 (cargo of cheese damaged by rats). Unless such damage was followed by a peril of the seas (*Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518). However, an ingress of water following vermin attack on the hull is a peril of the seas.

[187] *Scindia SS (London) Ltd v London Assurance* (1936) 56 Ll LR 136. The 2003 Clauses permit recovery for additional premium.

[188] [1980] 1 Lloyd's Rep 338.

[189] [1997] 2 Lloyd's Rep 146. See also *Oceanic SS Co v Faber* (1907) 13 Com Cas 28; *Hutchins Bros v Royal Exchange Corp* [1911] 2 KB 398 and *MacColl & Pollock Ltd v Indemnity Mutual Marine Assurance Co* (1930) 38 Ll LR 79, all of which involved latent defects becoming patent and not causing any additional loss. Contrast *Wills & Sons v World Marine Insurance Ltd (The Mermaid)* [1980] 1 Lloyd's Rep 350.

additional damage then the costs of putting right that damage were recoverable even if this entailed expenditure to correct the latent defect.[190]

(g) Wilful misconduct

8.130 Wilful misconduct is a deliberate act by the assured which was intended to cause the loss or which was reckless as to whether or not a loss resulted and which was intended to, or did in fact, lead to a claim.[191] Wilful misconduct on the part of the master and crew giving rise to loss is barratry, and is an insured peril.

(h) Delay

8.131 Loss of a hull[192] or cargo[193] proximately caused by delay is not an insured peril. By contrast, loss of freight as the result of a delay consequent upon the operation of a peril of the sea was in principle recoverable under a freight policy in the old Lloyd's SG form,[194] and this is recognised by s.55(2)(b) of the MIO, which does not refer to freight. The decisions imposing liability on freight insurers for delay were modified by the adoption in 1885 of the "time charter" clause, namely: "This insurance does not cover any claim consequent on the loss of time whether arising from a peril of the sea or otherwise." The clause does not refer to any proximity test, and was held in *Naviera de Canarias SA v National Hispanica Aseguradora SA*[195] to contemplate the situation in which there had been a chain of events, namely: an insured peril, delay consequent on the occurrence of that peril and subsequent loss of freight by the assured. The clause was thus effective to prevent recovery both where delay was the proximate cause of the loss of freight and where the delay was simply the intermediate consequence of the occurrence of a peril itself the proximate cause of the loss of freight.

(i) Inherent vice

8.132 Inherent vice is excluded from cover by s.55(2)(c) of the MIO, an exclusion echoed by the Institute Cargo Clauses. It was held by the Supreme Court in *The Cendor Mopu* that the same meaning is to be given to the term in each of these provisions, so that the addition of an express contractual exclusion adds nothing to the general law. There is no definition in MIO of the term "inherent vice." In *The Cendor Mopu* the Supreme Court resolved the conflict in the authorities and held that it is only where inherent vice is the sole cause of the loss, independently of perils of the seas, that the insurers have a defence. In that case the legs of an oil rig cracked and fell off when the vessel was hit by a wave towards the end of a lengthy sea voyage. Lord Mance stated that "inherent vice

[190] Under the 2003 Clauses, such costs are 50 per cent recoverable, and 100 per cent recoverable for additional premium.

[191] *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582.

[192] *St Margaret's Trust Ltd v Navigators & General Insurance Co Ltd* (1949) 82 Ll LR 752. Contrast *Talbot Underwriting v Nausch Hogan & Murray (The Jascon 5)* [2005] 2 CLC 868 where delay was held not to be the proximate cause of the loss.

[193] *Gregson v Gilbert* (1783) 3 Doug 232; *Tatham v Hodgson* (1796) 6 TR 656; *Taylor v Dunbar* (1869) LR 4 CP 206 and *Pink v Fleming* (1890) 25 QBD 396.

[194] *Inman Steamship Co Ltd v Bischoff* (1882) 7 App Cas 670; *Mercantile SS Co v Tyser* (1881) 7 QBD 73 and *Manchester Liners Ltd v British and Foreign Marine insurance Co* (1901) 7 Com Cas 26.

[195] [1978] AC 853.

[covers] inherent characteristics of or defects in a hull or cargo leading to it causing loss or damage to itself — in each case without any fortuitous external accident or casualty." It is also apparent from the analysis of the earlier cases by Lords Saville and Mance that inherent vice does not encompass anything other than an internal defect in the subject matter, and that it has no operation where the loss was caused by an external fortuitous event. On this reasoning it may be that inherent vice is not to be regarded as a proximate cause in its own right at all, but rather an illustration of the limits of the definition of perils of the seas. It will also be noted that under s.40 of the MIO, there is no warranty under a cargo policy that the cargo is seaworthy or that the carrying vessel is seaworthy to carry the cargo. That led the Supreme Court in *The Cendor Mopu* to conclude that there was no justification for applying a causation test to inherent vice claims.

8.133 Ordinary leakage and breakage may be regarded as inherent vice, because damage arising from them occurs not from any marine peril but from the nature of the cargo or the manner in which it has been shipped.[196] Thus, damage to cargo which is the result of inadequate packing or loading,[197] natural sweating,[198] mildew or spontaneous combustion[199] is the result of inherent vice. By contrast, damage which cannot be explained by the very nature of the cargo, such as unusual leakage of palm oil not attributable to the barrels in which it was stored,[200] fungus damage to paper not naturally susceptible to mould,[201] mildew damage to tobacco which ought not to have occurred in the ordinary course of events,[202] denting, rusting and pilferage of tins[203] and damage caused to cigarettes by sea water,[204] is not attributable to inherent vice and will thus constitute a peril of the seas.

(j) Ordinary wear and tear

8.134 Section 55(2)(c) of the MIO excludes from cover "ordinary wear and tear, ordinary leakage and breakage." Lord Mance in *The Cendor Mopu* expressed the view that these matters should be treated in the same way as inherent vice, and that, by analogy:

> "ordinary wear and tear and ordinary leakage and breakage would thus cover loss or damage resulting from the normal vicissitudes of use in the case of a vessel, or of handling and carriage in the case of cargo ...."

8.135 If there is a peril of the seas, then these fall to be disregarded. It follows that it is not necessary to consider whether wear and tear is the proximate cause of the loss: if the

[196] See *De Monchy v Phoenix Insurance Co of Hartford* (1929) 34 Ll LR 201; *Blower v Great Western Railway Co* (1872) LR 7 CP 655 and *Biddle, Sawyer & Co Ltd v Peters* [1957] 2 Lloyd's Rep 339.

[197] *Bird's Cigarette Manufacturing Co Ltd v Rouse* (1924) 19 Ll LR 301.

[198] *Bowring & Co Ltd v Amsterdam London Insurance Co Ltd* (1930) 36 Ll LR 309 and *Noten BV v Harding* [1989] 2 Lloyd's Rep 527.

[199] *Boyd v Dubois* (1811) 3 Camp 133.

[200] *Wilson, Holgate & Co Ltd v Lancashire and Cheshire Insurance Corp Ltd* (1922) 13 Ll LR 486; contrast *De Monchy v Phoenix Insurance Co of Hartford* 29 Ll LR 179.

[201] *Whiting v New Zealand Insurance Co Ltd* (1932) 44 Ll LR 179.

[202] *Sassoon & Co Ltd v Yorkshire Insurance Co* (1923) 16 Ll LR 129.

[203] *Wunsche International v Tai Ping Insurance Co* [1998] 2 Lloyd's Rep 8.

[204] *Bird's Cigarette Manufacturing Co Ltd v Rouse* (1924) 19 Ll LR 301.

expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or

(c) in the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival."

8.141 Section 60 of the MIO is poorly drafted. Broken down, the section provides for six forms of constructive total loss:[210]

(1) Where the subject matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable.[211] The tests for "reasonable" abandonment and apparent unavoidable actual total loss are objective, although the requirements can be judged only on the facts known to the assured at the time.[212] The term "abandonment" as used here does not refer to any decision by the assured to serve a notice of abandonment on the insurers, but rather relates to the assured's decision as to whether or not for practical purposes to treat the subject matter as lost. Thus if the assured has not given up hope of recovering the subject matter, then he cannot be said to have abandoned it even though he may have served a notice of abandonment on the insurers: *Masefield AG v Amlin Corporate Member Ltd*.[213] It was thus held at first instance in *Masefield AG v Amlin Corporate Member Ltd* that there is no constructive total loss under this head following seizure by pirates: the loss is not unavoidable, and in any event there is "abandonment" for this purpose only where the assured has reasonably given up hope of recovery.

(2) Where the subject matter insured could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred. Although the legislation measures constructive total loss by repair costs against repaired value, market clauses measure constructive total loss against the sum insured.[214] Repair costs are to be assessed on an objective basis, by reference to the cost that would have been incurred by a prudent uninsured shipowner.[215] Salvage costs incurred both before and after

[210] See *Clothing Management Technology Ltd v Beazley Solutions Ltd* [2012] EWHC 727 (QB), where it is noted that s.60(1) and 60(2) are quite distinct.

[211] See *George Cohen Sons & Co v Standard Marine Insurance Co* (1925) 21 Ll LR 30 and *Fraser Shipping v Colton* [1997] 1 Lloyd's Rep 586.

[212] *Lind v Mitchell* (1928) 32 Ll LR 70.

[213] [2010] EWHC 280 (Comm), affirmed on other grounds [2011] EWCA Civ 24.

[214] See, eg, *InvoInert Management Inc v Aprilgrange Ltd* [2015] EWHC 2225 (Comm).

[215] *Venetico Maritime SA v International General Insurance Co Ltd* [2013] EWHC 3644 (Comm). See also *Suez Fortune Investments Ltd v Talbot Underwriting Ltd (The Brillante Virtuoso)* [2015] EWHC 42 (Comm): "In assessing the costs of repair, the approach the court should take is to ask what a prudent uninsured shipowner in the position of the claimants would have done in deciding whether or not to repair the vessel and where and how the repair should be carried out." *Suez Fortune*, following *Angel v Merchants Marine Insurance Co* [1903] 1 KB 811, also decides that if actual repairs are not carried out, the measure is that of notional repair costs that a prudent uninsured owner would have been willing to incur, and that a large margin was to be added to cover risks which a prudent uninsured owner would have taken into account, eg, whether the vessel should be repaired or sold. It was held in both *Venetico* and *Suez*, not following *The Medina Princess* [1965] 1 Lloyd's Rep 361, that all repair costs — and not simply insured repair costs — are to be taken into account.

the notice of abandonment are to be taken into account.[216] Actual or estimated repair and refloating costs at the place of the casualty are to be included,[217] but no account is to be taken of any sums payable by third parties in respect of the loss, of the value of the unrepaired wreck[218] or of the fact that the vessel was of an advanced age and therefore required greater expenditure on repairs following the casualty than would otherwise have been the case.[219] The post-repair value of the insured subject matter is its market value, as the agreed value is not conclusive (see s.27(4)). Under cl.21 of the International Hulls Clauses 2003, in ascertaining whether a vessel is a constructive total loss, 80 per cent of the insured value of the vessel is to be taken as the repaired value, disregarding the damaged or break-up value of what is left of the vessel.

(3) Where the assured is deprived of the possession of his ship or goods by a peril insured against and it is unlikely that he can recover the ship or goods, as the case may be. The test is unlikelihood and not uncertainty;[220] although in the case of a vessel the assured need not demonstrate that deprivation is likely to be permanent as the cases indicate that there is a constructive total loss if the assured is unlikely to recover his property within a reasonable time,[221] treated as 12 months by the War Risks Clauses. A shorter period may be appropriate where the assured has been deprived of the possession of goods, as they may deteriorate rapidly or they may have a relatively short commercial life, so

[216] See *Sveriges Angfartygs Assurans Forening v Connect Shipping Inc (The Renos)* [2019] UKSC 29, [2019] 2 Lloyd's Rep 78 where the Supreme Court held that salvage costs incurred between the casualty and the service of the notice of abandonment were to be included. Lord Sumption, upholding the first instance decision of Knowles J as approved by the Court of Appeal held that the authorities pointed to the conclusion that the existence of a constructive total loss was not determined by the service of a notice of abandonment but rather than by the facts surrounding the casualty, and that subsequent events merely went to the amount recoverable by the assured. At first instance Knowles J ruled that the 1906 Act did not provide for the service of a provisional notice of abandonment pending the assured being able to determine on the evidence whether a notice of abandonment should be served: this point did not fall to be considered on appeal. However, the Supreme Court, reversing the lower courts on the point, held that the liability incurred by the assured under the Lloyd's Open Form Special Compensation Protection and Indemnity Clause (SCOPIC) for additional compensation to minimise environmental damage following a casualty was irrecoverable: only those costs which related to the salvage and repair of the vessel, as opposed to other forms of loss, could not count as part of the repair costs.

[217] *Thompson v Calvin* (1830) Ll & Wels 140; *Young v Turing* (1841) 2 M & G 593 and *Owners of the Yero Carras v London & Scottish Assurance Corp Ltd* (1935) 52 Ll L Rep 34, applied by *Suez Fortune*, the latter holding that in determining the cost of repair, there is no presumption that repairs would be effected in the port closest to the casualty, and that relevant considerations as to choice of port included "the loss of time necessary to reach the substituted port, the expense of reaching it, and the lack of facility to obtain freights there as compared with the port of refuge."

[218] *Hall v Hayman* [1912] 2 KB 5. This was the position at common law at the date of the passing of the 1906 Act (*Angel v Merchants' Marine Insurance Co Ltd* [1903] 2 KB 811) although the House of Lords overturned that ruling in *Macbeth & Co Ltd v Marine Insurance Co* [1908] AC 144, a case decided after the Act had come into force but on a policy entered into before that date. Bray J in *Hall v Hayman* held that the words of the Act were consistent with pre-Act authority, and that *Macbeth* was to be disregarded.

[219] *Phillips v Nairne* (1847) 4 CB 343.

[220] See, for illustrative cases involving vessels, *Marstrand Fishing Co Ltd v Beer* (1936) 56 Ll LR 163; *Rickards v Forestal Land, Timber & Railway Co Ltd* [1942] AC 50 and *Panamanian Oriental Steamship Co v Wright* [1971] 1 Lloyd's Rep 487; for cargo, see *Bayview Motors Ltd v Mitsui Marine and Fire Insurance Co* [2003] Lloyd's Rep IR 121.

[221] *Pollurian Steamship Co v Young* [1915] 1 KB 922; *Irvine v Hine* [1949] 2 All ER 1089 and *The Bamburi* [1982] 1 Lloyd's Rep 312.

(if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole:

The insurable value, in the case of a steamship, includes also the machinery, boilers, and coals and engine stores if owned by the assured; and in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade:

(b) in insurance on freight, whether paid in advance or otherwise, the insurable value is the gross am.ount of the freight at the risk of the assured, plus the charges of insurance:

(c) in insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole:

(d) in insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance."

8.152 The common principle is that the insurable value is to be assessed at the commencement of the risk rather than immediately prior to the loss. The insurers therefore bear the risk of any depreciation of the insured subject matter between the inception of the risk and the date of the loss. This is a curious principle and one that has, to a large extent, been eroded both by standard policy wordings and by the attitude of the courts, it having been held that a marine policy expressed as one which provides an indemnity ousts the principle s.16 and instead the assured is entitled to recover only for his actual loss as represented by the difference between the value of the subject matter immediately before and immediately after the occurrence of the insured peril.[246]

8.153 The rules on the measure of indemnity are subject to an important modification contained in s.81 of the MIO, which applies the average principle:

"Where the assured is insured for an amount less than the insurable value or in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance."

8.154 Average works automatically in the case of total loss, because the assured can recover only the maximum sum insured under the policy and must bear any shortfall himself. However, average is of the greatest significance where the loss is partial, because the assured may only claim from the insurers that proportion of the loss represented by the ratio that the sum insured bears to the actual value of the subject matter. Thus a partial loss is not fully recoverable even though the amount of loss is less than the maximum sum insured.

[246] *The Captain Panagos* [1985] 1 Lloyd's Rep 625 and *Thor Navigation Inc v Ingosstrak Insurance (The Thor II)* [2005] 1 Lloyd's Rep 547.

(b) Total loss

8.155 The most straightforward case is that of total loss. Section 68 of the MIO provides as follows:

"Subject to the provisions of this Ordinance and to any express provision in the policy, where there is a total loss of the subject-matter insured —

(1) If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy;

(2) If the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured."

(c) Partial loss of ship

8.156 Section 69 of the MIO lays down three rules of indemnity for a damaged ship:

Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows:

(1) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty.

(2) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above; and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above.

(3) Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above.

8.157 As regards repair costs under sub-ss.(1) and (2), the reasonable cost of repairs includes associated costs such as towing costs,[247] surveys, inspection by the assured[248] and docking. The "customary deductions" referred to were fixed as one-third in respect of wooden vessels other than on their maiden voyage, although it was never clear whether the iron vessels introduced in the second half of the nineteenth century were subject to the same principle. In practice the Institute Clauses provide indemnity on a "new for old" basis. As regards sales within s.69(3), it is uncertain at common law whether the test of reasonable depreciation is actual depreciation against insured value or against market value: in *Irvin v Hine*[249] Devlin J did not choose between the two,

[247] *MacKinnon McErlane Bookr Pty Ltd v P & O Australia Ltd* [1988] VR 534.
[248] *Alstom Ltd v Liberty Mutual Insurance Co (No 2)* [2013] FCA 116.
[249] [1950] 1 KB 555.

although in *Kusel v Atkin (The Catariba)*[250] Colman J held that the correct test was market value, a ruling followed in *The Brillante Virtuoso*.[251] The section does not deal with the situation in which the vessel has been sold unrepaired or with only sufficient repairs to allow the sale to be effected. Here, the agreed value has no part to play, and the assured is entitled to recover the difference between the sound value immediately prior to the loss and the actual proceeds of sale, deducting from the latter figure the cost of the repairs effected.[252]

(d) Partial loss of freight

8.158 Section 70 of the MIO provides that:

> "Subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy."

(e) Partial loss of goods

8.159 Section 71 of the MIO states that:

> "Where there is a partial loss of goods, merchandise or other moveables, the measure of indemnity, subject to any express provision in the policy, is as follows: —
>
> (1) Where part of the goods, merchandise or other moveables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy;
>
> (2) Where part of the goods, merchandise or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in case of total loss;
>
> (3) Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value;
>
> (4) "Gross value" means the wholesale price or if there be no such price, the estimated value, with, in either case, freight, landing charges and duty paid beforehand; provided that, in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. 'Gross proceeds' means the actual price obtained at a sale where all charges on sale are paid by the sellers."

[250] [1997] 2 Lloyd's Rep 749.
[251] [2015] EWHC 42 (Comm). See also *McKeever v Northernreef Insurance Co SA* [2019] 2 Lloyd's Rep 161.
[252] *Pitman v Universal Marine Insurance Co* (1882) 9 QB 192.

(f) General average contributions and salvage charges

Section 73 of the MIO states that: **8.160**

> (1) Subject to any express provision in the policy, where the assured has paid or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution, if the subject matter liable to contribution is insured for its full contributory value; but, if such subject matter be not insured for its full contributory value or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under insurance; and where there has been a particular average loss which constitutes a deduction from the contributory value; and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute.
>
> (2) Where the insurer is liable for salvage charges the extent of his liability must be determined on the like principle.

The principle, therefore, is that the sum recoverable under a marine policy for general average contributions and salvage charges is the full amount, but with a proportional recovery to the extent that the subject matter was underinsured. **8.161**

(g) Liabilities to third parties

By s.74 of the MIO: **8.162**

> "Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability."

(h) Successive losses

If the assured is unfortunate enough to suffer a series of losses in the same policy year, s.77 of the MIO sets out the amounts recoverable under the policy: **8.163**

> (1) Unless the policy otherwise provides; and subject to the provisions of this Ordinance, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured.
>
> (2) Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss: provided that nothing in this section shall affect the liability of the insurer under the suing and labouring clause.

8.164 Section 77(2) adopts the principle of merger, whereby unrepaired partial loss mergers into a total loss in the same policy year, so that the claim can only be for total loss: if the partial loss was the result of an insured peril but the subsequent total loss was uninsured, the result is that the assured recovers nothing. Where a partial loss is repaired, and a total loss follows, s.77(1) allows the assured to recover for the total loss (if caused by an insured peril). The same principle applies where a constructive total loss which the assured elects to treat as a partial loss by not serving a notice of abandonment is followed by an actual or constructive total loss: the assured is entitled to recover the full amount of the latter under a valued policy, given that the valuation is conclusive as between the parties despite the earlier damage.[253] There are two important limitations to the merger principle. First, s.77 is concerned only with the position where the losses occur in the same policy year: once a policy year has come to an end, the assured is entitled to recover for all unrepaired loss even though the subject matter has become a total loss in a later year.[254] Secondly, where a constructive total loss is followed by an actual total loss, the assured may claim for either of them, so that if the latter is uninsured the assured will have a valid claim for the former. This principle was confirmed in *Kastor Navigation Co Ltd v AXA Global Risks (UK) Ltd*,[255] where the vessel became a constructive total loss by fire and almost immediately afterwards sank for reasons which were unexplained so that the sinking was not covered by the policy. The Court of Appeal held that the fire was a constructive total loss in its own right and that the assured could recover for the fire.[256]

(i) Suing and labouring clause

8.165 Section 78 of the MIO is in the following terms:

> (1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance; and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject matter may have been warranted free from particular average, either wholly or under a certain percentage.
>
> (2) General average losses and contributions and salvage charges, as defined by this Ordinance, are not recoverable under the suing and labouring clause.[257]

[253] *Woodside v Globe Marine Insurance Co Ltd* [1896] 1 QB 105 and *Fooks v Smith* [1924] 2 KB 508.

[254] *British & Foreign Marine Insurance Co v Wilson Shipping Co Ltd* [1921] 1 AC 188.

[255] [2004] Lloyd's Rep IR 481, confirming *Hahn v Corbett* (1824) 2 Bing 206 and *Pesquerias v Beer* (1946) 79 Ll LR 417.

[256] It had not been possible to serve a notice of abandonment, given the proximity of the two perils, but service was held to have been excused by MIO s.62(7).

[257] Contractual salvage is, however, recoverable. See *Aitchison v Lohre* (1879) 4 App Cas 755 and the note to the MIO s.65. Use of the Lloyd's Open Form, a standard document in salvage cases, renders the salvage contractual: *China Pacific SA v Food Corp of India* [1982] AC 939; *The Choko Star* [1989] 2 Lloyd's Rep 42 and *The Vergina* [2002] Lloyd's Rep IR 51.

> (3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.
>
> (4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

8.166 The duty of the assured in s.78(4) is independent of any suing and labouring clause, although in practice such clauses are all but universal in marine insurance. The word "duty" is perhaps misconceived,[258] as the cases upon which s.78(4) is based appear to have turned on causation principles, in that the assured had by his inaction caused the loss.[259] There is, moreover, some difficulty in reconciling the "duty" with the ordinary principle set out in s.55(2)(a) that the assured is entitled to recover "even though the loss would not have happened but for the misconduct or negligence of the master or crew." It was suggested in *Astrovianis Compañia Naviera SA v Linard (The Gold Sky)*[260] that s.78(4) was a drafting error, although it could be reconciled with s.55(2)(a) (and thereby deprived of much of its effect) by confining the duty to the assured personally and to his direct agents other than the master or crew. That view has been rejected,[261] and it now clear that s.78(4) states a rule of causation. In *Orica Australia Pty Ltd v Limit (No 2) Ltd*[262] the insured, covered by a liability policy, incurred costs in re-stowing a cargo of ammonium nitrate. The insurers sought to deny liability for those costs by arguing that the insured had failed to mitigate its loss by accepting an earlier settlement offer by the cargo owner. The court applying, a causation test, held that the proximate cause of the loss was the occurrence of an insured maritime peril, and the chain of causation had not been broken by the insured's conduct. The point of principle aside, the evidence showed that the offer could not have been accepted anyway, as it involved the complete discharge of the vessel, which would not have been allowed by the port authorities. The result is that the assured is precluded from recovering in those rare cases where his conduct has been the proximate cause of the loss:[262] damages

[258] *British & Foreign Marine Insurance Co v Gaunt* [1921] 2 AC 41, 65 and *Lind v Mitchell* (1928) 32 Ll LR 70, 75.

[259] *Kidston v Empire Marine Insurance Co* (1866) LR 1 CP 535; *Currie v Bombay Native Insurance Co* (1869) LR 3 CP 72; *Benson v Chapman* (1849) 2 HLC 496 and *Notara v Henderson* (1872) LR 7 QB 225.

[260] [1972] 2 Lloyd's Rep 187.

[261] *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582 and *State of Netherlands v Youell* [1998] 1 Lloyd's Rep 236. In *Youell* Phillips LJ suggested that the word "agents" applied to every person to whom the assured had delegated the conduct of a marine adventure, but did not include, eg, builders. In *Melinda Holdings SA v Hellenic Mutual War Risks Association (Bermuda) Ltd* [2011] EWHC 181 (Comm), Burton J expressed the view that the distinction drawn by Phillips LJ was too subtle, and that the suing and labouring clause was in principle applicable to the assured's lawyers as his "agents."

[262] *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582; *State of Netherlands v Youell* [1998] 1 Lloyd's Rep 236; *Strive Shipping Corp v Hellenic Mutual War Risks Association* [2002] Lloyd's Rep IR 669; *Bayview v Mitsui Motor Corp* [2002] Lloyd's Rep IR 121; *The Nore Challenger* [2005] 2 Lloyd's Rep 534 and *Bayswater Carriers Pte Ltd v QBE Insurance (International) Pte Ltd* [2005] 1 SLR 69. *Linelevel* seems to be the only case since the passing of the legislation where a claim by the assured has been defeated (and then only in a very small part) by breach of the obligation to sue and labour, in that the assured caused its own loss by failing to effect repairs. In *Masefield AG v Amlin Corporate Member Ltd* [2011] EWCA Civ 24, the Court of Appeal, having held that the capture of insured subject matter was by pirates did not constitute a loss of the subject matter, was not required to decide whether the assured was required to pay a ransom under the duty to sue and labour. Rix LJ contented himself with commenting that, even if there was a loss and thus a duty to sue and labour, breach of that duty would not be the cause of any loss so that failure to sue and labour would not of itself preclude recovery. See also *Melinda Holdings SA v Hellenic Mutual War Risks Association (Bermuda) Ltd* [2011] EWHC 181 (Comm).

dock, buoy, pier, quay or any similar structure will not attract the operation of the clause. A collision with the fishing nets of a vessel is not a collision as the fishing nets cannot be regarded as part of the vessel.

9.006 However, the situation becomes difficult for collision with a sunken vessel or wreck which was once but is no longer navigable.[6] Whether a sunken vessel or wreck can still be defined as a "vessel" is controversial. The court in *Pelton Steamship Co Ltd v North of England Protecting and Indemnity Association*[7] adopted the view that if a sunken vessel is in such a position as would Induced a reasonably minded owner to give up operations of salvage, then this sunken vessel cannot be regarded as a vessel:

> "It seems to me … that navigability [at the time of collision] cannot be the test as to whether the thing is or is not a ship or vessel … and I cannot find any better test than the question whether or not any reasonably minded owner would continue salvage operations in the hope of completely recovering the vessel by these operations and subsequent repair."[8]

3. Principles of Liability in Collision Claims

9.007 For civil liability, the general principle of tort law will apply to principles of liability in collision claims. Most collision claims are based on negligence or negligent breach of a statutory duty though there are also some claims for nuisance[9] and trespass.[10] As a matter of substantive law, collisions at sea involve the application of the law of negligence in just the same way as collisions on the road. However, that the mere fact of the occurrence of a collision is not sufficient evidence of actionable negligence.[11]

9.008 The essential elements of actionable negligence in a collision claim are set out by Lord Stowell as early as 1823 in *The Dundee*:[12]

> "Want of that attention and vigilance which is due to the security of other vessels that are navigating the same sea, and which, if so far neglected as to become, however unintentionally, the cause of damage of any extent to such other vessels, the maritime law considers as a dereliction of bounden duty, entitling the suffered to reparation in damages."[13]

9.009 The negligence in the navigation of the vessel and the negligence in the management of the vessel are distinct areas of concern. The former area of negligence concerns the faults by the master, the pilot or the crew member while the latter area of negligence

[6] *Chandler v Blogg* [1898] 1 QB 32.
[7] (1925) 22 Ll L Rep 510.
[8] *Ibid.*, 513.
[9] *Crown River Cruises Ltd v Kimbolton Fireworks Ltd and London Fire & Civil Defence Authority* [1996] 2 Lloyd's Rep 533.
[10] *Esso Petroleum Co Ltd v Southport Corp* [1956] AC 218.
[11] *The Cythera* [1965] 2 Lloyd's Rep 454.
[12] (1823) 1 Hagg Adm 109.
[13] *Ibid.*, 120.

concerns the faults caused by either its crew member or the master or the company ensuring the vessel is safe for its voyage.

9.010 To establish civil liability in the event of collision between ships, the burden of proof is on the claimant to prove the facts that have given rise to liability incurred owing to negligence or want of good seamanship. In certain cases, the principle of *res ipsa loquitur* applies, where the facts of the collision speak for themselves in establishing at least *prima facie* evidence of negligence. A breach of the International Regulations for Preventing Collisions at Sea 1972 (COLREGs), as described below, is good evidence for the court to evaluate the causative potency of the fault and to make an assessment of the blameworthiness of the defendant. In *The Roseline,*[14] as per Sheen:

> "… a well run ship will be navigated in accordance with the regulations. It is the duty of the owners to make sure that their masters understand their duties and understand they are expected to run an efficient ship."[15]

9.011 To establish a right of action against the owner of the vessel, the court must decide that: (1) there was a collision between two ships, ie, there was a breach of duty of care; (2) the damage to the ship was caused or was contributed by the collision (causation in fact); and (3) the collision was caused wholly or in part by the fault of the owner or a person for whose act or omission he is responsible, which is subject to the remoteness rule (causation in law and remoteness of damage).

9.012 There is no right of action if the collision of the two vessels results in no damage.[16] In *The Margaret,*[17] the court gave the following comment:

> "… the cause of action in collision cases is not merely the fact of the ships having come into impact with one another, for that by itself is no cause of action, but that damage in the sense of injury was caused to the property of the plaintiffs by reason of that collision."[18]

4. Claim

9.013 The usual form of a marine hall insurance policy with the Institute Time Clauses — Hulls includes the three-fourths collision liability clause which limits the underwriter's liability to that proportion of the damage to the other vessel and is also based on the insured value of the vessel. The remaining one-fourth of the liability arising out of the collision, together with that part of the shipowner's remaining three-fourths liability which exceeds the Insured valued in the hall policy, is covered by the shipowner's P&I Club.

[14] [1981] 2 Lloyd's Rep 410.
[15] *Ibid.*
[16] See *The Margaret* (1881) 6 PD 76 (CA); see also *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound)* [1961] 1 Lloyd's Rep 1, 11 (PC).
[17] (1881) 6 PD 76.
[18] *Ibid.*, 79.

9.014 If collision cases give rise to substantial claims and liabilities, it is essential that the shipowner's office and the P&I club be notified immediately of any collision. Being the largest single underwriter (one-fourth), it is customary for the P&I club to handle the collision claim, subject to the agreement of the leading hull underwriter whose approval must be obtained in all major decisions relating to the matter and the proposals for the apportionment of liability.

5. Standard of Care and Burden of Proof

9.015 The standard of care adjudged in a maritime collision case is the standard of a "prudent seaman."[19] Prudent seaman can be taken to mean the ordinary skill, care and nerve to be found in each seaman according to his rank.[20] This standard varies from person to person depending on their rank, skill, care and experience and is very wide. The court would adjudge the conduct of the person navigating the ship to see if it falls below such standard based on all factual circumstances of the incident.[21] Thus, the standard of care is a question of fact to be decided on a consideration of all the relevant circumstances.

9.016 It is the duty of the owners to make sure that the master or the person navigating the ship understand their duties and understand that they are expected to run an efficient ship. The other officers on board must be of adequate qualification and experience to enable the master to carry out his duties.

9.017 An important factor in assessing whether the master's conduct was up to the standard of a prudent seaman is the extent of his compliance to the COLREGs; though there is no default presumption of fault by mere non-compliance of the regulations. The question to be asked in each case is essentially whether the failure to observe the particular regulation set in motion or contribute to a chain of circumstances that resulted in the collision, or was there an intervening factor that broke this chain, and that factor was in fact the real cause of the collision incident? The COLREG is applicable in Hong Kong and had been considered by the courts in various cases.[22] The compliance with the regulations is required by the principles of good seamanship.

9.018 In the case of collision between vessels, the burden usually rests on the plaintiff to prove that the other ship was in breach of its duty of care. Once the plaintiff proves the other ship has breached its duty of care, the burden then shifts on the defendants to show that it was caused by some external event that was totally unavoidable.

[19] *Ibid.*

[20] See *The Thomas Powell and the Cuba* (1866) 14 LT 603; see also *The Zaglebie Dabrowskie* [1978] 1 Lloyd's Rep 573.

[21] It depends primarily on what good seamanship required in a very special and difficult circumstances of the case, eg, the decision of a master ordering evacuation of a vessel which is about to sink in three hours after collision. See *The Zaglebie Dabrowskie* [1978] 1 Lloyd's Rep 573.

[22] See *The He Da 98* [2011] 5 HKLRD 126; see also *Kulemesin v HKSAR* (2013) 16 HKCFAR 195 (CFA); *Nippon Yusen Kaisha v Ship "Wing Sang"* (1914) 9 HKLR 110 and *Wong Cheong Wai v SS Holstein* (1909) 4 HKLR 223.

9.019 The universal test in examining duty of care general tort cases is applicable in collision cases, and that is to identify: (1) reasonable foreseeability of harm or damage; (2) a relationship of proximity between the claimant and the tortfeasor; and (3) that in all circumstances it was fair, just and reasonable to impose a duty of care on the defendant for his careless action.[23] In collision cases, it is generally self-evident that a duty of care exists by a vessel towards other vessels navigating at the same sea.

9.020 The Defendants are liable for damages unless they can show that the collision was inevitable. An inevitable accident is, according to the law laid down in *The Marpesia,*[24] following *The Virgil*,[25] one that cannot possibly be avoided by the exercise of ordinary care and caution and maritime skill.[26]

(a) *Res ipsa loquitur*

9.021 A collision between two ships attracts the operation of the doctrine *res ipsa loquitur* and it creates a rebuttable presumption of negligence. In *The Merchant Prince*,[27] the plaintiff's steamer, the Catalonia, was anchored in the Mersey when the Merchant Prince, a steamer belonging to the defendant, coming down the river and struck the Catalonia on the port side, doing considerable damage. The court of appeal held that the defendant had not satisfied the burden of proof for relying on the defence of inevitable accident and to disprove the *prima facie* evidence of negligence because the defendants had knowledge of the mechanics of the ship and the traffic condition of the river where the accident occurred.

9.022 To prove that the collision was inevitable, the defendant must do one of two things. Firstly, the defendant must show the cause of the accident and to show the result of that cause was inevitable. Or, in the alternative, the defendant must show all the possible causes which produced the effect and must further show with regard to every one of these possible causes that the result could not have been avoided.[28] In the court of appeal, the Master of the Rolls, Lord Esher, stated that:

> "Unless you can get rid of it, it is negligence proved against you that you have run into a ship at anchor … the only way for a man to get rid of that which circumstances prove against him as negligence is to [show] that it occurred by an accident which was inevitable by him — that is, an accident the cause of which was such that he could not by any act of his have avoided its result. He can only get rid of that proof against him by [showing] inevitable accident that is by

[23] *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

[24] (1871–1873) LR 4 PC 212.

[25] (1843) 2 W Rob 201, 166 ER 730.

[26] "In my apprehension, an inevitable accident in point of law is this; viz., that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. If a Vessel charged with having occasioned a collision should be sailing at the rate of eight or nine miles an hour, when she ought to have proceeded only at the speed of three or four, it will be no valid excuse for the Master to aver that he could not prevent the accident at the moment it occurred; if he could have used measures of precaution that would have rendered the accident less probable." *Ibid.*, 205, 731.

[27] [1892] P 179.

[28] *Ibid.*, 189.