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specialises in expert analytical coverage of contemporary global developments in shipping and maritime law, marine insurance law, international trade law, combined transport law, private international law, marine environmental law, law of the sea issues and related areas. Case commentaries, reports on conventions, standard form contracts and other developments are included as well as coverage of the work of specialist agencies such as the CMI, UNCTAD/UNCITRAL, IMO and EU.

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EDITORIAL

Reform of LOF salvage arbitration

The Lloyd's Open Form of Salvage Agreement (LOF) celebrated its centenary in 2008 and it continues to maintain its position as the most significant and widely used salvage agreement. The International Salvage Union, which represents professional salvors responsible for more than 90 per cent of global marine salvage services, has produced data for the period 1978–2005 indicating that out of a total of 5,135 salvage operations carried out by its members 2,701 were performed under LOF contracts, which represents 53 per cent. Subsequent data emanating from the ISU continues to show the LOF to be the single most utilised form by its members.

Since its emergence the contract has evolved through a number of editions, the most recent being the 10th which appeared in 2000. The pace of change has accelerated significantly over the last 30 years, as the law of salvage has bifurcated to include the protection of the marine environment and an accompanying exception to the 'no cure no pay' principle. The so-called 'safety net provision' appeared in the 1980 edition and was subsequently refashioned and broadened in its scope in the 1990 edition to correspond with the special compensation provision in Article 14 of the new International Salvage Convention 1989. The LOF gave effect to this radical development before the Convention came into force. The first SCOPIC agreement appeared in 1999 with the intention that it should be used in conjunction with the LOF contract. The alternative approach it represented for compensating salvors for services rendered to the environment was embodied in LOF 2000 and, subsequently, in 2007 the SCOPIC agreement was amended.

This brief overview makes evident that as changes have been introduced to the law and practice of salvage so also the substantive provisions of the evolving LOF contract have been extended to a corresponding degree. But the changes go well beyond substantive considerations. In matters of form LOF 2000 is a very different document from any of its predecessors, which were compact contracts embodying salvage and arbitration terms, with greater attention devoted to the latter. In contrast the current edition is a bundle of three documents: the LOF contract itself and two accompanying documents which are incorporated by express reference into the contract, namely the Lloyd's Standard Salvage and Arbitration Clauses and the Procedural Rules. The Lloyd's salvage arbitration system runs in tandem with the LOF contract and is an important element of the service provided by the Lloyd's Salvage Arbitration Branch. The arbitral service was expanded in 2005 with the introduction of a fixed-cost, documents-only arbitration procedure (FCAP).

There is currently in train a further reform of the arbitration system which is directed principally at the appointment and professional responsibilities of Lloyd's salvage arbitrators. This is a topic which has not, at least publicly, caused any problems in the past, with the positions filled by very experienced and eminent QCs drawn from the Commercial and Admiralty Bar. Currently there are three arbitrators and an appeal arbitrator, all of whom fall within the description just given. The proposal is that a new appointments process be established and a new body of five arbitrators and one appeal arbitrator be appointed to take up their responsibilities from 1 October 2009. With this in mind invitations to apply for the new positions have been circulated in appropriate quarters, including to the existing arbitrators, accompanied by documents relating 'to person specification and criteria for selection', and a Code of Conduct for LOF Arbitrators.

All this strikes one as being very modern and bureaucratic, and the documentation is filled for the most part with content that most people would consider self evident. The appointments are to be

made at the absolute discretion of the Council of Lloyd's, although 'as a result of the special nature of these appointments, and of the crucial importance of the requirement that Arbitrators have the full confidence and respect of the market, the Controller [of Agencies at Lloyd's] intends to take soundings from interested parties as part of the selection process'. This consultation is to take place at a meeting to be convened by the Controller and to which representatives from organisations principally involved with shipping and salvage will be invited, namely the ISU, International Union of Marine Insurers, International Chamber of Shipping, International Group of P&I Clubs, Admiralty Solicitors Group and also two non-executive directors of Lloyd's.

This proposal has caught many by surprise and provoked criticisms and complaints. The ISU is distinctly unhappy about the absence of notice and consultation, and many others may question the need to tamper with the selection, appointment and responsibilities of arbitrators when there exists no identifiable problem. The Controller responds by asserting that there is need for a more regulated and transparent system which will meet the needs of our changing times, ensure a fair system of salvage arbitration and satisfy the demands of the various users of the salvage service. And further that what is being proposed does not mean change at all.

This particular debate can be left to those directly involved, but the point can be reinforced that in arbitration nothing is more important than the quality and experience of the arbitrators. There is reason for saying that this is particularly true of salvage arbitration and over the years the success of Lloyd's salvage arbitration has been achieved because of the generations of eminent arbitrators who have been engaged with the system. We forget at our peril this lesson provided by history.

At the same time the present reform and the debate it is provoking should not be permitted to mask from sight other relevant problems.

There is growing concern about the increasing cost of referring disputes to Lloyd's salvage arbitration, a concern which, it has to be said, attaches to most significant international arbitral systems. The FCAP was introduced in 2005 in response to these concerns, but it is by definition only a limited remedy. The problem has not disappeared and although it is predominantly connected with the cost of legal and other professional assistance and representation it does pose a serious obstacle to the continued development of the LOF contract and associated arbitration. It is a problem to which there is no obvious solution but this is not a reason for turning a blind eye to its existence.

It also has to be appreciated that Lloyd's salvage arbitration not only resolves private disputes about, principally, the proper quantum of salvage awards, it also holds the balance between salvors, predominantly professional salvors, and marine underwriters, who fund traditional salvage awards. An important aspect of a salvage award is that it not only gives an indemnity for expenses and remunerates services, but that it also serves as an encouragement to others to provide salvage services when it is required and to be prepared to perform such services speedily, effectively and efficiently. In turn, salvage awards are funded by insurers of the beneficiaries of successful salvage services, and it is widely appreciated that the costs on both sides of the salvage equation are substantial and growing. Professional salvors complain that awards are insufficient and insurers that salvage payments and associated costs are too great, and caught in the middle are salvage arbitrators. One of the roles in particular of the Lloyd's salvage appeal arbitrator is to ensure that a fair balance is struck between the two competing interests and to keep that balance under constant scrutiny to ensure that it is properly maintained. It is therefore important that Lloyd's salvage arbitrators maintain their independence and are shielded from undue pressure or influence exerted by any sector of shipping or the insurance markets.

When a professional salvor operating under a LOF contract is uncertain of the likely return on his investment in a salvage service under the law of salvage now he at least has the option to provide the service under the alternative remuneration scheme provided by SCOPIC.

DRT

DIGEST OF CONTEMPORARY DEVELOPMENTS

CARRIAGE OF GOODS BY SEA

Bunge SA v ADM Do Brasil Ltd and Others (The Darya Radhe)
[2009] EWHC 845 (Comm)
English Commercial Court

Hague-Visby Rules – Article IV Rule 6 – dangerous cargo – implied obligation – common law

The *Darya Radhe* was loaded with a cargo of 44,337.515 tonnes of Brazilian soyabean meal pellets at Paranagua. The cargo had been loaded by nine shippers who each received at least one bill of lading incorporating the Hague-Visby Rules. It was estimated that between 14 and 20 rats had been introduced on board the ship at the time of loading. This caused the carriers Bunge, who were time charterers, significant delay and cost, which in total was in excess of US$2 million.

Each bill of lading incorporated Article IV Rule 6 of the Hague-Visby Rules, which provided:

> Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

The claimant time charterers alleged that the shippers were in breach of Article IV Rule 6 and liable for the losses caused by delay and the expenses incurred by them, or alternatively, that the shippers were in breach of the implied obligation under common law not to ship dangerous cargo.

In a consolidated arbitration involving all nine shippers, the arbitrators, by a majority decision, held that the rats had been allowed on board the vessel during the loading operations. Further, the arbitrators held unanimously, that the claim failed because (i) the claimants were unable to prove that any of the shippers were responsible for introducing any rats into the ship's holds, and (ii) the cargo loaded together with rats was not dangerous.

An appeal to the High Court failed. The argument that cargo was dangerous if it was liable to cause delay to the vessel and/or other cargo was rejected. Danger in the context of the Hague Rules and under the common law alluded to physical danger. It did not include any broader concept, such as delay caused by the detention of the carrying vessel (*Mitchell, Cotts & Co v Steel Brothers & Co Ltd* [1916] 2 KB 610; *The Lisa* [1921] P 38; *Transoceanica Italiana di Navigazione v HS Shipton & Sons* [1923] 1 KB 31; *The Giannis NK* [1998] 1 Lloyd's Rep 337). The arbitrators had also found as a fact that the cargo, together with the rats, did not pose a physical danger to the ship and other cargo.

In the result there had not been any breach of obligation under the Hague-Visby Rules nor the common law.

CHARTERPARTIES – TIME

Mansel Oil Ltd and Another v Troon Storage Tankers SA (The Ailsa Craig)
[2009] EWCA 425

Time charterparty – Shelltime 4 – delivery port range – cancellation – prior to nomination – validity

The Court of Appeal dismissed an appeal from the decision of the English Commercial Court (noted at (2008) 14 JIML 287). The facts of the case are not repeated here, but the preliminary issue before the court was: 'Whether the charterers were not entitled to cancel

the charterparty by reason of any absence of nomination of a delivery port?' The court agreed with the construction of the charterparty adopted by the judge at first instance.

On the facts of the case the time for the charterers to make a nomination had not arrived and it could not therefore be said that the charterers had failed to make a nomination.

The fact that the charterers had failed to make a nomination before the obligation to do so arose was not a reason for asserting that they did not possess the right to cancel the charterparty. In normal circumstances a nomination of a port must be made within such time as to enable the vessel to make her cancelling date and avoid delay.

Enviroco Ltd v Farstad Supply A/S (The Far Service)
[2009] EWHC 906 (Ch)
English High Court (Ch)

Time charterparty – indemnity clause – allocating insurable risk – fire – third party contractor – whether affiliate of charterer

Defendant owners chartered the *Far Service* to charterers Asco UK Ltd. The charterers employed contractors to clean the oil tanks of the vessel. When the contractor's employees were engaged on this work a fire broke out in the engine room of the vessel causing substantial damage. The owners brought proceedings in Scotland for damages in the sum of £2.7 million.

The contractors responded by bringing proceedings in England, in which the owners were defendants, seeking a declaration that the owners were not entitled to bring Scottish proceedings against them by virtue of an indemnity provision in the charterparty that sought to allocate insurable risk between the owner and charterer and their affiliate companies. The charterparty defined affiliate in the following terms:

> "Affiliate" means any Subsidiary of the charterer or Customer or a company of which the charterer or Customer are a Subsidiary or a company which is another Subsidiary of a company of which the charterer or Customer is a Subsidiary. For the purpose of this definition "Subsidiary" shall have the meaning assigned to it by section 736 of the Companies Act 1985.

The court was asked to answer as a preliminary issue the question whether the contractor was an affiliate within the meaning of the charterparty and therefore able to take the benefit of the indemnity.

Both the charterer and the contractor were subsidiaries of Asco plc, the parent company, but the question whether the contractor was an affiliate was clouded by the fact that the parent company had pledged its shares in the contractor to the Bank of Scotland. This had been effected by a Deed of Pledge, governed by Scottish law, which required the bank to become the registered holder of the shares pledged but with all the key rights continuing to be exercisable by the parent company.

The owner submitted that the consequence of this transaction was that the parent company was no longer a member of the contractor. The court rejected the submission.

Apart from the pledge the contractor fell within the indemnity clause in the charterparty.

The transfer of registration of membership was a technical procedure which was required to protect the bank's security. On the face of matters, reasonably assessed, this ought not to affect the allocation of risk as between the owner and charterer and their related companies.

The cross-reference to section 736 of the Companies Act 1985 did not change matters. When incorporated into the charterparty the section operated as a contractual term and was to be construed as such. While, between a company and its members, a 'member' was someone registered on the register of members, such an approach was inconsistent with commercial reality or business sense if applied to the present circumstances. The parent company did not cease to be a member simply because it had agreed to pledge its shares in the subsidiary company.

On a true construction of the charterparty the contractor was an 'affiliate' of the charterer.

CHARTERPARTIES – VOYAGE

Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)
[2009] EWCA 531

Voyage charterparty – amended Gencon – loading berth – implied warranty of safety rejected

The Court of Appeal dismissed an appeal from a decision of the English Commercial Court (noted at (2008) 14 JIML 289–90). The full facts of the case are not repeated here, in its essence the case concerned the question whether under an amended Gencon form the charterers had impliedly promised that the loading berth at the port of Chekka, in Lebanon, was safe. The Court of Appeal made the following points.

Whether a term is to be implied into a contract depends on the proper construction of the contract. The question is, what can the contract, having regard to its terms and the prevailing circumstances, be reasonably understood to mean when read in its entirety against the relevant background (*Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 11).

Where a charterparty expressly warrants the safety of a port but not that of a berth to be nominated by the charterers, there is an implied promise that the nominated berth is safe. The implied promise is implicit in the express warranty of safety of the port (*The Eastern City* [1958] 2 Lloyd's Rep 127).

Where there exists an implied warranty of a safe berth only, the same principles apply as for a safe port subject to two qualifications. The safe berth warranty does not apply to the vessel's passage to and from the port; and the promise is limited to risks not affecting the port as a whole or all berths in the port (*The APJ Priti* [1987] 2 Lloyd's Rep 37).

The fact that the word 'safely' had been struck out of clause 1 of the charter form was a relevant factor in the construction of the charterparty but it was not conclusive of any particular conclusion. It was merely indicative of the fact that the parties did not intend that there should exist an express term as to safety, whether of the port or berth.

The absence of an express warranty of safety with regard to the port, coupled with clause 1 of the charterparty, suggested the conclusion that there was no warranty of safety with regard to the channel leading to and from the berth.

A proper construction of clauses 1 and 20 of the charterparty suggested that the obligation to proceed to a nominated berth or as near as the vessel might get and lie afloat and there load a contractual cargo was not contingent on a warranty of safety. It was therefore not necessary to imply a warranty of safety to make the charterparty workable.

FOREIGN SOVEREIGN IMMUNITY

Wilhelm Finance Inc v Ente Administradir Del Astillero Rio Santiago
[2009] EWHC 1074 (Comm)

Argentine shipyard – defendant – English litigation – service of process – whether separate entity – State Immunity Act 1978

The claimant applied to the English courts for a declaration that two deeds arising out of a shipbuilding contract with an Argentinian shipyard for the construction of a bulk carrier were void.

The shipbuilding contract was subject to a condition precedent that it be approved by the Government of the Province of Buenos Aires, and in it the shipyard was described as 'a corporation organised and existing under the laws of Argentina'.

The shipyard had been created in 1993 when the employees and assets of a preceding state entity were transferred from the Ministry of Defence to the Province of Buenos Aires, apparently in preparation for its eventual privatisation which had yet to take place. The governor of the province had issued a decree

dated 20 December 1993 relating to the management of the shipyard which was to be managed by a board of directors nominated by the 'Executive power'. The decree recited that the shipyard was created as 'a State-Owned Economically Independent Entity' and that it should have 'sufficient power to act either in public or private areas, within the areas of competence defined by this Decree'. The shipyard had carried on the business of building and repairing ships for the Argentine navy and private owners.

With regard to service of process the shipyard's solicitors took the point that it was an entity of a state and that section 12 of the State Immunity Act 1978 (the Act) and CPR 6.44 applied, which required process to be transmitted through the Foreign and Commonwealth Office of the British Government to the Ministry of Foreign Affairs of the state in question, in this case Argentina. The claimants disputed this assertion and claimed, relying on section 14 of the Act, that the defendant shipyard was a 'separate entity' and not a 'state'. Section 14 excluded from the definition of 'state' 'any entity (hereinafter referred to as a separate entity) which is distinct from the executive organs of the government of the state and capable of suing and being sued'.

The court answered the question whether the shipyard was a separate entity in the affirmative. Both elements of what constituted a separate entity under section 14 were satisfied. The shipyard had the legal capacity to sue or to be sued in its own name. There was nothing in the constitution of the shipyard to indicate that it did not have the capacity to sue and to be sued, and in the course of its business the shipyard entered into contracts in its own name. It could not be inferred from the fact of state ownership that it lacked the legal capacity to engage in litigation in its own name.

The second element, which required it to be distinct from the executive organs of the government, was also satisfied. It was not described as such in the 1993 decree, where it was described as a 'state-owned economically independent entity'. Also, the nature of the functions performed by the shipyard could not be described as sovereign, and in no sense could it be described as a department of government.

In the result it was concluded that the defendant shipyard was a separate entity from the State of Argentina and therefore the procedural requirement of section 12 of the Act did not apply.

INTERNATIONAL SALES

Petroplus Marketing AG v Shell Trading International Ltd
[2009] EWHC 1024 (Comm)
English Commercial Court

FOB sale – pricing and payment provisions – bill of lading date – sellers – delay in loading – benefit from own wrongdoing

Sellers, Petroplus, agreed to sell to the buyers, Shell, FOB Coryton, 29–32,000 mt of high sulphur fuel oil (HSFO) and 1–2,000 mt of light cycle oil (LCO). The sale was made through brokers and the oil was to be lifted in one lot at Coryton during the period 21–25 June 2008, and Shell was to declare a three-day loading range by the close of business on 16 June 2008. On 24 June 2008 Shell nominated the *Ninae* to load the cargo and gave loading instructions. By then it had become clear that there would be a delay in loading the HSFO.

The relevant provisions, as set out in emails confirming the agreement, included a pricing and payment provision:

> The price of the HSFO was to be the average of the Platts mean quotation under the heading 'barges FOB Rotterdam' and '3.5pct' less a discount of US$0.50 per metric tonne applicable for the bill of lading date, the immediately two preceding quotations and the two immediately following quotations (B/L + 2–2). If no Platts quotation immediately two preceding quotations and the two immediately following quotations to apply . . . Price as per metric tonne on bill of lading quantity for FOB Coryton.
>
> Payment – To be effected in full, without deduction, offset or counterclaim in US dollars by telegraphic transfer to seller's nominated bank account latest five working days after bill of lading date against telex invoice and normal shipping documents, or seller's telex letter of indemnity for temporarily missing documents in a format acceptable to buyer.

There were various arguments made that these terms had been varied by or that an estoppel had arisen out of subsequent email exchanges, but these were rejected by the court.

The central question was whether the pricing mechanism should be maintained when the delay in shipping the HSFO had been brought about by the fault of the seller, and when this resulted in a later dated bill of lading and an increased purchase price. Shell contended that, as a matter of construction, or by virtue of the existence of an implied term, the sellers were not entitled to a price calculated by reference to the bill of lading date because this would be to allow the sellers to benefit from their own wrong. The court rejected this argument. The pricing and payment provisions in the contract made it clear that the sellers were to be paid the invoice amount in full notwithstanding that the buyers contended that they were in breach of contract. The machinery set out by the contract would be rendered ineffective and frustrated if the buyers were entitled to withhold payment by challenging the calculation of the price by reference to the bill of lading date on the grounds of short delivery or on the ground that the date resulted from a breach of contract on the part of the seller. The expression 'bill of lading' in the contract was not confined to contractually compliant dates.

KG Bominflot Bunkergesellschaft Für Mineralole mbh & Co v Petroplus Marketing AG (The Mercini Lady)
[2009] EWHC 1088 (Comm)
English Commercial Court

FOB sale – defective goods – implied terms – Sale of Goods Act 1979 – common law – duration of implied obligations

Sellers agreed to sell to buyers on FOB Antwerp terms 38,500 mt of EU Gasoil (± 10 per cent at buyer's option) to be shipped on board the *Mercini Lady*. The contract was governed by English law and contained the following provisions.

Clause 4 set out the specifications that the gasoil had to meet at the time of shipment, including as to total sediment.

Clause 12 provided: 'Quality and quantity, basis shoretank, to be determined by a mutually agreed independent inspector at the loading installation, in the manner customary at such installation. Such determination shall be final and binding for both parties, except in case of fraud or manifest error'.

Clause 18 provided: 'There are no guarantees, warranties or representations, express or implied, or (sic) merchantability, fitness or suitability of the oil for any particular purpose or otherwise, which extend beyond the description of the oil set forth in this agreement'.

An analysis of a composite sample made up of samples taken prior to loading from the five shore tanks from which the gasoil was loaded revealed that the composite sample met the stipulated specifications, including the sediment.

However, the buyers alleged that when the gasoil arrived at El Ferrol, the port of destination, after an incident free voyage, it did not conform with the specifications, particularly as to sediment. The intended receivers rejected the cargo and the buyers claimed damages in excess of US$3 million. The buyers contended that the sellers were in breach of:

(i) an implied term that the cargo would be of satisfactory quality following a normal voyage pursuant to s 14(2) of the English Sale of Goods Act 1979 (the Act); and/or
(ii) an implied term that the goods would be reasonably fit for their purpose following a normal voyage pursuant to s 14(3) of the Act; and/or
(iii) an implied term under the common law that the gasoil would be of satisfactory quality and/or in accordance with the contractual specification following a normal voyage and for a reasonable time thereafter.

These contentions were identified as preliminary issues to be determined by the court, which expressed the following conclusions.

Subject to the express terms of the contract, there was to be implied into a FOB contract an obligation pursuant to s 14(2) of the Act to deliver gasoil that was of satisfactory quality not only when the gasoil was delivered onto the ship but also for a reasonable time thereafter. The same implied obligation arose under

the common law, with the additional dimension that the gasoil should remain in accordance with the specifications for a reasonable period of time after delivery of the vessel (*Beer v Walker* [1887] All ER Rep 1138 CPD; *Mash & Murrell Ltd v Joseph I Emanuel Ltd* [1961] 1 WLR 862 (Comm)).

In CIF and CFR contracts, where the seller was aware of the destination of the goods, the time taken to perform a normal voyage represented the basic measure of what constituted a reasonable period of time. In contrast, with regard to a FOB contract, where the seller did not know the destination of the goods, what constituted a reasonable period of time depended on the circumstances appertaining to the contract. A FOB buyer was entitled to expect in exchange for the price paid for the goods that he would receive goods that were of satisfactory quality and would remain so for sufficient time for him to have some beneficial use of the goods or to sell them on (*Navigas Ltd of Gibraltar v Enron Liquid Fuels Inc* [1997] 2 Lloyd's Rep 759 QBD (Comm)).

There was no implied obligation under s 14(3) of the Act that the goods would remain fit for purpose within the specifications set out in the contract on delivery and for a reasonable time thereafter. This continued to be the case even if the seller knew the goods were to be carried on a named vessel or substitute and were likely to be on board and stored thereafter before use for a reasonable period of time.

Clause 18 did not preclude the implication of terms under s 14(2) and the common law. The clause was to be construed in accordance with English law and therefore it was to be construed strictly. It did not expressly refer to contractual conditions in the technical sense of that word, which represented the status of the implied terms, and therefore could not be construed as extending to such contractual terms (*Wallis Son & Wells v Pratt & Haynes* [1911] AC 394 HL). The parties were assumed to be aware of the distinction between conditions and warranties.

PRIVATE INTERNATIONAL LAW

Midgulf International Ltd v Groupe Chimique Tunisien [2009] EWHC 963 (Comm)

Anti-suit injunction – London arbitration – Tunisian proceedings – burden of proof – discretion of court

Disputes arose under two contracts for the sale and purchase of sulphur entered into by Midgulf, the sellers and traders in sulphur, and GCT, the buyers and a state owned company. The first contract contained a London arbitration clause but the parties were in dispute whether a similar agreement was embodied in the second contract.

With regard to the second contract, Midgulf applied to the English courts for the appointment of an arbitrator. GCT commenced proceedings in Tunisia for a declaration that no arbitration agreement had been agreed and also disputed the jurisdiction of the English courts to appoint an arbitrator. Midgulf thereupon sought from the English courts an interim anti-suit injunction which was granted, and this order was in turn challenged by GCT.

Whether the parties had agreed a reference to London arbitration in respect of the second contract depended on the proper construction of a number of emails which had been exchanged between them.

The court observed that although the anti-suit injunction is sought at the interlocutory stage, the grant of the injunction was likely to be final because its probable effect in the present circumstances would be to bring to an end the Tunisian proceedings and allow the London arbitration to proceed. In these circumstances the burden of proof on the applicant was to establish a high degree of probability of the validity of its case and of its right to an anti-suit injunction (*Bankers Trust v Jakarta International* [1999] 1 Lloyd's Rep 910; *American International Specialty Lines Insurance v Abbott Laboratories* [2003] 1 Lloyd's Rep 267; *Sheffield United v West Ham United* [2009] 1 Lloyd's Rep 167).

Midgulf had not discharged this burden of proof. It had a strongly arguable case but that was not sufficient. In the circumstances the just and appropriate course was to order a speedy trial of the issue as to the terms of the second contract and to continue the anti-suit injunction until that trial was concluded. Thereafter, the court would be in a position to decide whether or not to appoint an arbitrator and continue the anti-suit injunction indefinitely. As to this, see [2009] EWHC 1684 (Comm).

ANALYSIS AND COMMENT

THE EFFECT OF AN (APPROXIMATE) NOTICE OF REDELIVERY UNDER A TIME CHARTER: IMPLIED TERM AND ESTOPPEL, 'WITHOUT PREJUDICE' AND 'WITHOUT GUARANTEE'

IMT Shipping and Chartering GmbH v Chansung Shipping Co Ltd (The Zenovia)
[2009] EWHC 739 (Comm), [2009] 2 Lloyd's Rep 139

*Robert Gay**

Facts

The *Zenovia*, a bulk carrier, was under timecharter with the earliest permitted date for redelivery being 20 September 2007 and the latest permitted date being 22 November 2007. On 5 October 2007 the charterers gave:

> approximate notice of redelivery for the MV Zenovia at DLOSP I sp China on about 04 Nov 2007 basis agw, wp, wog, uce.

On 15 October 2007 the charterers sent a further notice to the owners stating:

> Plse note that we hereby have to revise the date of redelivery to owners to abt Nov 20th within the range of redelivery.

The position was that it had become clear that an extra voyage could be squeezed in before the latest permitted redelivery date, and therefore the charterers wished to revoke the notice which they had given on 5 October.

The owners insisted that the charterers were not entitled to change the expected redelivery date in this way and, on 2 November, after the vessel had completed the voyage which on 5 October had been envisaged as the last voyage but before the vessel began the charterers' intended additional voyage, the owners withdrew the vessel from the chartered service.

The charterers claimed damages for a repudiation of the charterparty. The dispute came to arbitration before Mr Christopher Moss (an experienced LMAA arbitrator) and Mr Michael Howard QC. The arbitrators decided that the owners had been entitled to withdraw the vessel, so that the charterers were not entitled to any damages.

The situation was in fact more complicated than has been indicated so far, because there was a chain of charterparties. The owners had chartered the vessel to COSCO, COSCO chartered the vessel to Western Bulk Carriers KS, Western Bulk Carriers KS chartered the vessel to IMT Shipping and Chartering GbmH, and in respect of the voyage which on 5 October 2007 had been envisaged as the last voyage, IMT had chartered the vessel to Oldendorff Carriers, who had in turn chartered her to Noble Chartering Inc BVI for a timecharter trip. An agreement was made between the owners, COSCO, Western and IMT under which there was a single arbitration between IMT and the owners.

The arbitrators had to decide a subsidiary question with regard to the effect of this agreement, as to whether the owners were entitled to rely on material which had not passed up the chain from IMT to the owners. The arbitrators held that the owners were entitled to ground a case of 'promissory

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estoppel' not only on material which had passed up the chain but on a Provisional Final Hire Statement from COSCO to the owners, which included a deduction for bunkers ROB at redelivery and thereby indicated an intention to redeliver about 4 November 2007, and also upon voyage orders which had been communicated directly by Noble to the owners and which related to a voyage that would naturally take until about 4 November 2007.

The charterers (that is, IMT) appealed to the High Court.

The issues and decision

The arbitrators held (numbering the points in the order in which they are dealt with in the judgment):

(i) the abbreviation 'wp' meant 'without prejudice'

(ii) notwithstanding the qualifications 'without prejudice' and 'without guarantee' the notice of 5 October 2007 should be treated as a valid and effective approximate notice of redelivery under the charterparty

(iv) the charterers were bound by a promissory estoppel, that they would redeliver the ship at the end of the voyage envisaged on 5 October and would not exercise their contractual right to redeliver on the latest date permitted under the charterparty

(iii) in addition, where an approximate date of redelivery is given by the charterers of a vessel, there is an implied term in the charterparty that the charterers are obliged not to do anything deliberately which prevents that approximate date being met.

Tomlinson J held that:

(i) although he personally would have considered that the abbreviation 'wp' in this context meant 'weather permitting' and not 'without prejudice', on this point he was bound by the arbitrators' view

(ii) a communication which was stated to be 'without prejudice' (and which did not subsequently lead to an agreement intended to be binding) had no legal effect.

However, the judge went on to consider the position as it would have been if the notice had not been stated to be 'without prejudice' (that is, as it would have been if the arbitrators had decided that 'wp' meant 'weather permitting' or perhaps as it would have been if the notice had not contained the abbreviation 'wp' at all). On this basis Tomlinson J held that:

(iii) there is no implied term in a time charterparty on the standard NYPE form to the effect that if the charterers give a notice of approximate redelivery their freedom of action is constrained so that they cannot revoke the approximate notice which they have given and undertake an additional voyage before redelivering the vessel

(iv) in this case the notice was not such that the charterers were entitled to rely on it by way of estoppel.

Tomlinson J considered that even if the owners were entitled to rely also on the Provisional Final Hire Statement and the voyage orders, the qualification 'wog' in the notice of 5 October would still mean that there was not enough to found a case of promissory estoppel. However, the judge also considered (obiter) that on the true construction of the agreement between the owners, COSCO, Western and IMT, the parties in the single arbitration should only be permitted to rely on material that was common to all four parties.

It appears that the formal position is not that points (i) and (ii) are the judge's ratio decidendi, but rather that formally point (ii) is obiter and points (iii) and (iv) are the ratio. (When the judge expresses point (ii) he carefully says: 'I am reluctant to uphold' and 'I am reluctant to accept', and 'In my view the award is susceptible to being set aside on this short ground'. The judge does not take the step from 'I am reluctant to uphold' (which is ruminative) to 'I reject' (which would express a decision) and he does not formally set aside the arbitrators' award on the basis of point (ii).)

However, points (iii) and (iv) may be of less effect as precedents than might appear at first glance.

First, point (iii) relates only to *approximate* notices of redelivery. The judgment expressly mentions the distinction between 'approximate' and 'firm' notices of redelivery. Consistently with this judgment, there might still be an implied term relating to firm notices of redelivery.

Secondly, point (iv) relates to a notice with the qualifying words 'without guarantee'. The judge was supposing a notice which did not include 'without prejudice', but did include the other qualifications in the notice given on 5 October 2007, and it is the words 'without guarantee' that led him to the conclusion that the notice did not contain 'a clear and unequivocal promise' which could give rise to an estoppel.

Commentary

In the writer's view, the judge's approach to issue (ii) is significant and deserves comment.

However, the main interest of the case is in issue (iii). The judge's approach indicates a restrictive approach to the question of implied terms in a charterparty, which is also exemplified by the judgment of the Court of Appeal in *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)* [2009] EWCA Civ 531. (In *The Reborn* there is a full discussion of the test(s) for the implication of terms into a contract, with full citation of authorities, but this commentary will resist the temptation to discuss *The Reborn*. *See* also p 209 above.)

The decision that an approximate notice of redelivery does not give rise to implied obligations on the charterers may also have practical effects for shipowners and charterers. Nevertheless, it will be suggested in this commentary that careful owners may avoid these practical consequences and may continue to rely on 'promissory estoppel', and that this may provide them with as much as the implied obligation would have done.

Effect of 'without prejudice'

The difference between the judge's approach to issues (i) and (ii) is striking. The arbitrators held that 'wp' meant 'without prejudice' and Tomlinson J considered himself bound by the arbitrators' view on this point. The arbitrators held, in effect, that 'without prejudice' did not mean any more than 'without guarantee', but Tomlinson J considered himself entitled to reject this view, instead applying a rule that what is stated to be 'without prejudice' cannot be relied upon.

It may well be questioned whether the judge's interpretation of 'without prejudice' is correct as a matter of 'English as she is spoke'. As the judge admits, the expression is often actually used in commercial communications 'in a matter which may be inappropriate' and, in the writer's experience of the shipping business, the words 'without prejudice' sometimes appear to be intended only as a form of emphasis or an indication that 'things are getting serious'.

Nevertheless, it is suggested that the judge's approach here may be correct. It is a part of the working of English commercial law that phrases in regular use should have fixed meanings, which should be applied regardless of the subjective intentions of the parties. (It may be appropriate to compare the decision of the Court of Appeal in *The Archimidis* [2008] EWCA Civ 175, [2008] 1 Lloyd's Rep 597 with regard to the wording 'one safe port [named port]'. In this context, the phrase 'one safe port' may well be a piece of jargon that shipbrokers have used without intending anything by it. However, the Court of Appeal held (correctly, in the writer's view) that this phrase has a definite meaning and must continue to have that meaning even in this context. *See* also (2008) 14 JIML 78.) The working of English commercial law may require that the meanings of such phrases should be a matter of rules to be applied by the Court, rather than the flexible understanding of commercial arbitrators.

It is also noteworthy that the judge did not approach the interpretation of the notice of 5 October by saying that the charterers' overall intention was to give an approximate notice of redelivery in accordance with the charterparty, and this overall intention should override the qualifying words which they used in their message. Rather, the judge's approach is to give full effect to the qualifying words.

We may compare *The Atlas* [1996] 1 Lloyd's Rep 642, where the Hague Rules provided that the carrier should issue to the shipper a bill of lading 'showing . . . the number of packages . . . or the quantity, or weight, as the case may be, as furnished in writing by the shipper' but the bills of lading as actually issued included the standard-form words: 'All particulars (weight, measure, marks, numbers, quantity, contents, value and etc) thereof as stated by the Merchant but unknown to the Carrier'. Longmore J held that if bills of lading provide 'Weight . . . number . . . quantity unknown', it cannot be said that the bills 'show' that number or weight.

It may perhaps be regretted that English commercial law is not adopting the approach of construing documents *ut res magis valeat quam pereat*, in order to give effect to the overall intention that this should be a bill of lading in accordance with the applicable Rules, or that this should be a contractual approximate notice of redelivery under the governing charterparty.

It is a consequence of the approach in *The Atlas* that if the shipper 'demanded' a bill of lading which would be in conformity with the applicable Rules, then the owners were in breach of their obligation under the Hague Rules to issue a bill of lading 'showing' the particulars as furnished by the shipper. Similarly, it follows from the approach of Tomlinson J to the words 'without prejudice' that the charterers' notice of 5 October would not satisfy their obligation under the charterparty to give an approximate notice of redelivery and, if the charterers had in fact redelivered at the time they envisaged on 5 October, they would have been in breach of charterparty in that they had not given a 30 days' approximate notice of redelivery.

Is there an implied term?

Tomlinson J is to be respectfully applauded for not taking the short way of dealing with the appeal before him, but instead tackling the question of general public importance raised by the award.

However, the tenor of his judgment is very different from some recent judgments where the Court of Appeal has upheld views which appeared commercially reasonable, such as in *Glencore Grain Ltd v Flacker Shipping Ltd (The Happy Day*) [2002] EWCA Civ 1068, [2002] 2 Lloyd's Rep 487, a case in which a vessel tendered an invalid Notice of Readiness (NOR) upon arrival off the discharge port and subsequently did not retender NOR at any time, and the charterers claimed that as a result they had used no laytime and were entitled to claim despatch, but the Court of Appeal held that regardless of the point that there was no valid NOR laytime would begin when the operation of discharge began, on the basis that by not indicating that they did not accept the validity of the NOR, together with agreeing to commence discharging operations, the charterers had waived any reliance upon the invalidity of the NOR and any right for a fresh, valid, NOR to be tendered. Indeed, in *CMA v CG MS (The Northern Pioneer)* [2002] EWCA Civ 1878, [2003] 1 Lloyd's Rep 212, a case where a time charterer had purported to exercise a right to cancel the charterparty under a war cancellation clause a month after the supposed war had broken out, the Court of Appeal held that the right to cancel had to be exercised within a reasonable time, and refused to enter into discussion as to whether this was a matter of an implied term, or of principles of election, waiver and estoppel.

The accepted background to issue (iii) is that the main purpose of requiring the charterers to give advance notice of redelivery is so that the owners may arrange the ship's future employment. (This was so found by the arbitrators, and Tomlinson J accepted that the arbitrators' findings as to the commercial context are not questions of law and are not amenable to review by the Court.)

Given this commercial background, it is natural to expect that there will be an implied term with regard to the effect of a notice of redelivery, and it is particularly surprising that Tomlinson J (whose practice as counsel was in shipping cases) should have departed from the view of experienced arbitrators and should have held that there is no such implied term.

One reason why Tomlinson J found difficulty in following the arbitrators' conclusion was that the implied term as stated by the arbitrators was too wide, and counsel for the owners had trouble formulating a more manageable term. However, it is submitted that it should be possible to formulate a term which is not too wide. The basic idea has to be that the charterers will not

undertake an additional voyage. This does not mean that if the voyage which they have in mind at the time when they give their approximate notice falls through, the charterers cannot undertake a substitute voyage (a substitute voyage is not a voyage 'additional' to the voyage envisaged at the time when the notice was given). There may be borderline cases, for example when the voyage envisaged was for a part cargo, and the charterers have an opportunity of loading a further part cargo, but the existence of cases which would have to be resolved as a question of fact and degree in a commercially reasonable way is not an argument against the implication of a term into a commercial contract.

However, Tomlinson J did not simply reject the implied term because no acceptable formulation was offered to him. He said:

> In my judgment it is not possible in the present case to imply into the charter a term whereby the charterers' freedom of action is in some way constrained by reference to an approximate redelivery date given, as required, honestly and on not less than 30 day's notice.

The judge commented that the arbitrators did not overtly consider the usual tests for the implication of contractual terms. The judge considered the question first in terms of 'business efficacy' as to whether the contract would not work without the suggested implied term, and held that manifestly the contract would work. Secondly, the judge considered whether the suggested implied term was obvious, or a term to which the parties would inevitably have agreed had the question been raised (that is, by the 'officious bystander') and held that it was not possible to make any confident assertion as to what the parties must have agreed.

With respect, it appears that the judge may have misunderstood what is required for 'business efficacy' or 'necessity'. As has been emphasised by Lord Hoffmann in *A-G of Belize v Belize Telecom Ltd* [2009] UKPC 10 at [23]:

> It is frequently the case that a contract may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean.

Similarly, at [25], Lord Hoffmann says that the imaginary conversation with an officious bystander:

> . . . carries the danger of barren argument over how the actual parties would have reacted to the proposed amendment. That, in the Board's opinion, is irrelevant.

Also, it may be suggested that Tomlinson J was applying the wrong set of tests altogether. In *Liverpool City Council v Irwin* [1977] AC 239, the House of Lords distinguished between cases where the Court is adding a term to an individual contract which may already have a lengthy and elaborate structure of express terms, and cases where the Court is 'laying down a general rule that in all contracts of a certain type – sale of goods, master and servant, landlord and tenant and so on – some provision is to be implied unless the parties have expressly excluded it' (Lord Cross of Chelsea at 257 H).

As Lord Cross makes clear, such a general implied term can be expressly excluded. For example, in the sale of goods the implied terms as to the seller's title and as to merchantable quality or fitness for purpose (which were originally judge-made implied terms of this sort) can be excluded, and a contract to pass only such title as the seller may have, or to sell an item 'as is where is' can make perfectly good sense. Therefore, it is submitted, it is no objection to the suggestion of such an implied term that the contract would still work without it.

Also, such a general implied term is attached by the law as a 'legal incident' of a kind of relationship, and as Lord Cross and Lord Edmund-Davies make clear in *Liverpool City Council v Irwin* at 258 E – 259 A and 266 E–F, it is irrelevant that if the officious bystander had raised the question, one of the parties might have responded 'Of course not'.

It is submitted that the law should continue to respond to fresh situations and newly-presented cases by finding further general implied terms of this sort. As Lord Salmon said in *Liverpool City Council v Irwin* at 263 B–C:

> . . . the law should not be condemned to sterility and . . . the judges should take care not to abdicate their traditional role of developing the law . . .

Can shipowners rely upon promissory estoppel?

The issue as to promissory estoppel turned upon the words 'without guarantee'. Specifically with regard to these words, the owners had argued in the arbitration that they (like the qualifications 'all going well' and 'unforeseen circumstances excepted') referred to matters outside the charterers' control, and did not prevent the notice as given on 5 October from being understood as a representation that the charterers themselves would not change their minds so as to keep the vessel longer. However, the arbitrators appear not to have accepted this argument, and only decided for the owners on the issue of promissory estoppel on the basis of the distinct argument that the notice should be construed as a contractual notice such as the charterers were obliged to give, disregarding any qualifying words which were inconsistent with this, and also on the basis that the owners were entitled to rely not only on the notice itself but also on the Provisional Final Hire Statement and the voyage orders. The judge considered that the PFHS and the voyage orders could not be used to escape 'the tentative and qualified nature of the approximate notice of redelivery' and, as discussed above, he said:

> Whilst there may be an argument for saying that an approximate notice of redelivery given by the charterers 'without guarantee' could have been rejected as uncontractual, this ignored the fact that the owners were seeking to spell a promissory estoppel out of what the charterers had in fact said.

Tomlinson J does not challenge the idea that a notice of redelivery given 'without guarantee' could have been rejected as uncontractual. It can very well be said that in order to satisfy the commercial purpose, a notice of redelivery (whether approximate or firm) must be worded in such a way as to allow an estoppel, and any qualifications which would prevent the owners from relying on the notice by way of estoppel will make the notice uncontractual.

Since the issue turned on the words 'without guarantee', the way for prudent shipowners to respond to this judgment seems clear. Notices of redelivery which are given 'without guarantee' should not be accepted. Every notice of redelivery which is qualified by anything beyond 'all going well' and 'unforeseen circumstances excepted' should be met with the question 'Do you intend this as a notice of redelivery in accordance with the provision in the charterparty? Do you intend that we should rely upon it by beginning to arrange the vessel's next employment?' Thus, as long as shipowners' operations departments stay on the ball, there should be no problem after all.

However, perhaps matters will be slightly more complicated. It may well be considered that the commercial purpose of approximate notices of redelivery is only to enable the owners to begin negotiations, and perhaps enter into a contract 'on subjects', while the commercial purpose of firm notices is to enable the owners to enter into a binding contract for the vessel's next employment. We are told that the owners of *Zenovia* refixed the vessel on the basis of the charterers' approximate notice of 5 October 2007. However, it may well be considered that these owners entered into a binding contract before they were strictly entitled to do so.

If that is correct, it will affect how it may be appropriate for a court of equity to respond to the estoppel created by relying on a notice of redelivery. It may well be considered that where a notice was intended to be relied upon to the extent of entering into a binding contract and the owners have entered into a binding contract in reliance on it, then it is fair and reasonable that the owners should be entitled to withdraw the vessel rather than allow the charterers to take an additional voyage. However, where a notice was only intended to be relied upon to the extent of entering into negotiations, then it would only be contemplated that the owners would incur some inconvenience, possibly some expense, and quite probably a small loss of reputation if they had to 'pull out' of a fixture which was on subjects. A court of equity might respond to such reliance by awarding owners a relatively small amount by way of compensation for wasted time and effort and damage to business reputation, while allowing the charterers to make the additional voyage.

Thus, with regard to firm notices of redelivery prudent shipowners with alert operations departments may be able to get everything they want by way of promissory estoppel, but with regard to approximate notices of redelivery shipowners may still feel a need for something better.

However, if there were the implied term which this judgment would deny, there would (following the speech of Lord Hoffmann in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2008] 2 Lloyd's Rep 275) still be a question as to the 'scope' of this contractual obligation. Thus, if there were the implied term which this judgment would deny, it might still give shipowners no more than they would get by way of promissory estoppel.

EXPANDING THE AMBIT OF LIABILITY FOR OIL POLLUTION DAMAGE FROM TANKERS: THE CHARTERER'S POSITION UNDER EU LAW

Commune de Mesquer v Total France SA and Total International Ltd
European Court of Justice, Case C–188/07

*Richard Caddell**

Facts

On 11 December 1999 the *Erika*, an oil tanker laden with a substantial cargo of heavy fuel oil, foundered and sank off the French Atlantic coast. The *Erika* had been chartered for the purposes of supplying the national Italian electricity company ENEL. The first defendant, a corporate entity now known as Total France, was the primary supplier of the oil, which it sold to the second defendant, Total International Ltd, which then chartered the ill-fated *Erika*. The resulting oil spill caused significant pollution to the French coastline, resulting in enormous costs of clean-up and a large number of claims for compensation.

At the material time, France was a party to the two key international conventions governing catastrophic oil spills, namely the International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention), both of which were amended in 1992 and, subsequently, in 2003. The CLC, adopted in the wake of the infamous *Torrey Canyon* disaster, establishes strict liability upon the owner of a ship at the time of an oil pollution incident (Article III), with the charterer immune from liability unless the damage was caused by personal act or omission committed intentionally or recklessly. However, the shipowner's liability may be limited provided that he did not intentionally or recklessly cause the spillage. In the case of the *Erika* spill, the liability of the shipowner was limited to approximately €13 million. Given that limitation is almost always possible under the CLC, the Fund Convention was established to provide prompt compensation for those legitimately affected by oil spills. Accordingly, in the *Erika* incident, the Fund Convention ultimately paid out compensation of approximately €185 million to a wide variety of victims.

The claimant in the present action, Commune de Mesquer, is the municipal authority responsible for administering the Breton coastline that had suffered extensive fouling as a result of the *Erika* spill. Following the spill, the Commune addressed an administrative order to both defendants, placing them on formal notice to dispose of the waste from the ship. The claimant also incurred costs of almost €70,000 in the clean-up operations of the municipal beaches, which it sought to recoup from the defendants. The specific international oil pollution conventions did not permit recovery of these costs from these particular defendants, as neither company could be considered the shipowner. Accordingly, the claimant brought a relatively novel action to recover its losses, based upon the

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various consolidated provisions of EU waste law, which establish the 'polluter pays' principle as a central operational aspect. Following extensive litigation, the action was heard by the Cour de Cassation, which immediately referred a series of questions of interpretation to the European Court of Justice (ECJ), under the Preliminary Reference procedures advanced by Article 234 of the EC Treaty. Of particular importance to the marine lawyer is the extent to which spilled oil from a vessel may be caught by the various definitions of waste advanced under the consolidated waste directives, and thereby the potential to expand the categories of defendant that may ultimately be required to contribute materially to the cost of clean-up under EU environmental law.

Ruling

Opinion of Advocate General Kokott

The Advocate General considered that there were three broad questions to consider in this particular issue. In the first instance it was necessary to ascertain whether heavy fuel oil, of the type spilled by the *Erika*, could itself be classed as 'waste' for the purposes of Article 1 of Council Directive 75/442/EC (the Waste Framework Directive). Article 1(a) of the directive defines waste as follows:

> . . . any substance or object . . . which the holder discards or intends or is required to discard.

The key issue in this respect involved whether heavy fuel oil, created as a distinct and deliberate result of a refining process, meeting the specifications of the buyer and being for all intents and purposes desired as a combustible substance for industrial use could be considered a 'waste product'. From this perspective, in the view of the Advocate General, the primary concern was whether the holder of the waste at the material time intended to discard the product as a natural course of events. Somewhat surprisingly, the Waste Framework Directive is silent regarding the *mens rea* involved in the discard of a particular substance, although a number of previous cases and references had established a list of indicative factors in this regard.

Given the relative uncertainty in this respect, the claimant argued that heavy fuel oil could meet the definitional criteria of Article 1 in that heavy fuel oil, by virtue of the refining process, might technically be considered a production residue. Production residues had been defined in a previous decision, *ARCO Chemie Nederland and Others* (Joined Cases 418/97 and 419/97), as a product that is not itself wanted for subsequent use and a substance that cannot be reused without prior processing. Such a line of argument might be considered rather speculative, especially since the oil in question, which was transported as cargo upon the *Erika*, had been carefully refined to meet the specific requirements of ENEL and was considered an important and valuable commodity by the consignee. The Advocate General rather swiftly and stridently rejected such an assertion and noted that the oil was a distinct product, as opposed to mere production residue, and accordingly must be classed as such 'especially where it meets the user's specifications, as in the present case' (paragraph 49). Therefore, on the basis that the cargo in question had been generated for a particular purpose and had been refined to meet the specific demands of the customer, the cargo itself could not per se be considered to be waste.

If the first issue was relatively self-explanatory, much hinged on the second question placed before the Court, namely whether the leaked oil could be considered to meet the definition of waste within the relevant legislation. In this respect, the argument advanced by Mesquer centred on the wider definition of waste established under the directive. To this end, Article 1(a) makes reference to Annex I of the directive, which establishes two further categories of waste. Of particular relevance to the present dispute was Category Q4, which establishes as waste:

> [m]aterials spilled, lost or having undergone other mishap, including any materials, equipment, etc., contaminated as a result of the mishap.

As the Advocate General observed, Category Q4 is merely an indicator that spilled substances may theoretically constitute waste for the purposes of the directive and that: 'it is not possible per se to

classify as waste hydrocarbons which are spilled by accident and cause contamination' (paragraph 67). Instead, the claimant must additionally demonstrate, in line with the provisions of Article 1(a), that the holder of the substances in question discarded, intended to discard or is required to discard them.

In this respect, a parallel land-based case was considered especially instructive, that of *Van de Walle and Others* (Case C–1/03). Here, in what may be considered a classic example of *Rylands v Fletcher* liability had the case come before the courts of England and Wales, the owner of a service station was held liable under the Waste Directive when hydrocarbons from the storage pumps leached into the soil and contaminated land on an adjoining property. In *Van de Walle*, the Court considered that the spilled petrol in question constituted a product that could not be reused without processing, given that it would require recovery and refining in order to be economically useful. With the nature of the product having been established, the spill from the service station accordingly constituted waste on the basis that the owner had discarded the material. The fact that the owner of the service station had not intended the product to be spilled and was attributed solely to an unanticipated accident was irrelevant for the purposes of the Waste Directive – Article 15 establishes that where waste has been spilled, the holder or previous holder must bear the cost of clean-up.

While noting the criticism that had been levelled at the *Van de Walle* decision within the academic literature, Advocate General Kokott was nonetheless bound to apply the principle in a marine context. Given that the Waste Framework Directive did not explicitly exclude oil as a substance that might be potentially caught by its definition, it was accordingly observed that heavy fuel oil is to be treated as waste 'if it is discharged in a tanker accident and is mixed with water and sediment'.

Although the directive might technically catch spilled oil within its category Q4 definition of waste, the precise application of the 'polluter pays' principle remained to be determined. This particular issue was considered especially controversial, not only by the Cour de Cassation in referring the matter to the ECJ in the first instance, but also within coastal Member States of the EU, which raised concerns over the potential implications of a broad-ranging decision on liability in generating conflict with well-established international rules. In this respect, in a relatively rare departure from standard practice, submissions were heard from Belgium, France, Italy and the UK. The Belgian representatives were especially concerned over the potential joinder of the charterer of the vessel carrying the spilled cargo, and possibly its ultimate producer, given that the rules of liability established under the CLC are extremely clear. Considerable disquiet was raised regarding the possibility of undermining the application of the CLC and Fund Convention to impose liability upon the charterer where the criteria to do so under the international instruments had clearly not been established. Belgium and the Total companies argued that the relevant provisions of international law should take precedence over the individual application of a provision of EU waste law. In response, the Advocate General rejected this argument, noting that the Community has not ratified either the CLC or the Fund Convention and such provisions are thereby irrelevant to a Community action, which must necessarily apply the relevant EU legislation (paragraph 84).While noting that '[t]he obligation of loyalty between the Community and the Member States requires such conflicts to be avoided where possible' (paragraph 101), considerations of conflict were precluded from this particular reference given that the version of the CLC which excluded charterer liability was not in effect in France at the time at which the Waste Framework Directive was adopted.

Consequently, the Advocate General moved to advance a detailed discussion of the 'polluter pays' principle and the extent to which the various Total companies might be considered to be the polluter in the material case. In this respect, she objected somewhat to the limited liability and restricted class of defendants envisaged under the CLC and Fund Conventions, noting that: '[i]f this limitation of liability applies, the individual claims under Article V(4) are settled only *pro rata*, that is to say partially, by the owner of the ship. This appears *prima facie* to be a breach of the polluter-pays principle' (paragraph 137). In this respect, the Advocate General considered that the producer and/or the seller or carrier of the oil in question might be ordered to contribute to the cost of clean-up 'if they can be accused of contributing personally to causing the leak' (paragraph 147). If such a position

could not be established within the national court then the Advocate General somewhat controversially considered that it would be compatible with Article 15 of the Waste Framework Directive for the general public, in the form of Commune de Mesquer in this particular instance, also to accept the costs associated with clean-up given the public interest in oil transportation generally.

European Court of Justice

Insofar as the issues of interest to the maritime lawyer are concerned, the ECJ – convened as a Grand Chamber – largely endorsed the findings of the Advocate General in respect of the three main questions raised. In the first instance, having first ruled that the reference was in fact admissible, the Court ruled rather self-evidently that such oil could not be considered to be waste 'where it is exploited or marketed on economically advantageous terms and is capable of actually being used without requiring prior processing' (paragraph 48). Such a substance is more akin to a requested cargo than to an undesirable and economically redundant side-product of an industrial process.

On the second question, the Court largely followed the reasoning of the Advocate General and observed that 'such hydrocarbons accidentally spilled at sea are to be regarded as substances which the holder did not intend to produce and which he "discards", albeit involuntarily, while they are being transported, so that they must be classified as waste' (paragraph 59). Some divergence from the reasoning of the Advocate General was experienced here, with the Court noting that the spill had occurred within the Exclusive Economic Zone of France rather than on the land territory. In this respect, the Court deemed it sufficient that the oil had drifted through the sea before finally being discharged upon land, with constructive spillage considered to fulfil the behavioural criteria of waste for the purposes of the directive.

Finally, the Court considered that a 'holder' of the waste ought to be held responsible for the costs of clean-up of the spill, in accordance with Article 15 of the directive. In this respect, the Court applied the principle in *Van de Walle* and ruled that a shipowner is the most obvious 'holder' of the waste, but that this did not in principle rule out the possibility that previous holders might also be brought to account for the costs of clean-up (paragraphs 74 and 75). To this end, the Court considered the question of whether a charterer might also be regarded as a previous holder, given that he arranged for the transportation of the oil in a vessel that had ultimately proven unworthy of the carriage contract. Here, the Court answered in the affirmative and ruled that if a 'seller-charterer contributed to the risk that the pollution caused by the shipwreck would occur, in particular if he failed to take measures to prevent such an incident, such as measures concerning the choice of ship' (paragraph 78), then such an entity could be considered to have produced the waste and would accordingly be held liable. Whether this was in fact the case remains an evidential question for the national courts, to which this case was remitted.

Commentary

The *Erika* disaster has proved to be rather a *cause célèbre* in the development of a particularly 'European' strand of the regulation of oil tankers and associated spillages. Following the disaster itself, the ERIKA package of measures, adopted swiftly by the EU institutions, introduced a series of sweeping policies, including clamping down on rogue classification societies, improving vessel design in the form of double-hulled tankers and establishing a tentative basis for further compensation for damage resulting from oil spills. At first glance, the ruling in *Commune de Mesquer* appears to contribute further to this novel approach by opening up the settled liability regimes provided under the CLC and Fund Convention, by advancing a new class of defendants within the European Union via the rather unorthodox back door of waste legislation.

EU waste law – not least the search for a clear definitional basis – has long been criticised as being unduly unwieldy and complicated. The *Commune de Mesquer* ruling provides ample illustration of these difficulties as the Court wrestled with the myriad of legislative provisions and opaque definition of waste in response to a major ecological disaster. In many respects, the ruling is of

considerable value to environmental/waste lawyers, not least in its appraisal of both the definitional vagaries of the subject matter and the application of the 'polluter pays' principle. There are nevertheless considerable implications of the ruling to the maritime lawyer, for which three central observations may be considered pertinent.

First, the ruling itself is in keeping with some of the more subtle policy elements introduced by the EU institutions to address substandard shipping, especially where such vessels are engaged in hydrocarbon transportation with the potential to cause considerable environmental and economic damage to coastal regions within the Member States. Just as the European Commission has sought to regulate the classification industry more stringently, the ruling in *Commune de Mesquer* exerts further financial pressure upon operators and charterers to eschew the use of riskier vessels. If the effect of the decision is to reduce a degree of corner-cutting and promote a greater emphasis on tanker safety upon pain of personal (and seemingly unlimited) liability, then it ought to be warmly welcomed from this perspective.

Secondly, it remains to be seen whether the ruling will be applied on a widespread basis in a marine context and there remain a number of unanswered questions. The Court merely charted a theoretical course through the complex passages of EU waste legislation to open the door for the liability of charterers on this basis. The issue of whether a charterer will in fact be held liable is dependent upon proof of failure to take adequate measures regarding the choice of ship. This would appear to suggest a due diligence requirement on the part of the charterer, but there may be a degree of divergence in the application of this ruling across the spectrum of maritime laws of the pertinent Member States. It appears likely that such a ruling, together with that of *Van de Walle*, may be applied more consistently and regularly to land-based incidents, in which case further refinement in a terrestrial context may have implications for the marine interpretation of this rule.

Finally, some concern has been raised by the generation of potential conflict with the long-standing rules of the CLC and Fund Convention in expanding the range of liability in an oil-spillage situation. Although the pursuit of novel defendants such as those in *Commune de Mesquer* is likely to be rare in practice, the implicit warning in the opinion of the Advocate General towards the desirability of a strong degree of uniformity between international and Community law remains pertinent. Nevertheless, while the Community remains a non-party to key liability conventions a judicial door remains ajar to further innovative and divergent judgments of this nature.

EU competition law on sharing information between competitors

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This article considers the application of European Community competition law to the difficult topic of information exchange between competitors. The European Commission recently issued guidelines on the topic but many questions still remain. The case law is analysed and a tool kit set out for lawyers and economists on how to assess information exchanges.

Introduction

This article examines the European Union (EU) or European Community (EC) competition (or antitrust) law as it relates to the sharing of information between competitors and pays particular attention to the shipping sector. The rules applicable to the economy generally are usually applicable to the shipping sector and vice versa.[1] This topic involves the analysis of such questions as: what is 'information exchange'; what information may be exchanged lawfully; what information may not be exchanged lawfully; what about prices, forecasts and trading patterns; what are the guidelines on information exchange; and what does the European Court of Justice (ECJ), the Court of First Instance (CFI) and the European Commission (Commission) have to say about the law on information exchange?

What is information exchange?

Information exchange is, at its simplest, the communication of fact, fiction or opinion between different parties. It is noteworthy that the law on information exchange applies even when mere opinions are exchanged or even when deliberately misleading information is exchanged; it is not just the exchange of hard or accurate data or facts which trigger the application of the rules.

The Commission has defined an 'information exchange system' in the Commission's 'Guidelines on the Application of Article 81 of the EC Treaty to Maritime Transport Services'[2] (Guidelines) as entailing: 'an arrangement on the basis of which undertakings exchange information

[1] On EC competition law and information exchange generally see, in particular, *Bellamy & Child* (6th edn P Roth, V Rose (eds) 2008) paras 5.084–5.096; A Jones, B Sufrin *EC Competition Law* (3rd edn 2008) 902–10; and R Whish *Competition Law* (5th edn 2003) 486–96. On information exchange and shipping, see N Ersbøll 'Information Exchange Between Competitors' European Maritime Law Organisation conference (17 October 2008). This article examines information exchange arrangements between businesses (ie undertakings) involving the exchange of information. The exchange of information between national competition authorities falls outside the scope of the article as it is an entirely different topic.

[2] [2008] OJ C245/2. The Guidelines deal with the exchange of information as such and do not address the situation where the exchange occurs in the context of a wider anti-competitive arrangement (see para 42 of the Guidelines).

amongst themselves or supply it to a common agency responsible for centralizing, compiling and processing it before returning it to the participants in the form and at the frequency agreed'.[3] Therefore it is not just 'direct' information exchange between competitors which is subject to the rules; it is also 'indirect' information exchange which occurs through the medium of, for example, trade associations, publications and market research agencies which can be subject to scrutiny.

This article considers the issue of information exchange in its own right. Obviously, the exchange of information can form part of a wider anti-competitive arrangement (eg a cartel) but this article considers the issue of pure information exchange. The article also considers information exchange between undertakings rather than information exchange between competition authorities, which is an entirely different topic.

The topic of information exchange is described in some jurisdictions as the 'dissemination of information among competitors' or 'data dissemination'. The exact label does not matter in the legal analysis.

Nature of the law on information exchange

The law on information exchange is one of the most difficult and opaque areas of all of competition law. It is difficult to discern the law because each case turns on its own facts. As paragraph 45 of the Guidelines state: '… the actual or potential effects of an information exchange must be considered on a case-by-case basis as the results of the assessment depend on a combination of factors, each specific to an individual case …'. It is opaque because the rules, laid down either in case law or in the policy statements of the EU institutions have been, by necessity, vague. Despite the twin challenges of difficulty and opaqueness, this article seeks to set out the law on the area as clearly as possible, recognising that there are shortcomings involved.

The law on this area is neither precise nor indeed extensive. In terms of the extent of the case law, there are relatively few cases in EC competition law – a phenomenon which is also reflected in US antitrust law.[4] The development of the case law is entirely dependent on cases coming before either the Member State institutions or the EU institutions. There is case law from the ECJ and the CFI but it is somewhat general in nature.[5] Those cases which are decided are highly fact-specific and somewhat sporadic, so it is difficult to have a comprehensive understanding of the law on this area.

Topicality of the issue of information exchange

Information exchange is always topical. It is of great practical importance to businesses, including those businesses in the shipping sector. This is because all businesses across all economic sectors share information to a greater or lesser extent with each other. Such exchanges occur through the media or channels such as trade associations, their respective employees, meetings between managers and other forms of interaction, whether formal or informal and whether regular or sporadic. These exchanges often occur through necessity (eg two businesses cooperating on a particular project), or in the context of planning for acquisitions (eg due diligence of the target business) or joint ventures.

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[3] ibid para 38.

[4] For example it was written in 2006 that, in the context of the exchange of information in gun-jumping in the United States of America: '… there are limited sources of information available for counselling purposes. For example, there is only one reported judicial decision interpreting the Sherman Act and no reported judicial decision interpreting the [Hart-Scott-Rodino] Act on the [Federal Trade Commission] Act in the gun-jumping context' *Premerger Co-ordination* (W R Vigdor (ed) (2006) 3). Gun-jumping is the phenomenon whereby a proposed acquirer of a business proceeds to completing the transaction before it ought to do so (eg merger consent has not yet been granted).

[5] Guidelines para 44 states that the 'case law of the Community Courts provides some general guidance'.

Despite the subject being always topical, the issue of information exchange is particularly topical at the moment in the shipping world, given the abolition of the block exemption for liner conferences in Regulation 4056/86 and the call by some interested parties for an information exchange system to be put in place. The Commission has responded to these calls by adopting, on 1 July 2008, the Guidelines on various topics including the topic of information exchange.[6] The Guidelines are a welcome addition to the knowledge on this area. They help to consolidate or codify the Commission's thinking but they are also limited in many respects because they do not – nor could they – answer all the questions which arise in practice or provide a finite set of precise tools with which to examine each possible scenario. The Commission 'will apply these Guidelines for a period of five years'.[7] Section 3.2 of the Guidelines (ie paras 38–59 inclusive) deal with the issue of information exchange. In particular, those paragraphs deal with information exchanges between competitors in liner shipping.[8]

Situations where information exchange is an issue

Having established the topicality of the issue, it is useful to examine the situations in which the issue arises. Some examples help demonstrate where the issue arises and the legal problems which may flow.

The issue of information exchange is closely connected with the topic of trade associations because such associations are often the fora for the exchange of information between members of these associations. Indeed, officials of trade associations often encourage and facilitate the exchange of information between competitors through the use of surveys among members and then distributing the results (whether aggregated or disaggregated) among members.

Information exchange is also an issue of considerable practical importance in the context of mergers and acquisitions. Buyers and sellers invariably exchange information; sometimes this exchange is necessary (eg for the buyer to know what it is buying) and sometimes it is unnecessary but it nonetheless occurs (eg parties exchange information out of curiosity). Some participants in mergers and acquisitions do not give enough attention to the dangers of illegal exchanges of information in the context of these negotiations and the fact that such exchanges may be illegal in certain circumstances.

The importance of the topic of information exchange has grown significantly since the development of the internet and so-called 'Business to Business' (B2B) sites. Internet or email exchanges make the exchange of information so much easier by, for example, facilitating the collection, dissemination, storage, retrieval and interrogation of large amounts of information. The easy availability and exchange of information means that many businesses now have information on their systems of which many managers can be entirely unaware. The use of electronic communication also means that there is also a very reliable evidence chain demonstrating the exchange of information because the exchange is now so easy to prove.

[6] On 29 September 2006, the Commission published an issues paper (or staff paper) on the potential impact of information exchanges between liner carriers on the market for liner shipping available at http://ec.europa.eu/competition/antitrust/legislation/maritime/issues_paper_shipping.pdf. By way of background, see also IP/06/1283. The Commission was concerned that exchanges of information could lead in practice to a coordination of prices and other trading conditions between liner carriers. Stakeholders were invited to submit their comments. The paper was a step in the preparation of the Guidelines. On 13 September 2007, the Commission published draft guidelines ([2007] OJ C–215/3) and on 1 July 2008 the Commission adopted the final guidelines (Commission Press Release IP/08/1063 and MEMO/08/460). There was little difference from the draft guidelines; the changes related principally to the provisions on pools and efficiency.

[7] Guidelines para 8.

[8] ibid Title to s 3.2.

Information exchange between undertakings (including exchanges among competitors) is also an issue in litigation. For example, if a number of competitors are suing or being sued then there may need to be some form of information exchange so as to allow them to litigate effectively. This raises the issue of so-called 'joint defence agreements' or 'joint plaintiff agreements'. Typically, competitively sensitive information might be shared between the lawyers and other advisers (eg economists) in litigation but the competitively sensitive information would not be shared among the competing undertakings themselves.

Types of information exchange

Before analysing the law, it is also useful to classify and distinguish between different types of information exchange for the purposes of describing and discussing the phenomenon.[9] However, from a legal perspective, the distinctions are of little significance because what matters most is whether there is the object or effect of preventing, restricting or distorting competition.

Formal or informal exchanges

Exchanges are organised on either a formal basis (such as the structured exchange of information within the confines of a trade association (eg a survey)) or on an informal basis (such as the ad hoc exchange of information between individual employees in different companies who meet (eg socially or at a conference) and exchange information about their employers' activities). Examples of formal exchanges would involve the exchange of information at meetings of trade associations or through surveys conducted by trade associations.

Direct or indirect exchanges

The exchange of information can be either direct (as in an exchange of information between competitors in a trade association) or indirect (as in the case of benchmarking). It is essentially irrelevant from a legal perspective whether the exchange is direct or indirect provided there is: (a) an anti-competitive arrangement; or (b) an abuse of dominance. An indirect exchange could be organised because of a desire to 'cover tracks' but that would not assist or help in escaping liability where there is an anti-competitive arrangement or abuse of dominance. A difficult issue arises where information is passed through an intermediary such as where a supplier passes information between retailers (eg a supplier tells retailer X that retailer Y will increase its retail price or, in the shipping context, a freight forwarder is told by carrier X that it will raise rates and the forwarder tells carrier Y).

One-off or sustained exchanges

Exchanges can be either one-off or sustained over time. One-off exchanges occur when, for example, executives meet by chance at, for example, a trade show, a sports event or a social gathering. Sustained exchanges could occur, for example, where information is systematically exchanged on a regular basis such as in a trade association or industry forum.

General or specific exchanges

Exchanges of information can be an element of either a wider arrangement or a specific arrangement in its own right. The Commission has written that:

> [t]he exchange of information may be a facilitating mechanism for the implementation of an anti-competitive practice, such as monitoring compliance with a cartel. Where an exchange of information is ancillary to an anti-competitive practice its assessment must be carried out in combination with an assessment of that practice.[10]

[9] The Commission has found it useful to make distinctions between different types of information exchanges (eg Guidelines para 41).
[10] ibid para 42.

In this regard, managers charged with competition compliance should be suspicious of colleagues possessing ongoing specific information which could have come from competitors.

Merger-related exchanges and non-merger-related exchanges

Some exchanges occur in the context of mergers. First, there is often an exchange of information during the negotiation of a merger agreement: the buyer needs to understand what it is buying and the seller is keen to advertise its asset to increase its price. Secondly, exchanges can occur in due diligence as well as the negotiation of representations and warranties. Thirdly, it could occur when acquirers 'jump the gun' and exchange information improperly. Gun-jumping can occur for various reasons, including the enthusiasm of the merger parties, the desire or need to achieve efficiencies quickly, the need not to lose competitive advantage as well as frustration over the length of competition review by regulators.

Exchanges which are ancillary to anti-competitive behaviour and exchanges which are illegal in their own right

The Commission drew the following distinction in its Guidelines:

> 42. The exchange of information may be a facilitating mechanism for the implementation of an anti-competitive practice, such as monitoring compliance with a cartel; where an exchange of information is ancillary to such an anti-competitive practice its assessment must be carried out in combination with an assessment of that practice …
>
> 43. However, an exchange of information, in its own right, might constitute an infringement of Article 81 of the [EC] Treaty by reason of its effect. This situation arises when the information exchange reduces or removes the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted.[11] Every economic operator must determine autonomously the policy which it intends to pursue on the market. The Court further considered that undertakings are, therefore, precluded from direct or indirect contacts with other operators which influence the conduct of a competitor or reveal their own (intended) conduct if the object or effect of those contacts is to restrict competition, ie to give rise to conditions of competition which do not correspond to the normal conditions of the market in question, taking into account the nature of the products or the services provided, the size and number of the undertakings and the volume of the market.[12] By contrast, in the wood pulp market, the Court has found that unilateral quarterly price announcements made independently by producers to users constitute in themselves market behaviour which does not lessen each undertaking's uncertainty as to the future attitude of its competitors and hence, in the absence of any preliminary concerted practice between producers, do not constitute in themselves an infringement of Article 81(1) of the Treaty.[13]

In passing, it is notable that the comment by the Commission that the exchange of information constitutes a breach of Article 81 EC where it reduces or removes the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted is central to the entire analysis. One might put it another way and say that the exchange of information which removes the element of 'surprise' or uncertainty is more likely to be a breach of competition law. It is appreciated that this is somewhat circular because the definition requires that the exchange breaches competition law.

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[11] Judgment of the Court of Justice in Case C–7/95 P *John Deere v Commission* [1998] ECR I–3111 para 90 and judgment of the Court of Justice in Case C–194/99 P *Thyssen Stahl v Commission* [2003] ECR I–10821 para 81.

[12] Judgment of the Court of Justice of 23 November 2006 in Case C–238/05 *Asnef-Equifax v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2006] ECR I–11125 para 52 and judgment of the Court of Justice in Case C–49/92 P *Commission v Anic Partecipazioni* [1999] ECR I–4125 paras 116 and 117.

[13] Judgment of the Court of Justice in Joined Cases C–89/85, C–104/85, C–114/85, C–116/85, C–117/85 and C–125/85 to C–129/85 *A Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I–1307 paras 59–65.

Competition law has to strike the right balance

The Commission has written that:

> [i]t is common practice in many industries for aggregate statistics and general market information to be gathered, exchanged and published. This published market information is a good means to increase market transparency and customer knowledge, and thus may produce efficiencies. However, the exchange of commercially sensitive and individualised market data can, under certain circumstances, breach Article 81 of the Treaty . . .[14]

As the Commission identified, at paragraph 44 of the Guidelines, the dilemma caused by information exchange:

> The case law of the Community Courts provides some general guidance in examining the likely effects of an information exchange. The Court has found that where there is a truly competitive market, transparency is likely to lead to intensification of competition between suppliers.[15] However, on a highly concentrated oligopolistic market, on which competition is already greatly reduced, exchanges of precise information on individual sales at short intervals between the main competitors, to the exclusion of other suppliers and of consumers, are likely to impair substantially the competition that exists between suppliers. In such circumstances, the sharing, on a regular and frequent basis, of information concerning the operation of the market has the effect of periodically revealing to all competitors the market positions and strategies of the various individual competitors.[16] The Court has also found that an information exchange system may constitute a breach of the competition rules even when the market is not highly concentrated but there is a reduction of the undertakings' decision-making autonomy resulting from pressure during subsequent discussions with competitors.[17]

The more concentrated the market then the more likely that exchanges would amount to an illegal exchange.

While there are clear competition law concerns or dangers associated with information exchanges, it would be entirely wrong for competition law to prohibit all interaction between businesses because to do so would be to stifle commerce. Equally, it would be wrong to permit, without question, all exchanges because there are some exchanges which cause serious competition law problems. So competition law has to strike the balance between these two extremes.

In terms of striking that balance, it is useful to see the benefits of information exchange and it would be wrong to assume that all information exchange is problematical. The Commission recognises that it can be beneficial that there is transparency in the market and competitors can adapt to the behaviour of others so as to 'meet competition'.

So, if there are benefits, what concerns could there be with information exchange? Unfortunately, there are real concerns. Competition law is concerned with the information exchange between undertakings which could distort competition, rather than the disclosure of information as such. For example, it is anti-competitive for undertakings to exchange confidential pricing information privately between themselves but it is not anti-competitive for undertakings to submit such information to governmental or EC authorities or to publish it to the world.

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[14] Guidelines para 39.
[15] Judgment in *John Deere v Commission* (n 11) para 88.
[16] Judgment of the Court of First Instance in Case T–35/92 *John Deere Ltd v Commission* [1994] ECR II–957 para 51, upheld on appeal in *John Deere Ltd v Commission* (n 11) para 89; and, more recently, the judgment in *Asnef-Equifax v Ausbanc* (n 12).
[17] Judgment of the Court of First Instance in Case T–141/94 *Thyssen Stahl AG v Commission* [1999] ECR II–347 paras 402 and 403.

A competitive market is one where rivals surprise each other with their actions; if there is such an exchange of information privately then the element of surprise has been removed from the market, which could then become an anti-competitive market. Competition law is concerned about the exchange of information in even the most informal of situations, even including the exchange of rates of commission by estate agents at a dinner party!

Competition law is concerned with the exchange of competitively sensitive information between competitors because the normal rivalry or competition which ought to exist between them is eliminated or potentially eliminated. As the Commission has recognised, an 'exchange of information may even have in itself the object of restricting competition'.[18]

The concern is whether the information exchange reduces or removes the degree of uncertainty as to the operation of the particular market with the result that competition between undertakings is restricted.

Competition law is not concerned with the exchange of information as such but rather its impact on competition. The difficulty is trying to distinguish between the pro-competitive exchange of information and the anti-competitive exchange of information. The distinction can be a fine one. It can also be difficult to draw the distinction. The legality of the exchange is not determined by the nature of the information because the same information could be either legitimate or illegitimate depending on the circumstances.

EC competition law generally

Introduction

Before examining the detail of the rules on information exchange, it is important to begin with a very brief overview of the basic rules of EC competition law.

It is also important to stress that these rules are not simply about fair or unfair practices and they are not simply about ensuring competitiveness. Instead, the rules are somewhat specific and if there are no breaches of those rules then there is simply no breach of EC competition law.

Concept of 'undertakings'

Articles 81 and 82 of the EC Treaty apply only to 'undertakings'. Any entity which is not an undertaking has a perfect defence to the application of those articles. The term 'undertaking'

[18] Guidelines para 42, citing *Commission v Anic Partecipazioni* (n 12) paras 121–6. It is useful to recall the ECJ's full discussion of this issue:

> 121. For one thing, subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period, as was the case here, according to the findings of the Court of First Instance.
>
> 122. For another, a concerted practice, as defined above, falls under Article [81(1)] of the Treaty even in the absence of anti-competitive effects on the market.
>
> 123. First, it follows from the actual text of Article [81(1)] that, as in the case of agreements between undertakings and decisions by associations of undertakings, concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object.
>
> 124. Next, although the concept of a concerted practice presupposes conduct of the participating undertakings on the market, it does not necessarily imply that that conduct should produce the concrete effect of restricting, preventing or distorting competition.
>
> 125. Lastly, that interpretation is not incompatible with the restrictive nature of the prohibition laid down in Article 85(1) of the Treaty (see Case 24/67 *Parke Davis v Centrafarm* [1968] ECR 55, p. 71) since, far from extending its scope, it corresponds to the literal meaning of the terms used in that provision.
>
> 126. The Court of First Instance therefore rightly held, despite faulty legal reasoning, that, since the Commission had established to the requisite legal standard that Anic had participated in collusion for the purpose of restricting competition, it did not have to adduce evidence that the collusion had manifested itself in conduct on the market. The question whether Anic has refuted the presumption set out in paragraph 121 of this judgment must therefore be examined.

is not defined by the EC Treaty but it has been considered by the ECJ, the CFI and the Commission to mean an entity engaged in economic activities. Examples of undertakings would include companies, joint ventures and consultants but not employees.

Anti-competitive arrangements

Article 81 EC prohibits, as a general rule, anti-competitive arrangements. The article deals with three types of arrangement: (a) agreements between undertakings; (b) decisions by associations of undertakings; and (c) concerted practices involving undertakings. In order to fall within the scope of Article 81, the arrangement must have the object or effect of preventing, restricting or distorting competition. Either object or effect is sufficient.

Information exchanges in the context of trade associations fall neatly under the heading 'decisions by associations of undertakings'. However, it ultimately does not matter which of the three headings is used because the substantive analysis remains the same.

It is very important to try to work out what is the object or effect of the information exchange. If it is a truly competitive market then transparency is likely to lead to intensification of competition between suppliers.[19]

Any arrangement prohibited by Article 81(1) EC is void by virtue of Article 81(2) unless it can be exempted under Article 81(3) EC.

Article 81(3)

Some anti-competitive arrangements may be beneficial to the economy in an overall sense despite the arrangements having anti-competitive elements. Article 81(3) of the EC Treaty provides:

> The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
> — any agreement or category of agreements between undertakings;
> — any decision or category of decisions by associations of undertakings;
> — any concerted practice or category of concerted practices,
>
> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
>
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The Commission has published guidelines on the application of Article 81(3).[20] These guidelines on Article 81(3) are also relevant to information exchange in the case of the maritime Guidelines.[21]

Abuse of dominance

Article 82 EC controls the abuse of dominance by any undertaking having a dominant position in the Common Market or any substantial part of the Common Market. There is no exemption permitted for an abuse of dominance. The article relates to undertakings having a dominant position. The concept of 'dominance' is not defined in the article but has been defined by the Commission and the Courts as meaning the ability to act to an appreciable extent

[19] *John Deere v Commission* (n 11) para 88.
[20] [2004] OJ C101/97.
[21] Guidelines para 46: '[t]he Guidelines … mainly relate[s] to the analysis of a restriction of competition under Article 81(1) of the Treaty. Guidance on the application of Article 81(3) of the Treaty is to be found in paragraph 58 below and in the general notice on the subject'.

independently of competition and consumers. The term 'abuse' is not defined either but generally means the unfair exploitation of the dominance.

Fines

The most dramatic penalty for a breach of EC competition law which can be imposed by the EC is the imposition of a fine of up to 10 per cent of worldwide turnover of the undertaking breaching competition law (Reg 1/2003 art 23 OJ 2003 61).

Damages

Breaches of EC competition law can result in persons aggrieved by the breach being entitled to seek damages or exemplary damages.

The EC rules on information exchange: tools for review?

Is there an anti-competitive arrangement or abuse of dominance?

EC competition law is not concerned with the exchange of information as such but it is concerned where the exchange is: (a) part of an anti-competitive arrangement among undertakings; and/or (b) an abuse of dominance by an undertaking having a dominant position. Therefore, the first, and more relevant rule on information exchange, is Article 81 of the EC Treaty. The second, but less relevant rule on information exchange, is Article 82 of the EC Treaty. If the exchange of information has the object or effect of assisting in the implementation of an anti-competitive practice or abuse of dominance then such an exchange will be illegal under EC competition law.

What is the structure of the market?

In reviewing the legality of an information exchange arrangement, the Commission states that certain features should be assessed, including the structural features of the market (eg the levels of concentration and the structure of supply and demand).[22]

The Guidelines are succinct on the issue of the structure of the market:

47. The level of concentration and the structure of supply and demand on a given market are key issues in considering whether an exchange falls within the scope of Article 81(1) of the Treaty.[23]
48. The level of concentration is particularly relevant since, on highly concentrated oligopolistic markets, restrictive effects are more likely to occur and are more likely to be sustainable than in less concentrated markets. Greater transparency in a concentrated market may strengthen the interdependence of firms and reduce the intensity of competition.
49. The structure of supply and demand is also important, notably the number of competing operators and the symmetry and stability of their market shares and the existence of any structural links between competitors.[24] The Commission may also analyse other factors such as the homogeneity of services and the overall transparency in the market.

If the market is concentrated then an information exchange is more likely to strengthen the interdependence of undertakings in that market and the agreement is therefore more likely to breach Article 81.

[22] ibid para 45.
[23] ibid para 25.
[24] In liner shipping there are operational and/or structural links between competitors, for example membership of consortia agreements that allow shipping lines to share information for the purposes of providing a joint service. The existence of any such link, however, will have to be taken into account on a case by case basis when assessing the impact an additional exchange of information has in the market in question.

What is the nature of the information being exchanged?

In reviewing the legality of an information exchange arrangement, the Commission states that certain features should be assessed including the nature of the information exchanged.[25]

Exchange of commercially sensitive data

The exchange of commercially sensitive unpublished information would potentially raise competition difficulties. Examples of this type of information would include data relating to issues such as price, cost, capacity, plans, production, research etc. Paragraph 50 of the Guidelines states:

> [t]he 'exchange of commercially sensitive data relating to the parameters of competition, such as price, capacity or costs, between competitors, is more likely to be caught by Article 81(1) of the Treaty than other exchanges of information. The commercial sensitivity of information should be assessed taking into account the criteria set out [in the Guidelines].

Exchange of public and unpublished information

The exchange of already published or publicly available information usually causes no difficulty under Article 81. This is because the exchange does not reduce the level of uncertainty in the market. If there is an exchange which reduces the level of uncertainty in the market then that would be more likely to infringe Article 81 of the EC Treaty because it reduces the rivalry or level of competition between the undertakings involved in the exchange.[26] Paragraph 51 of the Guidelines states that:

> [t]he exchange of information already in the public domain does not in principle constitute an infringement of Article 81(1) of the Treaty.[27] However, it is important to establish the level of transparency of the market and whether the exchange enhances information by making it more accessible and/or combines publicly available information with other information. The resulting information may become commercially sensitive and its exchange potentially restrictive of competition.

There can still be a breach of Article 81 where the information is false, inaccurate or even misleading. The information does not have to be precise for there to be a breach of Article 81.

Examples of the type of competitively sensitive information which could cause competition difficulties when exchanged include information on:

- costs
- details of bids or tenders
- discount history
- pricing
- stock levels
- future plans
- advertising and marketing plans.

Aggregated and disaggregated data

The exchange of individualised (as opposed to aggregated) information is more likely to be in breach of Article 81 than the exchange of aggregated information provided the information is not capable of being easily disaggregated (eg the market shares of a small number of

[25] Guidelines para 45.
[26] *Thyssen Stahl AG v Commission* (n 11) para 81.
[27] Cases I–191/98 etc *Atlantic Container Line v Commission* [2003] ECR II–3275 para 1154.

competitors or a market where the shares of individual competitors would be easily discernible). Paragraph 52 of the Guidelines states:

> Information may be individual or aggregated. Individual data relates to a designated or identifiable undertaking. Aggregate data combines the data from a sufficient number of independent undertakings so that the recognition of individual data is impossible. The exchange of individual information between competitors is more likely to be caught by Article 81(1) of the Treaty[28] than the exchange of aggregated information which, in principle, does not fall within Article 81(1) of the Treaty. The Commission will pay particular attention to the level of aggregation. It should be such that the information cannot be disaggregated so as to allow undertakings directly or indirectly to identify the competitive strategies of their competitors.

What is the position of aggregated and disaggregated data in the context of liner conferences? Paragraph 53 of the Guidelines states:

> However, in liner shipping caution should be used when assessing exchanges of capacity forecasts even in aggregate form, especially when they take place in concentrated markets. In liner markets, capacity data is the key parameter to coordinate competitive conduct and it has a direct effect on prices. Exchanges of aggregated capacity forecasts indicating in which trades capacity will be deployed may be anticompetitive to the extent that they may lead to the adoption of a common policy by several or all carriers and result in the provision of services at above competitive prices. Additionally, there is a risk of disaggregation of the data as it can be combined with individual announcements by liner carriers. This would enable undertakings to identify the market positions and strategies of competitors.

Age of the data

The exchange of historical information is generally not regarded as breaching Article 81. The difficulty is in deciding what is 'historical'. A rule of thumb is that information which is more than a year old is generally seen as historical but the accuracy of this approach depends entirely on the industry and the circumstances involved.

The exchange of 'future information' is particularly problematical. So, information about future price or production changes could be easily problematical in the context of Article 81.

Paragraph 54 of the Guidelines states:

> The age of the data and the period to which it relates are also important factors. Data can be historic, recent or future. Exchange of historic information is generally not regarded as falling within Article 81(1) of the Treaty because it cannot have any real impact on the undertakings' future behaviour. In past cases, the Commission has considered information which was more than one year old as historic[29] whereas information less than one year old has been viewed as recent.[30] The historic or recent nature of the information should be assessed with some flexibility taking into account the extent to which data becomes obsolete in the relevant market. The time when the data becomes historic is likely to be shorter if the data is aggregated rather than individual. Exchanges of recent data on volume and capacity are similarly unlikely to be restrictive of competition if the data is aggregated to an appropriate level such that individual shippers' or carriers' transactions cannot be identified either directly or indirectly. Future data relates to an undertaking's view of how the market will develop or to the strategy it intends to follow in that market. The exchange of future data is particularly likely to be problematic, especially when it relates to prices or output. It may reveal the commercial strategy an

[28] Commission Decision 78/252/EEC of 23 December 1977 in Case IV/29.176 *Vegetable Parchment* ([1978] OJ L70/54).
[29] Commission Decision 92/157/EEC of 17 February 1992 in Case IV/31.370 *UK Agricultural Tractor Registration Exchange* ([1992] OJ L68/19) para 50.
[30] Commission Decision 98/4/ECSC of 26 November 1997 in Case IV/36.069 *Wirtschaftsvereinigung Stahl* ([1998] OJ L1/10) para 17.

undertaking intends to adopt in the market. In so doing, it may appreciably reduce rivalry between the parties to the exchange and is thus potentially restrictive of competition.

Frequency of the exchanges

If information is exchanged frequently then it is more likely that there would be a difficulty under Article 81. If the information is exchanged on several occasions and there is only a relatively short gap between the exchanges then that is more likely to raise an issue because the uncertainty or unpredictability which would otherwise exist has been removed or reduced. Paragraph 55 of the Guidelines states:

> [t]he frequency of the exchange should also be considered. The more frequently the data is exchanged, the more swiftly competitors can react. This facilitates retaliation and ultimately lowers the incentives to initiate competitive actions on the market. So-called hidden competition could be restricted.

Manner of the exchange

The manner of the exchange can be important. As the Guidelines state in paragraph 56:

> … data is released should also be looked into to assess the effect(s) it may have on the market(s). The more the information is shared with customers, the less likely it is to be problematic. Conversely, if market transparency is improved for the benefit of suppliers only, it may deprive customers of the possibility of getting the advantage of increased 'hidden competition'.

A great deal turns on to whom the information is released. If the information is released to customers then it is less likely that there would be a competition issue. If information is released to suppliers only then it is more likely that there would be a competition issue.

It is clear that there is no defence or immunity to be derived from the information being exchanged through an agency or other third party.[31]

Price indexes

If a price index is exchanged then it would be unlikely to breach Article 81 where the information was sufficiently aggregated. However, if the uncertainty which would ordinarily surround future conduct was to be reduced by reason of the index then the dissemination of such an index would ordinarily breach Article 81.

Paragraphs 57–58 of the Guidelines deal with the issue in some depth:

> 57. In liner shipping, price indexes are used to show average price movements for the transport of a sea container. A price index based on appropriately aggregated price data is unlikely to infringe Article 81(1) of the Treaty, provided that the level of aggregation is such that the information cannot be disaggregated so as to allow undertakings directly or indirectly to identify the competitive strategies of their competitors. If a price index reduces or removes the degree of uncertainty as to the operation of the market with the result that competition between undertakings is restricted, it would violate Article 81(1) of the Treaty. In assessing the likely effect of such a price index on a given relevant market, account should be given to the level of aggregation of the data and its historical or recent nature and the frequency at which the index is published. In general it is important to assess all individual elements of any information exchange scheme together, in order to take account of potential interactions, for example between exchange of capacity and volume data on the one hand and of a price index on the other.
>
> 58. An exchange of information between carriers that restricts competition may nonetheless create efficiencies, such as better planning of investments and more efficient use of

[31] Guidelines para 38.

capacity. Such efficiencies will have to be substantiated and passed on to customers and weighed against the anti-competitive effects of the information exchange in the framework of Article 81(3) of the Treaty. In this context, it is important to note that one of the conditions of Article 81(3) is that consumers should receive a fair share of the benefits generated by the restrictive agreement. If all four cumulative conditions set out in Article 81(3) are fulfilled, the prohibition of Article 81(1) does not apply.[32]

What would be the change in the level of competition in the absence of the information exchange?

In considering the impact of the information exchange, it is necessary to 'consider the actual or potential effects of the information exchange compared to the competitive situation that would result in the absence of the information exchange agreement.[33] To be caught by Article 81(1) of the Treaty, the exchange must have an appreciable adverse impact on the parameters of competition'.[34]

Exchange of information in the context of liner conferences

The Guidelines deal specifically with the issue of information exchange in the context of liner conferences:

53 . . . in liner shipping caution should be used when assessing exchanges of capacity forecasts even in aggregate form, especially when they take place in concentrated markets. In liner markets, capacity data is the key parameter to coordinate competitive conduct and it has a direct effect on prices. Exchanges of aggregated capacity forecasts indicating in which trades capacity will be deployed may be anticompetitive to the extent that they may lead to the adoption of a common policy by several or all carriers and result in the provision of services at above competitive prices. Additionally, there is a risk of disaggregation of the data as it can be combined with individual announcements by liner carriers. This would enable undertakings to identify the market positions and strategies of competitors.

54. The age of the data and the period to which it relates are also important factors. Data can be historic, recent or future. Exchange of historic information is generally not regarded as falling within Article 81(1) of the Treaty because it cannot have any real impact on the undertakings' future behaviour. In past cases, the Commission has considered information which was more than one year old as historic[35] whereas information less than one year old has been viewed as recent.[36] The historic or recent nature of the information should be assessed with some flexibility taking into account the extent to which data becomes obsolete in the relevant market. The time when the data becomes historic is likely to be shorter if the data is aggregated rather than individual. Exchanges of recent data on volume and capacity are similarly unlikely to be restrictive of competition if the data is aggregated to an appropriate level such that individual shippers' or carriers' transactions cannot be identified either directly or indirectly. Future data relates to an undertaking's view of how the market will develop or to the strategy it intends to follow in that market. The exchange of future data is particularly likely to be problematic, especially when it relates to prices or output. It may reveal the commercial strategy an undertaking intends to adopt in the market. In so doing, it may appreciably reduce rivalry between the parties to the exchange and is thus potentially restrictive of competition.'

The position of trade associations is also dealt with in paragraph 59 of the Guidelines:

[32] ibid para 25.
[33] Judgment in *John Deere Ltd v Commission* (n 11) paras 75–77.
[34] Guidelines para 25; [2004] OJ C101/97 para 16.
[35] Commission Decision 92/157/EEC of 17 February 1992 in Case IV/31.370 *UK Agricultural Tractor Registration Exchange* (n 29) para 50.
[36] Commission Decision 98/4/ECSC of 26 November 1997 in Case IV/36.069 *Wirtschaftsvereinigung Stahl* (n 30) para 17.

> In liner shipping, as in any other sector, discussions and exchanges of information can take place in a trade association provided the association is not used as (a) a forum for cartel meetings;[37] (b) a structure that issues anti-competitive decisions or recommendations to its members;[38] or (c) a means of exchanging information that reduces or removes the degree of uncertainty as to the operation of the market with the result that competition between undertakings is restricted while not fulfilling the Article 81(3) conditions.[39] This should be distinguished from the discussions that are legitimately conducted within trade associations, for example on technical and environmental standards.

Exchange of information in the context of liner consortia

The Commission makes plain in paragraph 40 of its Guidelines that:

> [t]he liner shipping sector, exchanges of information between shipping lines taking part in liner consortia which would otherwise fall under Article 81(1) of the Treaty are permitted to the extent that they are ancillary to the joint operation of liner transport services and the other forms of cooperation covered by the block exemption and Regulation (EC) No. 823/2000 . . .[40]

The Guidelines explicitly state at paragraph 40 that they do not deal with these information exchanges in the context of liner consortia.

Concluding remarks

The Commission recognises in its Guidelines that it is 'common practice in many industries for aggregate statistics and general market information to be gathered, exchanged and published'.[41] However, notwithstanding that it may be a common practice, EC competition law does not permit it simply because it is a common practice.

The exchange of information is recognised as 'a good means to increase market transparency and customer knowledge, and thus may produce efficiencies'.[42] Notwithstanding this apparent and the benign view of the exchange of information, EC competition law is very suspicious of the exchange of information and, therefore, the Guidelines state that the 'exchange of commercially sensitive and individualised market data can, under certain circumstances, breach Article 81 of the Treaty'.[43]

May the Guidelines be relied upon or used by those outside the liner conference arena? The Guidelines may certainly be used by undertakings outside the liner shipping sector but they probably cannot be relied upon by such 'outsiders'.

How much use are the Guidelines to assisting undertakings in regard to the exchange of information? The guidelines are useful in that, before their implementation, the law on the area had to be garnered from the various cases and these Guidelines are 'intended to assist the providers of liner shipping services in assessing when such exchanges breach the competition rules'.[44] However, the challenge will lie in their application over time and in circumstances not contemplated by the Guidelines.

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[37] Commission Decision 2004/421/EC of 16 December 2003 in Case COMP/38.240 *Industrial tubes* ([2004] OJ L125/50).
[38] Commission Decision 82/896/EEC of 15 December 1982 in Case IV/29.883 *AROW/BNIC* ([1982] OJ L379/1); Commission Decision 96/438/EC of 5 June 1996 in Case IV/34.983 *Fenex* ([1996] OJ L181/28).
[39] *UK Agricultural Tractor Registration Exchange* (n 29).
[40] Guidelines para 40.
[41] ibid para.39.
[42] ibid.
[43] ibid.
[44] ibid.

Conflicts of Conventions in the Rotterdam Rules

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In the Rotterdam Rules,[1] States Parties commit themselves to denounce previous carriage by sea Conventions.[2] Other Conventions are, however, believed not to conflict with the Rotterdam Rules,[3] partly due to some elaborate conflict clauses in the Rules. In this article I will first discuss the collision clauses from a policy point of view, and thereafter I will discuss whether conflicts exist with other transport Conventions despite the conflict rules.

1 Introduction[4]

In the discussions, one often hears references to the mandate of negotiations, the difficulties encountered during negotiations and the drafting history. I have chosen a perspective similar to that which might be taken by the courts when the Rules are in force. In this situation, it is first and foremost the norms carried by the text of the Convention that matter. I will try to clarify these norms, so that politicians can take a view as to whether this is what they want. Negotiation history may explain why a text has become the way it has, but it cannot justify the fact that it becomes law.

2 Policy analysis

My first topic is how the conflict of Conventions as envisaged by the draftsmen looks from a policy point of view.

The idea in the Convention is that it shall apply door-to-door, regardless of mode of transportation, as long as an international sea leg is involved.[5] Exceptions are only made for conflicting liability rules for other modes of transport. Such conflicts include rules where there is no per unit limitation of liability, the per kilo limitation is higher than in the Rotterdam Rules and the basis of liability is stricter.

[1] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (A/RES/63/122). The Convention opened for signature on 23 September 2009. I would like to take the opportunity to commend the persons contributing to a successful completion of the Rotterdam Rules negotiations within reasonable time.
[2] Rotterdam Rules art 89.
[3] For some materials relating to the Conventions discussed here see http://www.folk.uio.no/erikro.
[4] This paper was presented in preliminary format at the Inter-Tran conference 'The European Transport Policy – Legal and Logistical Impacts on the Finnish Transport Industry (30 January 2009) and then at the 3rd Arab Conference for Commercial and Maritime Law in Alexandria (19 April 2009). The ideas have been further developed after the presentations.
[5] Rotterdam Rules arts 1(1) and 6.

The main provision to deal with this is Article 26, which provides that conflicting Conventions, on certain conditions, shall take precedence over the Rotterdam Rules before or after the sea voyage. During the sea voyage it is envisaged that there is no conflict, presumably because, inter alia, the CMR[6] refers back to the Rotterdam Rules and similar Conventions in respect of the sea leg.[7] However, if there is a problem Article 82 Rotterdam Rules provides that the special Conventions in case of conflict shall take precedence, and also to a greater extent than what would appear to flow from Article 26.

The details of the drafting of Article 26 and the associated drafting of Article 82 have already been much debated,[8] and I do not wish to go into details in this respect here. What is of a greater concern is the result the draftsmen intended. To illustrate how the Rotterdam Rules will work, one can perhaps imagine a carriage by road from Northern Sweden, across the Øresund to Denmark with delivery at the port in Denmark.[9] In that case, the new regime will have the following effects.

The inland stretch in Sweden remains uncovered by any international Convention[10] unless the carrier undertakes to extend the maritime contract to that part of the transport.[11] If the carrier does not do that, but still undertakes the whole transport in two different contracts, there will in fact be a multimodal operation, but in law a national, unimodal road transport plus an international transport across the channel.

If the carrier undertakes the entire transport under one contract, the liability regime applying to the road transport will vary. If the goods are carried across the channel by sea, the Rotterdam Rules regime will apply for the road stretch as well.[12] But if the goods are carried by road, the CMR will apply to the whole carriage.[13]

These different possibilities illustrate clearly the weaknesses of the door-to-door approach in the Rotterdam Rules. First, such a situation is quite complicated. The effects of the different ways of organizing the transport are not easily understood. In the above examples, the carrier's liability pursuant to international rules for the road stretch in Sweden may be 0,[14] 8.33 SDRs per kg[15] or 3 SDRs per kg/857 SDRs per unit (whichever is the higher),[16] and there is no obvious reason for the variation.

Secondly, it does not add to uniformity. On the contrary, in the above example the Rotterdam Rules add yet another regime for the inland transport without removing any, even if all involved States Parties implement the Rules as intended. The uniformity achieved by the denunciation of older carriage Conventions required by the Rotterdam Rules could be maintained even if the Rules had created more uniformity among the Conventions that are supposed to remain in force.

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[6] Convention on the Contract for the International Carriage of Goods by Road (CMR) 1956, as amended by Protocol to the CMR 1978.

[7] CMR Convention art 2.

[8] See in particular C Hancock 'Multimodal transport and the new UN Convention on the carriage of goods' [2009] 14 JIML 484–95 and A Diamond 'The next sea carriage Convention?' [2008] LMCLQ 135–87.

[9] I assume, of course, that all involved States are States Parties to the Rotterdam Rules and the CMR Convention.

[10] There is no international Convention which applies to domestic road transport in Sweden. The CMR Convention only applies to international carriage: see its art 1(1).

[11] Rotterdam Rules art 1(1) ('The contract … *may* provide for carriage by other modes of transport …'; emphasis added). Similarly on the application of the CMR, see M A Clarke 'International carriage of goods by road: CMR' (4th edn Informa London 2003) 46.

[12] This follows from the general scope of the Rotterdam Rules (see above). The conflict rule in Rotterdam Rules art 34 does not apply, as this only relates to conflicts with applicable international Conventions, and there is, as already mentioned, no international Convention which applies to domestic road transport in Sweden.

[13] CMR Convention arts 1(1) and 17.

[14] Again, there is no international Convention which applies to domestic road transport in Sweden.

[15] CMR Convention art 23(3).

[16] Rotterdam Rules art 59(1).

Thirdly, it does not create a level playing field. The liability rules seem to favor some modes of transport and some ways of organizing the transport over others, while it is generally recognized that the alternatives ideally should compete on equal terms in this respect.[17] I do not know whether it makes it worse or better that it is perhaps not always obvious which interests are favored (see below).

Finally, the Rotterdam Rules go a long way to maintain maritime peculiarities. I doubt that the nature of maritime transport really warrants liability rules that are fundamentally different from those of other modes of transport. I will discuss this shortly. But if the nature of maritime transport warrants such special rules, it does in all events not seem logical to extend them to the non-maritime part of the transport, as do the Rotterdam Rules. If there are special reasons why the per kilo limit should be 3 SDRs at sea, while it is 8.33 SDRs in road transport, why then apply the special maritime limit also for the road stretch, as in the example above? This creates a privilege for the sea carrier by including the road carriage in his offer to the customer and thereby triggering the use of the sea carriage limitation regime, if that is beneficial to him, and I can see no reason why the sea carrier should have such a privilege.[18]

But are there really valid reasons for the maritime peculiarities, even in the sea leg? A good way of approaching this problem is to compare the different regimes for the carrier's liability for cargo damage, and look for a pattern that reflects the nature of the carriage.

Convention	*Mode*	*Basis for liability*	*Limitation*	*Breaking the limit*	*Global limitation*
Rotterdam Rules	Sea	Negligence with exceptions, art 17	3 SDRs/kg or 857 SDRs per unit (whichever is the higher), art 59	Almost unbreakable, art 61	LLMC[19] etc
CMR Convention	Road	Quite strict, art 17	8.33 SDRs/kg, art 23	Wilful misconduct, art 29	Never
Budapest Convention	Inland waterways	Quite strict, art 16	2 SDRs/kg or 666.67 SDRs per unit (whichever is the higher), art 20	Almost unbreakable, art 21	Strasbourg Convention[20]
Montreal Convention[21]	Air	Very strict, art 18	17 SDRs/kg, art 22	Quite unbreakable, art 22	Never
CIM Rules	Rail	Quite strict, art 36	17 SDRs/kg, art 40	Almost unbreakable, art 44	Never

[17] The Convention concerning International Carriage by Rail (COTIF) 1980 Appendix B; Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM Rules) art 48 §2 specifically provides that: 'Where one and the same sea route is served by several undertakings …, the regime of liability applicable to that route shall be the same for all those undertakings'.

[18] The sea carrier has this privilege even if the sea leg of the transport is very minor in relation to the road leg; see on this point UNCITRAL Document A/CN.9/621 para 187. In other Conventions, there is an example of a choice of Convention rule that depends on the relative length of the legs; see Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI) (2000) art 30(2).

[19] Convention on Limitation of Liability for Maritime Claims (1976).

[20] Strasbourg Convention on the Limitation of Liability of Owners of Inland Navigation Vessels (CLNI) 1998.

[21] Convention for the Unification of Certain Rules for International Carriage by Air (1999) (Montreal Convention).

The obvious peculiarity with maritime transport – that there are so many eggs in one basket as ships are much bigger than any other means of transportation – is often taken care of by global limitation. The low per kilo limit cannot in any event be justified by this peculiarity, as the unit limitation sometimes leads to much higher liabilities than in the other modes of transport.[22]

It may also be that maritime transport is more risky than transport by other modes, and that the liability rules therefore ought to be more lenient to the carrier. I have, however, seen no evidence that the risk actually is greater at sea. And if it were, I suppose that would be an argument for stricter rules rather than more lenient rules to induce the greater care necessary under such circumstances.[23]

The insurance arrangements in maritime transport are at least as sophisticated as in any other modes of transport. The fact that there is an efficient insurance system should not, of course, justify stricter liability. But the insurance system is no reason to maintain the maritime peculiarities.

I do not think that there is any chance that the liability rules of other modes of transport should be aligned with the maritime standard. If it is desirable to obtain uniformity and a level playing field, there is therefore only one way to go – to align maritime liability with the liabilities of other modes of transport. The peculiarities of maritime transport are no reason for not doing so, at least not as long as global limitation is maintained.

The Rotterdam Rules do not, perhaps, reflect the best policies in respect of simplification, uniformity, level playing fields and maritime peculiarities. However, one should not make this a bigger problem than it actually is. Insurance costs are marginal, and other factors are likely to be much more decisive in the pursuit of profitability, both on the carrier's side and on the cargo side. Although the playing field may not be level, it is not so very unlevel. It would be perfectly possible to live with the differences in liability rules outlined above, however unwarranted they may be. This last point, however, can also be turned the other way around – if cargo liability insurance is not a major problem, how can one defend keeping up and extending the maritime peculiarities in this field, as the Rotterdam Rules do?

3 Technical analysis

3.1 The problem

I will now turn from the policy analysis of what the draftsmen have tried to achieve in respect of door-to-door regimes to the issues the draftsmen did not address. I will restrict myself to technical matters, ie where there may be an unresolved conflict between the Rotterdam Rules and one or more unimodal transport Conventions.

The carrier's liability for localized damage or delay will not be discussed. Article 26 will thus fall outside the scope of this discussion, as it is clear from the wording that it only applies to the carrier's liability for localized damage or delay:

> When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship …

[22] The unit limitation will be applicable for goods weighing less than 857/3 kg/unit = 285.67 kg/unit. If the goods weigh less than 857/17 kg/unit = 50.41 kg/unit, the maximum liability of the Rotterdam Rules would be higher than even that of the Montreal Convention or the CIM Rules. This may very well be the case, eg for computers and teddy bears, which again may or may not be worth far more than the limit.

[23] J Ramberg *The law of transport operators in international trade* (Stockholm University Law Publishers 2005) at 37ff also points out that the maritime limitation rules can be seen as risk sharing in a common adventure.

What I will attempt to do is first to identify conflicts between the Rotterdam Rules and other transport Conventions. By conflicts I mean not only that the regulations differ in effect, but also that they differ in wording. Even if a close reading of the two instruments should conclude that there is a construction that would remove all conflicts, the State Party to the unimodal Convention may have violated it by replacing the Rotterdam Rules wording for the wording agreed in the unimodal Convention.

Furthermore, there may be a conflict between two Conventions even if the private parties can comply with both of them by waiving rights. It is the obligations of the States Parties to harmonize legislation, and not the possibilities of the private parties to comply with it that is the concern here.

Some of the Conventions include a provision that expressly states that the provisions in that Convention shall apply regardless of the basis of the claim.[24] Presumably this applies also if the basis of the claim is another Convention. But even if such provisions are not included, the purpose of a Convention on harmonization of laws must be that the States Parties are not also free to promote alternative rules for the same subject area.

As discussed below, the focus is on the shipper and the contractual carrier. Similar problems could arise in respect of the unimodal carrier as a performing carrier. The Rotterdam Rules include provisions of the liability of such performing parties if they are maritime performing parties,[25] and these rules could be in conflict with other Conventions. However, such possible conflicts are to some extent avoided by excluding an 'inland carrier' from the definition of a 'maritime performing party'.[26]

The exclusion of inland carriers from the definition of maritime performing parties is by its wording limited to inland carriers whose services are not 'exclusively within a port area'. An inland road carrier that picks up the goods at the ship's side and takes them to a hinterland destination is thus not a 'maritime performing carrier', and no conflicts with the CMR Convention arise in respect of the Rotterdam Rules' liability for maritime performing carriers. However, conflicts may still arise in respect of the CMR Convention and the Rotterdam Rules' liability for the contractual carrier that includes the hinterland leg of the transport, and this is what will be discussed below.

After the discussion of possible conflict areas (below at 3.3–3.6) I will discuss whether conflict rules such as Article 82 of the Rotterdam Rules can resolve any conflicts, or whether the conflicts in fact make the particular Convention irreconcilable with the Rotterdam Rules (below at 3.6–3.7).

For the sake of simplicity, I will use the CMR Convention as the main focus for the discussions below.

3.2 Documents

It has already been stated that the Rotterdam Rules apply to the example given above of carriage by truck through Sweden and then across the Øresund by ferry from Sweden to a location in Denmark.[27] Therefore, a document issued by the carrier would be subject to the Rotterdam Rules Chapter 3 on Electronic transport records and Chapter 8 on Transport documents and electronic transport records. However, at the same time, the transport will be subject to the document rules of the CMR Convention Chapter 2. The fact that a part of the

[24] Budapest Convention art 22, Rotterdam Rules art 4 and Montreal Convention art 29. The corresponding rule in the CMR Convention art 28 is limited to extra-contractual claims. The CIM Rules do not include any rule of this kind.
[25] Rotterdam Rules art 19.
[26] ibid art 1(7).
[27] Above Section 2.

transport will be carried out by sea does not relieve the carrier of the obligation to issue a CMR Convention Consignment Note to the final place of destination,[28] regardless of whether the liability rules of the CMR apply to the sea leg.[29] This means that two very different rules on documentation may apply to the same transport.

It may not be in conflict with the Rotterdam Rules that a CMR Convention Consignment Note is issued for the transport in addition to the documentation envisaged in the Rotterdam Rules. After all, the carrier is under no absolute obligation to issue any kind of documentation under the Rotterdam Rules,[30] and there is no ban on documentation that departs from the patterns set out in the Rules. Still, for the States Parties to the Rotterdam Rules it may not be appropriate to maintain a competing set of rules on cargo documentation. An international Convention in which the States Parties agree on how the rules on cargo documentation should be applied would otherwise be quite meaningless.[31]

In any event, the CMR Convention provides an absolute right for the sender to have a CMR Convention Consignment Note rather than the Rotterdam Rules documentation,[32] and normally disallows States Parties the right to authorize the use of other documentation, eg a Rotterdam Rules document of title, even by specific additional Conventions.[33] Therefore, there is a conflict between the two sets of rules in this respect.

Obviously, when there are two sets of document rules there are some similarities but also some differences in the details, eg of the particulars to be contained in the documents. I will not carry out a full comparative study in this respect as the incompatibility has already been established.

There are also document requirements that are different from the requirements in the Rotterdam Rules in air law,[34] rail law[35] and inland waterways law.[36] In the air law regime, it is expressly provided that its document rules will prevail even if Rotterdam Rules documents are issued.[37] Thus, the same problems arise in respect of these Conventions as in respect of the CMR Convention. However, in inland waterways law it is presupposed that other documents can be used; indeed the use of a maritime bill of lading may render the inland waterways regime inapplicable.[38]

3.3 Disposal and delivery rules

The rules of disposal and delivery of the cargo are traditionally closely linked to the cargo documentation. It is therefore no surprise that the rules differ in the CMR Convention and the Rotterdam Rules; indeed, the Rotterdam Rules contain a number of variants in Chapters 9, 10 and 11. The most conspicuous differences are:

[28] CMR Convention art 4.
[29] Other liability rules may, however, apply by virtue of CMR Convention art 2.
[30] Rotterdam Rules art 35.
[31] No reservations are allowed in the Rotterdam Rules; see art 90.
[32] CMR Convention art 4.
[33] CMR Convention art 1(5): 'The Contracting Parties agree not to vary any of the provisions of this Convention by special agreements between two or more of them, except … to authorize the use in transport operations entirely confined to their territory of consignment notes representing a title to the goods'. The Article was pointed out in the course of the negotiations of the Rotterdam Rules; see UNCITRAL document A/CN.9/616 para 216 et seq.
[34] Montreal Convention art 4 et seq.
[35] CIM Rules art 11 et seq and Convention concerning International Carriage by Rail (COTIF) 1980 Appendix B, Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM Rules), Annex III Regulations concerning the International Carriage of Containers by Rail (RICo) art 10. As in the CMR Convention, the use of other documents than those provided for in the Convention is expressly prohibited (CIM Rules art 13 §4).
[36] Budapest Convention ch III.
[37] Montreal Convention art 9.
[38] ibid art 2.

- the controlling party is defined differently in CMR Convention Article 12 and Rotterdam Rules Article 51
- the rules on presentation of documents are different in CMR Convention Article 12 and Rotterdam Rules Chapter 9
- the rules for non-collected goods differ in CMR Convention Article 14 and Rotterdam Rules Article 45(c).

These are straightforward examples of contradictory regulation; a State Party to both Conventions would be in conflict with its obligations under one as well as the other.

One could imagine that this conflict would be resolved by the choice of document; a CMR Convention Consignment Note would trigger the CMR Convention rules on disposal and delivery, while a Rotterdam Rules document would trigger the Rotterdam Rules. But it will not necessarily be clear which set of rules the issuer had in mind, and at least the CMR Convention rules will apply regardless of form due to a special provision in that Convention.[39] Possible clarification between the private parties can, as already mentioned, in any event not relieve a State Party of its duty to implement the rules of the CMR Convention and the Rotterdam Rules, respectively.

There are also rules on disposal and delivery of the cargo that are different from the requirements in the Rotterdam Rules in air law,[40] rail law[41] and inland waterways law.[42] Thus, the same problems arise in respect of these Conventions as in respect of the CMR Convention.

3.4 Carrier's liability for unlocalized damage

In respect of localized damage, the Rotterdam Rules to some extent refer to other Conventions.[43] However, in respect of unlocalized damage the idea is apparently that this should be dealt with solely by the Rotterdam Rules. This creates a problem, because the other Conventions to some extent also include provisions for unlocalized damage.

Indeed, the system of the CMR Convention is virtually identical to that of the Rotterdam Rules in this respect. There is a general liability rule, and then exceptions for localized damage.[44] If the damage is not localized, the general liability rule applies, which makes it a rule for unlocalized damage.[45]

The CMR Convention is not a multimodal Convention. However, it follows explicitly from Article 2 that it does apply even if the transport includes ro-ro carriage by sea. And even if the transport includes a carriage by sea that is not ro-ro, the carrier will be liable for unlocalized damage under the general liability rule. The Convention does not include an exception for such legs, and such exemptions would in any event not apply if the carrier could not prove that the damage occurred at such a leg, and thus would not be unlocalized.

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[39] CMR Convention art 4: 'The absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage which shall remain subject the provisions of this Convention'.
[40] Montreal Convention art 12 et seq.
[41] CIM Rules arts 28 and 30–34.
[42] Budapest Convention art 10 and ch 14.
[43] Rotterdam Rules art 34.
[44] CMR Convention arts 17 and 2.
[45] M A Clarke (n 11) 33. In a report of the UNCITRAL Secretariat to the delegates negotiating the Rotterdam Rules, it was pointed out that a road carrier does not necessarily have responsibility for the sea leg. But the point was hardly that he would *never* have such responsibility; see UN Document A/CN.9/WG.III/WP.29 (31 January 2003): Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]: General remarks on the sphere of application of the draft instrument. Note by the Secretariat paras 62–63 and 115–16. In UN Document A/CN.9/WG.III/WP.78 (21 September 2006): Transport Law: Preparation of a draft Convention on the carriage of goods [wholly or partly] [by sea]: Relation with other Conventions. Note by the Secretariat para 35, it is noted that the conflicts do not arise in respect of sub-contractors, but no explanation is offered why, for example, the CMR Convention is not applicable to the main contract of carriage if it involves both road and sea transportation.

Again, there is a striking conflict between the Rotterdam Rules and the CMR Convention. Both Conventions include liability rules for unlocalized damage. They are different,[46] and a State Party cannot implement both sets.

Similar to the CMR Convention, there are liability provisions that include unlocalized damage – even if other modes of transport are involved – in rail law.[47] The inland waterways regime provides that the contractual carrier remains liable if the goods are trans-shipped, even in breach of the contract.[48] This provision presumably also applies to trans-shipment to another mode of transport. Thus, the same problems arise in respect of these Conventions as in respect of the CMR Convention. In air law, however, the unimodal regime only applies to the air part of the carriage, and no issue of unlocalized damage arises that can create a problem in relation to the Rotterdam Rules.[49]

3.5 Shipper's liability

Both the CMR and the Rotterdam Rules include rules on shipper's liability.[50] Again, they are not identical, neither in form nor in tenor. It would not be possible for a State Party to both Conventions to implement both sets of rules, as the intended clarity and uniformity would then be lost in transports within the scope of both Conventions, and the shipper would get either more or less liability than envisaged in either of the Conventions.

There are also rules on shipper's liability that are different from the requirements in the Rotterdam Rules in air law,[51] rail law[52] and inland waterways law.[53] Thus, the same problems arise in respect of these Conventions as in respect of the CMR Convention.

3.6 Conflict rules – the principal view

In the text above, I have identified four clear-cut examples of conflict between the Rotterdam Rules and the CMR Convention (and other unimodal Conventions). There are also others, such as rules of the evidentiary effect of the transport documents, time bars, conditions for breaking the limits etc.[54]

Could Article 82 remove the conflicts? The parts of Article 82 that relate to the CMR Convention read as follows:

> Nothing in this Convention affects the application of any of the following international Conventions in force at the time this Convention enters into force, including any future amendment to such Conventions, *that regulate the liability of the carrier for loss of or damage to the goods*: . . .
>
> (b) Any Convention governing the carriage of goods by road *to the extent that such Convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship*; . . . (emphases added)

If one reads this without the words in emphasis, the rule is quite straightforward: When applicable, a Convention governing the carriage of goods by road, such as the CMR Convention, takes precedence whenever it is applicable. In that way there is technically no conflict. I shall refer to this below as 'the conflict rule'.

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[46] See above Section 2.
[47] This follows implicitly from CIM Rules arts 27 §4(b) and (for certain listed services) 48 and expressly from RICo Rules art 3.
[48] Budapest Convention art 4.
[49] Montreal Convention art 38 (but see art 18(4)).
[50] CMR Convention arts 7 and 10; Rotterdam Rules ch 7.
[51] Montreal Convention art 10.
[52] CIM Rules art 19 §4.
[53] Budapest Convention art 8.
[54] See UN Document A/CN.9/WG.III/WP.29 paras 72–105 and UN Document A/CN.9/WG.III/WP.78 para 41.

However, there are two major qualifications of this conflict rule (the emphasized words). They both point to the carrier's liability, and the second one specifically to one particular situation of localized damage. The conflict rule is simply not a general conflict rule, and it does not include conflicts of the kind outlined above; indeed, there are no indications in the *travaux préparatoires* that the draftsmen even considered such conflicts (or indeed any indication what they actually intended). Therefore, one must conclude that the conflict rule in Article 82 does not resolve the conflicts with the CMR Convention outlined above.

If States Parties to the Rotterdam Rules are to act correctly, they must therefore denounce the CMR Convention. That is unfortunate, as the Rotterdam Rules in other respects are shaped to avoid conflicts with that Convention.

What is said about the CMR Convention is also true for the other unimodal Conventions. The first qualification in italics in the quotation above is common for all of them. And the second qualification – in Article 82 paragraphs (a), (c) and (d) respectively – are similar to the CMR qualification in that they all refer to localized damage.

3.7 Conflict rules – a rescue attempt

My conclusion above in 3.6 is rather serious. I will therefore make an attempt to harmonize the Rotterdam Rules with the other unimodal Convention by stretching the words of Article 82 to the extent necessary to rescue the Convention, so one can see what that would look like.

(i) First, can Article 82 resolve conflicts of Conventions as outlined above? That would depend on whether the qualifications in fact exclude such conflicts as those outlined above at sections 3.1–3.4 from its scope.

The first qualification to be discussed here is contained in the words:

> … to the extent that such Convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship …

The words obviously reflect CMR Convention Article 2 on ro-ro transports; a provision which makes the maritime liability regime applicable for localized damage if a truck with CMR Convention cargo has been loaded on board a ship, even if the CMR Convention is applicable for the entire transport carried out by the truck. Apparently, the words do not include containers removed from the truck and carried by sea in the course of a CMR Convention carriage, and they do not include the CMR Convention provisions on documents etc.

However, even if the words as such are quite narrow, it does not necessarily narrow down the conflict rule correspondingly. Obviously, the words may qualify the conflict rule, so that the conflicts between the CMR Convention and the Rotterdam Rules only are resolved to the extent the CMR Convention applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship.[55] But equally well, the words can be understood to qualify the Convention referred to, so that sub-paragraph (b) of the Article is only a complicated code description of the CMR Convention. In that way, the conflict rule applies when there is a conflict with a Convention for road carriage that includes a rule such as CMR Convention Article 2, regardless of whether that rule applies in the specific conflict.

There is some support in the *travaux préparatoires* that it is the latter reading that is the correct one, as the idea was to avoid conflicts with existing Conventions.[56] If this is correct, one hurdle that could prevent the conflict rule to resolve the conflicts between the Rotterdam Rules and the unimodal Conventions would have been overcome.

[55] This seems to be the reading of A Diamond (n 8) 142–43 and C Hancock (n 8) 493.
[56] UNCITRAL Document A/63/17 para 249.

The qualifications in respect of other unimodal Conventions in Article 82, paragraphs (a), (c) and (d) could be read in a similar manner,[57] so that the conflict rule in Article 82 could apply to all conflicts between these Conventions and the Rotterdam Rules.

(ii) However, there is still another hurdle, namely the other qualification: '… that regulates the liability of the carrier for loss of or damage to the goods …'. These words may either specify that the conflict rule only applies to Conventions that include liability rules or that it only applies to the rules concerning the carrier's liability of the Conventions. In the latter case, the conflict rule of Article 82 would not resolve the conflicts concerning documentation, delivery and shipper's liability pointed out above.

The wording, however, clearly indicates that the former contraction is the correct one. What creates some doubt is the fact that it is somewhat strange to put in an elaborate clause such as this in a stringent legal text, as it does not seem to add much of significance, since all of the Conventions that otherwise qualify under the criteria of Article 82 include liability rules anyway. Still, the better reading may arguably be the reading that renders the words legally meaningless.

Thus, the second hurdle could also be overcome with a somewhat strained construction. Again, this would be the same for the other unimodal Conventions, as the words discussed here apply to all of them.

(iii) Altogether, therefore, it appears that the substantive conflicts between the Rotterdam Rules and the CMR Convention are resolved by Article 82.[58] However, the solution would not be a good one.

Technically, this would mean that, for each transport, it would be necessary to determine whether the CMR Convention would apply, and then apply a mixture of the CMR Convention and the Rotterdam Rules, which it is not for any road carrier to ascertain. This would be very complicated – and the conflict of Conventions issue will be brought from the courtroom to the everyday life of the trucker. How can a road carrier possibly determine whether he should issue documentation pursuant to the CMR Convention or the Rotterdam Rules?

Politically, this would mean that large parts of the fully fledged Rotterdam Rules would not apply to many door-to-door transports in Europe, even if a sea leg is included. The rules on documents, uniform liability etc of the CMR Convention would take precedence, as there is usually a road leg before and after the sea leg, and the CMR Convention applies in most European Member States. From a European point of view, it may be that this is a meager political outcome of a door-to-door reform.

In respect of uniformity, the result would be that yet another regime would be created: the Rotterdam Rules – CMR Convention mixture. This would be a step backwards.

Thus, even with the strained construction outlined above the Rotterdam Rules can be preserved together with the other unimodal Conventions only if one is willing to swallow a camel or two.

(iv) A pertinent observation in respect of this sad result is perhaps that the problems could have been avoided had the Conventions been more flexible.[59] It has been well known for decades that conflicts of Conventions such as those discussed here arise whenever a new

[57] In the same way as para (b) implicitly refers to CMR Convention art 2, para (a) implicitly refers to Montreal Convention arts 38 and 18, para (c) implicitly refers to CIM Rules art 48 and para (d) implicitly refers to Budapest Convention art 2(2).

[58] Sceptic A Diamond (n 8) at 145 and Hancock (n 8) at 492 et seq.

[59] See E Røsæg: 'The applicability of Conventions for the carriage of goods and for multimodal transport' [2002] LMCLQ 315–49 at 332.

Convention is negotiated. Still, effort is always employed in these Conventions to ensure that other Conventions do not touch any part of it.[60] In the Rotterdam Rules, this rigid tradition has been followed[61] and, in addition, omitted the standard supersession clause[62] that would have allowed backwards compatibility. The honorable exception is the railways Convention, which expressly allows for adjustments by new Conventions[63] – seemingly without harm of any kind.

4 Summary

It has been a major point in the drafting of the Rotterdam Rules that they shall extend to door-to-door transport. It has, however, proved difficult to extend a maritime Convention to land. First, the resulting regimes are complicated and undesirable from a policy point of view (Section 2 above). Secondly, there remain unresolved conflicts with unimodal transport Conventions that cannot easily be ignored (Section 3 above). The attempts to resolve conflicts in the Conventions leave a motley image and are, to some extent, unsuccessful.

[60] CMR Convention art 1(5) provides that the parties cannot make special agreement among themselves, as otherwise would have been allowed under the Vienna Convention on the Law of Treaties 1969 arts 30 and 41. Budapest Convention art 32 provides for certain special arrangements between two or more States Parties, and such special arrangements that would be relevant here are then presumably not allowed. Montreal Convention art 57 disallows reservations.

[61] Rotterdam Rules art 90 disallows reservations. In addition, the conflict rule in art 82 does not apply to future Conventions.

[62] See eg International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 art 42 and United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules) 1978 art 25.

[63] CIM Rules arts 66, 8.

The legal status of the Arctic under contemporary international law: an Antarctic regime or poles apart?

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Introduction

The Arctic's status under contemporary international law has become increasingly relevant. While the Arctic area can be considered geographically a regional issue, recent developments have confirmed its global significance. In August 2007 a Russian submarine planted a titanium Russian flag on the seabed over four kilometres beneath the North Pole. The Ilulissat Declaration was signed in May 2008, marking a renewed commitment of the littoral[2] Arctic states to safeguard the Arctic.[3] At the same time, the global demand for natural resources is greater than ever before, despite the current recession, with the price of crude oil recently rising to US$147 a barrel[4] and, once economic recovery begins, likely to rise further. Although the treatment under contemporary international law of the Arctic and Antarctic areas undeniably differs, there are also significant similarities. This author suggests that a great deal can be learnt from the approach of states to Antarctica and the Antarctic regime under international law, which can also be applied in part to the Arctic area.

This article seeks to demonstrate that existing international legal instruments do not, and cannot, adequately respond to the ecological threats facing the Arctic region. An Arctic treaty is required in order to protect this fragile environment. Part 1 of this analysis defines and contextualises the Arctic region. Part 2 identifies the potential opportunities/threats arising from the effects of climate change on the Arctic. Part 3 explores three fundamental themes of sovereignty, shipping and natural resources. Part 4 compares and contrasts the polar regions, while Part 5 proposes an Arctic regime for the 21st century.

Part I: Background and definitions

The Arctic defined

There is no single definition of the Arctic area. It comprises both the northern territories of the Arctic states, as well as the Arctic Ocean. Its physical geography and scope is vast,

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[2] Meaning 'of or on the shore of the sea' (Oxford English Dictionary).

[3] The Ilulissat Declaration (28 May 2008) available at http://www.um.dk/NR/rdonlyres/BE00B850-D278-4489-A6BE-6AE230415546/0/ArcticOceanConference.pdf.

[4] K Hopkins 'Fuel prices: Iran missile launches send oil to $147 a barrel record' *The Guardian* (12 July 2008) available at http://www.guardian.co.uk/business/2008/jul/12/oil.commodities.

'sprawling over one sixth of the earth's landmass; more than 30 million km^2 and twenty-four time zones'.[5] The Arctic region is widely recognised as being the area of land, sea and sea ice located north of the Arctic Circle (being 66° 33′ N). The Arctic Ocean covers 14 million square kilometres.[6]

Polar vulnerability and the changing nature of the Arctic

The polar regions have long been considered to be an early warning system for global climate change.[7] The rate of climate change in the Arctic region has been more rapid due to its vulnerability to the effects of global warming. Between 2004 and 2005 the Arctic Ocean lost 14 per cent of its dense and thick perennial ice (ice that poses an obstacle to shipping).[8] In 2005 the Ayles Ice Shelf (an area of 87.1 square kilometres – larger than Manhattan) calved off Ellesmere Island.[9] In its Fourth Assessment Report, the Intergovernmental Panel on Climate Change (IPCC) has recognised the particular vulnerability of the polar regions to the effects of climate change.[10] On average, surface air temperatures in the Arctic have warmed at twice the global rate.[11] Certain data have shown that the Arctic sea ice is disappearing 30 years ahead of IPCC predictions.[12] A study by the Canadian Centre for Climate Modelling and Analysis has predicted that the Arctic may be almost entirely ice-free all year round by 2100.[13]

Legal regimes applicable to the Arctic

There are eight Arctic states: the US, Canada, Russia, Denmark (by virtue of its self-governing territory Greenland), Norway, Sweden, Finland and Iceland (although only the US, Canada, Russia, Denmark and Norway – the so-called 'Arctic 5' or 'A5' countries – are littoral to the Arctic Ocean). To the extent that the Arctic region forms part of the territory of these states, it is governed by national law.[14] The eight Arctic states are not the only stakeholders in the Arctic region, since the ice region itself also has an indigenous community of over four million. However, there are no treaties which specifically deal with the Arctic region. There is 'no comprehensive regional legal regime' in the Arctic.[15]

Under the United Nations Convention on the Law of the Sea 1982 (UNCLOS),[16] each state party enjoys sovereignty over its territorial waters[17] (being that part of the sea between the baseline[18] and a distance of 12 nautical miles out to sea) and may exercise sovereign rights over its 200-nautical mile exclusive economic zone (EEZ). However, a state may be able to

[5] Arctic Council available at http://arctic-council.org/article/about.
[6] H Huntingdon et al 'An Introduction to the Arctic Climate Impact Assessment' (2007) 10 available at http://www.acia.uaf.edu/PDFs/ACIA_Science_Chapters_Final/ACIA_Ch01_Final.pdf.
[7] R Schmid 'Arctic Temps Reach Record Highs' *Associated Press* (16 October 2008) available at http://dsc.discovery.com/news/2008/10/16/arctic-temperatures.html.
[8] S Borgerson 'Arctic Meltdown: The Economic and Security Implications of Global Warming' Foreign Affairs (March/April 2008) 2 available at http://www.foreignaffairs.org/20080301faessay87206/scott-g-borgerson/arctic-meltdown.html.
[9] Laboratory for Cryospheric Research University of Ottawa News available at http://www.geomatics.uottawa.ca/copland/.
[10] O Anisimov et al 'Polar regions (Arctic and Antarctic)' in M Parry et al (eds) *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press Cambridge 2000) 655.
[11] O Anisimov et al (n 10) 656.
[12] M Knight 'Climate changing "stronger, faster, sooner"' CNN (20 October 2008) available at http://edition.cnn.com/2008/TECH/science/10/20/wwf.climate.report/index.html?eref=rss_latest.
[13] H Huntingdon et al (n 6) 3.
[14] D Johnston 'The Northwest Passage Revisited' (2002) 33 Ocean Development & International Law 146.
[15] D Rothwell 'International Law and the Protection of the Arctic Environment' (1995) 44 International and Comparative Law Quarterly 280.
[16] United Nations Convention on the Law of the Sea (Montego Bay 10 December 1982, in force 16 November 1994), 1833 United Nations Treaty Series 3.
[17] UNCLOS art 2(1).
[18] Defined under art 5 of UNCLOS as: 'the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state'.

exercise sovereign rights beyond the 200-nautical mile limit if it can demonstrate that its continental shelf extends beyond this. Beyond the EEZ or extended continental shelf, the Arctic Ocean (whether water or sea ice – including the North Pole), as part of the 'global commons',[19] is classified under UNCLOS as 'high seas'[20] or, in respect of the seabed, the 'Area',[21] and as such is under the control of the International Seabed Authority (ISA).

Regional Arctic protection initiatives

Less so than in respect of Antarctica, there have nevertheless been responses to the need for a conservation-based and precautionary approach in the Arctic, namely the Arctic Environmental Protection Strategy 1991 (AEPS) and the subsequent formation of the Arctic Council. The AEPS was a non-binding agreement entered into by the eight Arctic states to 'protect and preserve the Arctic environment' by means of a series of principles and objectives.[22] This agreement recognised that the question of natural resources was central to the Arctic regime and the need for 'sustainable economic development' of the region.[23] Established by the 1996 Ottawa Declaration to 'oversee and coordinate' the programmes established under the AEPS, the Arctic Council is a 'high-level intergovernmental forum'[24] which has, as its mandate: 'promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic'.[25] The Arctic Council continues to be a significant instrument of regional cooperation.

The Northern Dimension policy is defined as a 'regional expression' of the approach of the EU, Iceland, Norway and Russia.[26] Its geographical area comprises the European Arctic and Sub-Arctic areas. While sustainable development is one of its objectives, environment and natural resources are components of one of its so-called 'priority sectors'.[27] The Barents Euro-Arctic Council, as the intergovernmental forum specifically of the Barents Euro-Arctic Region, was also formed with sustainable development of the region as its overall objective.[28]

Europe and the Arctic

The European Commission issued a report in March 2008, which directly addressed the issue of energy and security in the context of the Arctic.[29] In November 2008 the Commission released a 'Communication' on the Arctic region, in which it called for the need to balance 'the priority goal of preserving the Arctic environment and the need for sustainable use of

[19] The 'global commons' are widely understood to be 'areas beyond the limits of national jurisdiction': Principle 2 of the Rio Declaration on Environment and Development (Rio June 1992) available at http://www.unep.org/Documents.Multilingual/Default.asp?documentID=78&articleID=1163.

[20] UNCLOS art 86.

[21] ibid art 1(1).

[22] Arctic Environmental Protection Strategy 'Declaration on the Protection of Arctic Environment' (Rovaniemi Finland June 1991) 3 and 9 available at http://arctic-council.org/filearchive/artic_environment.pdf.

[23] Arctic Environmental Protection Strategy (n 22) 7.

[24] Arctic Council (n 5).

[25] Ottawa Declaration (16 September 1996) available at http://arctic-council.org/filearchive/Declaration%20on%20the%20Establishment%20of%20the%20Arctic%20Council-1..pdf.

[26] The Northern Dimension available at http://ec.europa.eu/external_relations/north_dim/index.htm.

[27] Northern Dimension Policy Framework Document para 19 available at http://ec.europa.eu/external_relations/north_dim/docs/frame_pol_1106_en.pdf.

[28] Barents Euro-Arctic Council 'Cooperation in the Barents Euro-Arctic Region – Target: stability and sustainable development' (1 June 2005) available at http://www.barentsinfo.fi/beac/docs/11675_doc_CSO.2005.18ENGBarentsInfosustainabledevlp.pdf.

[29] Paper from the High Representative and the European Commission to the European Council 'Climate Change and International Security' (14 March 2008) available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/reports/99387.pdf.

resources'.[30] On 9 October 2008 the European Parliament resoundingly passed a resolution (by 597 votes to 23) on Arctic governance.[31] This far-reaching resolution recognised the growing 'geopolitical and strategic' importance of the Arctic.[32] It further recognised the lack of any bespoke treaty regime for the Arctic region, as well as the inability of UNCLOS sufficiently to respond to the changing physical nature of the Arctic Ocean as a result of climate change. As well as noting the particularly harmful effects of global warming on the 'High North', the European Parliament acknowledged the intrinsic energy and security aspects of the Arctic question. Although constituting an important recognition at the highest level of the EU of the fundamental significance of the Arctic region, without further action by the EU this will not help to strengthen protection of the region.

The International Maritime Organization

Described as the 'most important institution in international maritime law', the International Maritime Organization (IMO) has a potentially central role in the governance and regulation of the Arctic Ocean.[33] As the 'competent international organization'[34] under UNCLOS, the IMO is responsible for establishing sea lanes – an increasingly relevant competence in light of the anticipated increased levels of vessel traffic made possible by ever greater sea ice melt.[35] The IMO may also impose 'international rules and standards to prevent, reduce and control pollution of the marine environment from vessels'.[36] This is especially significant in the Arctic Ocean – an environment that is particularly vulnerable to the effects of pollution from vessels.[37] Finally, the IMO is arguably the most appropriate body for effectively regulating the expansion of tourism in the Arctic Ocean: there is 'an acute need to establish special guidelines for cruise ships in the Arctic through the IMO'.[38] The IMO can also designate marine areas as an 'area to be avoided'.[39] Such designation could be used to prevent navigation of the Northern Sea Route, stretches of which are known to be unnavigably shallow.[40]

The Ilulissat Declaration

Issued on 28 May 2008, the Ilulissat Declaration can in part be seen as a recognition by the A5 of their responsibility to protect the fragile Arctic environment, affirming that: 'The Arctic is a

[30] Communication from the Commission to the European Parliament and the Council 'The European Union and the Arctic Region' European Commission (20 November 2008) 13 available at http://ec.europa.eu/external_relations/arctic_region/docs/com_08_763_en.pdf.

[31] European Parliament 'European Parliament resolution on climate change' (14 February 2007) P6_TA(2007)0038 available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0038+0+DOC+XML+V0//EN.

[32] European Parliament (n 31).

[33] WWF 'Cruise Tourism on Svalbard – A Risky Business?' WWF International Arctic Programme (2004) available at http://assets.panda.org/downloads/wwfcruisetourismonsvalbard2004_v5p3.pdf.

[34] UNCLOS art 22.

[35] UNCLOS art 22 requires coastal states to take account of the recommendations of the IMO in respect of the designation of sea lanes.

[36] UNCLOS art 211(1).

[37] In respect of oil spills, it has been observed that: 'Oil persists for longer periods in the Arctic because low temperatures result in low rates of evaporation and relatively little light during most of the Arctic year reduces ultraviolet radiation necessary for decomposition'. M Nuttall *Protecting the Arctic: Indigenous Peoples and Cultural Survival* (Routledge Abingdon 1998) 10.

[38] M Jariabka 'Transatlantic Policy Options for Supporting Adaptation in the Marine Arctic: Report of the Expert Workshop on 11–12 September 2008' Arctic Transform (November 2008) 4 available at http://www.arctic-transform.org/download/workshop_synthesis_report.pdf.

[39] IMO Regulation SOLAS V/10 on Ships' Routeing defines an 'area to be avoided' as 'an area within defined limits in which either navigation is particularly hazardous or it is exceptionally important to avoid casualties and which should be avoided by all ships, or by certain classes of ships': IMO Regulation SOLAS V/10 on Ships' Routeing available at http://www.imo.org/safety/mainframe.asp?topic_id=770.

[40] R Brubaker, W Østreng 'The Northern Sea Route Regime: Exquisite Superpower Subterfuge?' (1999) 30 Ocean Development & International Law 30; T Potts, C Schofield 'An Arctic Scramble? Opportunities and Threats in the (Formerly) Frozen North' (2008) 23 International Journal of Marine and Coastal Law 157.

unique ecosystem, which the five coastal states have a stewardship role in protecting'.[41] However, the extent of this role is not defined and, at the same time, the declaration has been criticised as a cloak for the efforts by the A5 to 'carve up' the territory to facilitate exploitation.[42] This is because, although the declaration is worded in terms of conservation and cooperation, three of the eight Arctic states (Iceland, Finland and Sweden) were excluded from the Ilulissat Conference, and some environmental groups[43] see the declaration not as an agreement to protect but as an agreement to exploit. The economic undertones of the declaration are inescapable, particularly given the context in which the declaration was made, namely one of competing territorial claims to a resource-rich area.

The A5 group of countries that issued the Ilulissat Declaration considered that UNCLOS was sufficient to address issues of sovereignty over the Arctic region, seeing 'no need to develop a new comprehensive international legal regime to govern the Arctic Ocean'.[44] This assertion by the A5 of the adequacy of UNCLOS has rightly been described as an 'important development', given the extent to which UNCLOS is unable to comprehensively regulate the Arctic region.[45] This is because UNCLOS makes no distinction between the 'high seas' and the Arctic Ocean. As such, to affirm the adequacy of UNCLOS is to overlook the essential need for any Arctic legal regime to be sufficiently environmentally protective. Indeed, UNCLOS makes no distinction between sea and ice other than under Article 234, which addresses sea ice only in terms of marine pollution and as a potential navigational hazard. It must be asked whether such affirmation is founded on the desire of the A5 to ensure that the legal protection regime in the Arctic is not so robust as to be a hindrance to commercial exploitation.

Part 2: Arctic 'opportunities' from climate change

Two particular consequences of climate change in the Arctic region relate to the viability of new commercial shipping routes[46] and the potential for natural resource extraction.[47] While these represent 'opportunities', they should not be confused with being beneficial, since the worldwide costs of global warming far outweigh the individual profits of those who can exploit the Arctic.

As a result of climate change, the maritime myth of a navigable Northwest Passage could in future become a reality, with its opening up for the second consecutive year in 2008.[48] Similarly, seasonal openings of the Northern Sea Route may make trans-Arctic commercial shipping a possibility in the coming decades.[49] The shipping route from Rotterdam to Yokohama is currently 11,200 nautical miles via the Suez Canal. The same route via the Northwest Passage would be only 6500 nautical miles – little more than half the distance.[50] For

[41] The Ilulissat Declaration (n 3).
[42] J Borger 'Arctic declaration denounced as territorial "carve up"' *The Guardian* (29 May 2008), available at http://www.guardian.co.uk/environment/2008/may/29/fossilfuels.poles.
[43] Mike Townsley of Greenpeace International commented: 'It's clear what's going on. They are going to use the law of the sea to carve up the raw materials, but they are ignoring the law of common sense – these are the same fossil fuels driving climate change in the first place'. J Borger (n 42).
[44] The Ilulissat Declaration (n 3).
[45] W Thomas 'Arctic Debate Heats Up: "Ilulissat Declaration" Adopted by Riparian States' (2008) 5 International Energy Law Review 178.
[46] J Kraska 'The Law of the Sea Convention and the Northwest Passage' (2007) 22(2) International Journal of Marine and Coastal Law 258.
[47] I Bunik 'Alternative Approaches to the Delimitation of the Arctic Continental Shelf' (2008) 4 International Energy Law Review 114.
[48] European Space Agency (ESA) 'Arctic Sea Ice Annual Freeze-up Under Way' ESA News (3 October 2008) available at http://www.esa.int/esaEO/SEM6MB9FTLF_planet_0.html.
[49] S Hassol *Impacts of a Warming Arctic: Arctic Climate Impact Assessment* (Cambridge University Press Cambridge 2004) 11 available at http://www.amap.no/acia/.
[50] S Borgerson (n 8) 3.

so-called 'megaships', currently unable to navigate the Suez and Panama Canals, their voyages would be even shorter.[51] Military fleets might also sail through these northern routes to avoid other riskier waters, such as the Malacca Strait, notorious for its pirate attacks.[52] As a result, the potential increase of shipping volume in these previously unnavigable Arctic waters is enormous, as is the corresponding environmental impact.[53] Commentators have emphasised that these waterways still pose navigational hazards to ships and so cannot yet be considered as viable alternatives to existing routes.[54] Even so, it appears to be more a question – at least in respect of the more navigable Northwest Passage – of when, not if, they will become navigable.[55]

Many of the gaps in legal regulation and governance in respect of Arctic shipping relate to a lack of instruments over which the IMO would have competence. Currently, the voluntary IMO Guidelines for Ships Operating in Arctic Ice-Covered Waters[56] is the only IMO instrument applicable to the Arctic marine environment specifically (although there are many other IMO instruments which apply to the global marine environment, and therefore ipso facto to the Arctic Ocean too). As a result, there is significant potential and need for the IMO to take a far greater lead in shaping the international legal framework as it applies to the Arctic Ocean.

With respect to natural resources, there is now a very real probability that the immense hydrocarbon and mineral wealth that lies beneath the Arctic seabed will, over the coming years, invite attempts at extraction. As more of the sea ice melts, the prospect of commercial exploitation becomes ever more feasible.[57] The profound irony, at least in respect of hydrocarbon exploitation, has been recognised: 'there is something paradoxical about seeking in the Arctic the very carbon fuels that are melting the northern ice'.[58] At the same time, it is essential that action be taken under contemporary international law to prevent the environmentally harmful impacts of such development.

Part 3: Sovereignty, shipping and natural resources

Sovereignty over the Arctic[59]

It is clear that the Arctic area within national territory is subject to national jurisdiction. However, there are a number of regimes governing claims to extended sovereign rights outside of the EEZ, none of which provides certainty under international law.

UNCLOS: Sovereignty by reference to baselines

UNCLOS defines the marine areas over which a state may exercise sovereign rights by reference to the distances at sea from coastal 'baselines', which are defined as 'the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state'.[60] UNCLOS only provides for a particular state's sovereign rights to the extent of either that state's EEZ or its extended continental shelf. In order to assert sovereign rights over an extended continental

[51] ibid.
[52] P Gwin 'Dangerous Straits' *National Geographic* (October 2007) available at http://ngm.nationalgeographic.com/2007/10/malacca-strait-pirates/pirates-text.
[53] C Joyner 'United States Legislation and the Polar Oceans' (1998) 29 Ocean Development & International Law 282.
[54] R Brubaker, W Østreng (n 40) 30; T Potts, C Schofield (n 40) 157.
[55] D Pharand 'The Arctic Waters and the Northwest Passage: A Final Revisit' (2007) 38 Ocean Development & International Law 4.
[56] IMO Guidelines for Ships Operating in Arctic Ice-Covered Waters available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D6629/1056-MEPC-Circ399.pdf.
[57] R Shaw 'A Russian Flag at the North Pole?' (2007) 13 Journal of International Maritime Law 232.
[58] J Graff 'Fight for the Top of the World' *Time* (19 September 2007) available at http://www.time.com/time/world/article/0,8599,1663445-2,00.html.
[59] This section addresses issues concerning the exercise of sovereign rights beyond areas of national jurisdiction.
[60] UNCLOS art 5.

shelf, a state must submit relevant information to the Commission on the Limits of the Continental Shelf (CLCS).[61] Russia made such a claim in 2001 (based on Russia's claim that the submarine mountain range, the Lomonosov Ridge, forms part of its continental shelf). If successful, Russia's sovereign natural resource exploitation rights would increase by 460,000 square miles (although the CLCS has since asked Russia to make a revised submission).[62]

Norway's 2006 submission to the CLCS for an extended continental shelf[63] was granted in March 2009. UNCLOS requires each state party to submit its application within 10 years of the date of entry into force of UNCLOS for that state.[64] This limitation period is significant because it urges the Arctic states to consider whether they wish to make an application, knowing that they only have 10 years to do so. Combined with the pace at which climate change has been changing the shape of the Arctic region, and its potential to be exploited commercially – both in terms of its natural resources and shipping opportunities – it seems likely that Arctic states will make applications simply because they only have 10 years to do so. Undoubtedly, this 10-year limitation period adds greater impetus to an already competitive race for natural resources.

Sector theory

One approach which has been adopted to divide the Arctic region between its states outside the UNCLOS regime is the 'sector theory', under which 'pie-shaped' wedges of territory are created by a line drawn from the North Pole southwards to the applicable states.[65] Sector theory was historically one means of delineating Arctic territory (as used, for example by Canada).[66] Although this method is of limited relevance at present, since no Arctic state claims any part of the northernmost Arctic seas,[67] Russia does delineate its boundary with Norway in the Barents Sea on this basis.[68]

The Northwest Passage and Northern Sea Route

The significance of the opening-up of these two trans-Arctic shipping routes has been discussed above. However, in relation to the Northwest Passage, there has been significant debate as to whether this route is, or should be, subject to the territorial jurisdiction of any state (in particular, Canada) or whether it should more properly be considered a strait 'used for international navigation', in accordance with Article 37 of UNCLOS.[69]

Attempts to extend sovereignty

Driven by the promise of abundant natural resources and the commercial maritime importance of the region, Arctic states have attempted to assert their claims over areas of

[61] Set up under Annex II of UNCLOS on the basis of 'equitable geographic representation' to make 'final and binding recommendations' on applications by states for an extended continental shelf.
[62] Division for Ocean Affairs and the Law of the Sea (United Nations) 'Submissions to the Commission: Submission by the Russian Federation' (20 December 2001) available at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm.
[63] In respect of 'three separate areas in the North East Atlantic and the Arctic: the Loop Hole in the Barents Sea; the Western Nansen Basin in the Arctic Ocean; and the Banana Hole in the Norwegian Sea': Division for Ocean Affairs and the Law of the Sea (United Nations) 'Submissions to the Commission: Submission by Norway' (27 November 2006) available at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nor.htm.
[64] UNCLOS Annex II art 4.
[65] I Bunik (n 47) 115.
[66] R Dufresne 'Canada's Legal Claims Over Arctic Territories and Waters' Library of Parliament (6 December 2007) 4 available at http://www.parl.gc.ca/information/library/PRBpubs/prb0739-e.pdf.
[67] S Kaye 'Territorial Sea Baselines along Ice-Covered Coasts: International Practice and Limits of the Law of the Sea' (2004) 35 Ocean Development & International Law 85.
[68] D Rothwell *The Polar Regions and the Development of International Law* (Cambridge University Press Cambridge 1996) 289.
[69] D Johnston (n 14) 148.

the Arctic territory. One approach has been through military build-up. The Canadian army has had a military presence at Inuvik for a long time, which, although almost abandoned in the past, has now been significantly expanded.[70] Indeed, Canada intends to spend €2.14 billion building up to eight ice-breakers. Canada also plans to establish more military bases in the region.[71]

An equally assertive approach occurred in August 2007, when the Russian Government despatched a submarine to plant a Russian flag on the seabed directly beneath the North Pole. While some commentators have dismissed Russia's actions as having, in legal terms, 'very little significance', it is submitted that in the context of territorial claims to the Arctic, strictly legal aspects are only one part of an intensely political, scientific and diplomatic issue.[72] Indeed, it has been stated that Russia's actions 'served to invest a legitimate process with geopolitical weight and significance'.[73]

A rather more desperate attempt to secure all possible claims to the Arctic Circle has occurred in respect of Hans Island. Canada and Denmark have long disputed which of them has sovereignty over this 'tiny, uninhabited lump of rock' lying in the Nares Straight between Ellesmere Island and Greenland.[74] Despite an agreement concluded in 1973 which addressed the delimitation of Arctic waters lying between the two states, it unsatisfactorily postponed the issue of which state the tiny island should belong to. Over the years since the conclusion of the agreement, both states have sought to claim Hans Island as their own territory by planting symbolic flags and burying bottles of native liquor.[75]

In the absence of a systematic legal framework applicable to the Arctic region, states have resorted to rather impulsive and sometimes ill-conceived attempts to extend their Arctic spheres of influence. As a result, there is a clear need for transparent regulation in the region to remove the incentive for a polar 'scramble'.[76]

Natural resources – the 'New Houston'?[77]

Arctic resources

It is logical to ask why sovereignty over the Arctic should be such a contentious issue. In 1991 the AEPS recognised that natural resources were an 'important activity' of Arctic states.[78] Developments since 1991 have shown this to be something of an understatement. The seabed beneath the Arctic Ocean contains huge deposits of oil, gas and minerals. In 2008 the US Geological Survey (USGS) carried out the 'first comprehensive assessment of oil and gas resources north of the Arctic Circle', revealing that the region may contain up to 20 per cent of the world's undiscovered but exploitable oil and gas reserves.[79] The assessment estimated that 90 billion barrels of oil, 1669 trillion cubic feet of natural gas, and 44 billion barrels of

[70] O Burkeman 'A very cold war indeed' *The Guardian* (5 April 2008) available at http://www.guardian.co.uk/environment/2008/apr/05/poles.endangeredhabitats.
[71] 'Scramble for the Arctic' *Financial Times* (16 August 2007) available at http://www.ft.com/cms/s/0/9ab06e46-4c03-11dc-b67f-0000779fd2ac.html.
[72] R Shaw (n 57) 232.
[73] T Potts, C. Schofield (n 40) 158.
[74] O Burkeman (n 70).
[75] CBC News 'Canada, Denmark dispute ownership of tiny Arctic island' (26 July 2005) available at http://www.cbc.ca/canada/story/2005/07/25/hansisland050725.html
[76] Paper from the High Representative and the European Commission to the European Council (n 29).
[77] M McCarthy 'Riches in the Arctic: the new oil race' *The Independent* (25 July 2008) available at http://www.independent.co.uk/environment/nature/riches-in-the-arctic-the-new-oil-race-876816.html
[78] Arctic Environmental Protection Strategy (n 22).
[79] M McCarthy (n 77).

natural gas liquids may be lying under the Arctic Ocean.[80] In its World Petroleum Assessment 2000, the USGS put the figure at 25 per cent.[81] It is small wonder that the gathering momentum, driven in particular by the A5, has been referred to as the 'new oil race'.[82]

An Arctic abundance?

Despite the dramatic terms which the media and many commentators have used to describe the Arctic's natural resource wealth, some commentators have observed that such claims may be inflated.[83] Indeed, one study of 2006 found that the principal Arctic resource is gas rather than oil (describing the Arctic as a 'gas province') – a commodity considerably costlier and logistically more challenging to extract and transport than oil.[84] Although the report stated that the Arctic's natural resources were 'disappointing from a world oil resource base perspective', this should not, and indeed has not, in any way diminished the significance of the region in terms of its exploitability and the commercial interest this has continued to generate.

Energy security and the Arctic: the 'scramble for resources'[85]

The extent to which energy security in the Arctic has been expressed as a real phenomenon and concern is confirmation of the Arctic states', and the world's, interest in the polar region. At its Bucharest Summit in April 2008, NATO specifically addressed the issue of energy security. In January 2008 NATO had already recognised that 'energy dependency and scarcity will remain an [sic] fact of life for Europe and America'.[86] It is also clear that NATO will remain involved in any future questions of energy supply and security.[87]

Part 4: The Arctic and Antarctica: a polar comparison

In assessing the legal regime applicable to the Arctic region, it is logical to look to its southern counterpart for guidance. From an environmental protection perspective, the Antarctic Treaty System has been a success, at least in the short term. However, before an assessment can be made of the relevance of the Antarctic regime, it is necessary to analyse the similarities and distinctions between the polar regions.

Polar geography

The Arctic and Antarctic regions are, in geophysical terms, poles apart. Antarctica is a vast continent that straddles the South Pole, and consists of 10 per cent of the earth's land surface.[88] By contrast, there is no separate territory which can be described as exclusive Arctic territory. Parts of the Arctic cut across sections of land which are clearly part of the territory of the applicable states. However, other parts of the Arctic are landless – indeed much of the Arctic comprises the Arctic Ocean.

[80] US Geological Survey, 'Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle' (2008) available at http://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf

[81] US Geological Survey World Petroleum Assessment 2000 available at http://pubs.usgs.gov/fs/fs-062-03/FS-062-03.pdf.

[82] M McCarthy (n 77).

[83] T Potts, C. Schofield (n 40) 154–5.

[84] Wood Mackenzie 'Future of the Arctic' cited in 'Wood Mackenzie downgrades Arctic as energy supply source' (2006) Oil and Gas Financial Journal.

[85] Paper from the High Representative and the European Commission to the European Council (n 29).

[86] Immediate Report 'NATO before Bucharest: the Alliance at the Crossroads' (Rome 29 January 2008) 3 available at http://www.ndc.nato.int/download/research/Report%2001_2008%20StrategicAssessment.pdf.

[87] NATO Report 'NATO's Role in Energy Security' (8 October 2008) available at http://www.nato.int/issues/energy_security/index.html.

[88] K Bastmeijer *The Antarctic Environmental Protocol and its Domestic Legal Implementation* (Kluwer Law International The Hague 2002) 3.

Polar effects of climate change

Climate change will have similar, yet different impacts on the polar regions. The melting of ice is common to both regions, but there are a range of significant differences as well. First, the Antarctic continent will survive the ice melt, whereas some predictions expect the entire Arctic sea ice to have disappeared by 2100.[89] As the sea ice melts, it will become 'high seas'.[90] In addition, the effects of climate change will, under the current regimes applicable to both poles, be considerably more damaging in the Arctic region, which does not enjoy the same levels of environmental and commercial protection afforded by the Antarctic Treaty System.

Natural resources: moratorium versus 'scramble'

The 1959 Antarctic Treaty 'froze' national claims to sovereignty in Antarctica.[91] There is no such moratorium in the Arctic region, where issues of sovereignty are live and contentious. In many ways, the Arctic regime is more of a permissive, as opposed to prohibitive, regime. UNCLOS entitles a state to exploit natural resources to the limits of its EEZ. Beyond this, UNCLOS allows states to make submissions to the CLCS for an extended continental shelf (and therefore the right to exploit natural resources). While the Arctic approach is prospective, the Antarctic regime is precautionary.

The Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA) was intended to be a further instrument safeguarding the Antarctic environment.[92] It is unlikely that it will come into force, and it is interesting to note that France and Australia refused to sign it on the basis that it did not go far enough to protect the Antarctic region.[93] While this could be seen as an excuse by France and Australia to frustrate the implementation of CRAMRA, by contrast, the Antarctic Environmental Protocol, which is in force, imposes a 50-year moratorium on mineral resource activities in Antarctica.[94] Described as 'the most comprehensive and stringent regime of environmental protection rules established under the rules of public international law anywhere in the world', the Antarctic Environmental Protocol represents an unequivocally preventive stance by its parties.[95]

There is a fundamental distinction between the preventive approach of the Antarctic regime (as most clearly embodied in the Antarctic Environmental Protocol) and the currently unresolved status of the Arctic. It is submitted that the status of the Arctic region requires further clarification. At the same time, there is a need to manage strictly any claims to natural resources in areas beyond those over which Arctic states are entitled to exercise sovereign rights. An Antarctic-style moratorium could be used to protect the Arctic area outside of national jurisdiction. In this context, UNCLOS can be seen as part of the problem as well as part of the solution. States have adhered to it, and this is a success for international law compliance, but simultaneously there is a risk that activities that are UNCLOS-compliant take no account of the particularly vulnerable nature of the Arctic. UNCLOS permits natural resource extraction from the 'Area' under the regulation of the ISA.

The human dimension

A fundamental distinction between the polar regions is the human dimension. An estimated four million indigenous peoples live in the Arctic region, whereas the polar south, lacking a

[89] H Huntingdon et al (n 6) 3.
[90] UNCLOS art 86.
[91] The Antarctic Treaty (Washington 1 December 1959, in force 23 June 1961) 402 United Nations Treaty Series 71.
[92] The Convention on the Regulation of Antarctic Mineral Resource Activities (Wellington 2 June 1988, not in force) (1988) 27 International Legal Materials 868.
[93] P Sands *Principles of International Environmental Law* (2nd edn Cambridge University Press Cambridge 2003) 716.
[94] Protocol on Environmental Protection to the Antarctic Treaty 1991 (Madrid 4 October 1991, in force 14 January 1998) (1991) 30 International Legal Materials 1461.
[95] P Sands (n 93) 722.

permanent population – indigenous or otherwise – is a 'true wilderness'.[96] Antarctica's temporary population comprises scientists (approximately 5000 a year), who are exceeded in number only by tourists (approximately 14,000 per year).[97]

There are several different indigenous groups in the Arctic region, who both represent a voice in its governance and are intrinsically connected with its environmental, economic and political destiny. The indigenous groups of the Arctic have been stakeholders in the key regional responses to the need for conservation in the area (although it should be noted that Arctic indigenous peoples are also citizens of their native states). The Nordic Saami Council and the USSR Association of Small Peoples of the North were observers to the AEPS.[98] Although states form the membership of the Arctic Council, the Inuit Circumpolar Conference, the Saami Council and the Association of Indigenous Minorities in the Far north (sic), Siberia, the Far East of the Russian Federation are all 'Permanent Participants' under the Ottawa Declaration.[99] Moreover, the Ottawa Declaration makes permanent participation open to 'other Arctic organizations of indigenous peoples with majority Arctic indigenous constituency'.[100]

Whereas the indigenous peoples of the Arctic region have participated fully in the process to regulate, protect and administer the Arctic, there are no such participants in the Antarctic regime. Yet, paradoxically, the Antarctic treaty regime is far more robust than the sum of its Arctic counterparts, which have been implemented in a piecemeal fashion. It is not surprising that, at present, one cannot refer to any single, coordinated and effective Arctic treaty regime, as it is found in its polar opposite.

Treaty coverage: bespoke regime or piecemeal legislation?

Whereas the Antarctic Environmental Protocol is comprehensive and stringent in the environmental protection it confers on Antarctica, the environmental protection measures which have evolved in respect of the Arctic have done so in a piecemeal manner – there is 'no unifying connector'.[101] The Antarctic is governed by its own treaty regime, underpinned by the Antarctic Treaty and the Antarctic Environmental Protocol, which exclusively addresses the Antarctic area itself.[102] By contrast, the Arctic has 'several specific agreements which provide for the protection of certain components of the Arctic environment'.[103] The Arctic-specific international agreements have been directed at individual species such as caribou,[104] fur seals,[105] whales[106] and polar bears,[107] rather than at the Arctic environment itself. An international and at times controversial actor in Arctic governance, the North Atlantic Marine Mammal Commission (NAMMCO) is responsible for 'cooperation on the conservation,

[96] K Bastmeijer (n 88) 3.
[97] ibid 5.
[98] Arctic Environmental Protection Strategy (n 22).
[99] Ottawa Declaration (n 25).
[100] ibid.
[101] D Rothwell (n 15) 281.
[102] The Antarctic treaty regime also includes: the Convention for the Conservation of Antarctic Seals (London 1 June 1972, in force 11 March 1978) (1972) 11 International Legal Materials 251; the Convention on the Conservation of Antarctic Marine Living Resources (Canberra 20 May 1980, in force 7 April 1982) (1980) 19 International Legal Materials 841; and the Convention on the Regulation of Antarctic Mineral Resource Activities (n 92).
[103] R Wolfrum 'Environmental Protection of Ice-Covered Regions' in R Wolfrum, F Morrison (eds) *International, Regional and National Environmental Law* (Kluwer Law International The Hague 2002) 339.
[104] Agreement between the Government of the United States of America and the Government of Canada on the Conservation of the Porcupine Caribou Herd (Ottawa 17 July 1987) 2174 United Nations Treaty Series 268 available at http://untreaty.un.org/unts/144078_158780/16/2/7177.pdf.
[105] Convention for the Preservation and Protection of Fur Seals (7 July 1911, in force 15 December 1991) 214 United Nations Treaty Series 80.
[106] International Convention for the Regulation of Whaling (Washington 2 December 1946, in force 10 November 1948) 161 United Nations Treaty Series 74.
[107] Agreement on the Conservation of Polar Bears (Oslo 15 November 1973).

management and study of marine mammals in the North Atlantic'.[108] The NAMMCO was established in 1992 by the Faroe Islands, Greenland, Iceland and Norway in opposition to[109] the international moratorium on commercial whaling.[110] The Arctic region beyond national jurisdiction needs a unified agreement that can effectively protect not just its native species but also the region itself.

An Arctic lacuna?

A key component of the Ilulissat Declaration was the affirmation by the A5 that UNCLOS adequately addresses the issues of sovereignty and conservation inextricably linked with the Arctic region. While the Arctic area is undeniably geologically different from Antarctica, it is also arguably sufficiently different from the 'high seas' in non-polar regions.[111] UNCLOS applies to the Arctic seabed (being part of the 'Area' under UNCLOS), but it is submitted that a lacuna exists given the fact that UNCLOS cannot offer adequate protection for the frozen Arctic 'high seas'.[112] Although the 'Area' is defined as forming part of the 'common heritage of mankind' this does not mean that it is immune from exploitation.[113] The ISA can exploit any part of the 'Area', and it is submitted that UNCLOS should distinguish between the 'high seas' as they are found in the Arctic and the 'high seas' of non-polar regions. The Arctic 'Area' should be immune from exploitation of any kind.

International commercial shipping opportunities: an Arctic phenomenon

The geological differences between the Arctic and Antarctic regions give rise to another fundamental distinction between the two areas. The commercial issues surrounding the Northwest Passage and Northern Sea Route as outlined above are entirely a consequence of the Arctic's archipelagic geography, especially in the case of the Northwest Passage, and no parallel can be found in Antarctica.

Polar ice similarities

The legal status of ice is a key issue in Antarctica. This is because the Antarctic continent is surrounded by vast permanent ice shelves, such as the Ross and Filchner-Ronne, which extend from the ice sheet covering the land, over the Southern Ocean. As a result, Antarctic coastal baselines are notoriously difficult to define. There has been much discussion as to whether these should begin, as is usually the case, where the landmass ends, or whether they should begin at the outermost edge of the ice shelf.[114] The distinction is significant, since – given the vast size of the Antarctic ice shelves – a baseline defined on the land can result in the EEZ ending at a point well within the ice shelf and far short of navigable waters. Conversely, to define the baseline by reference to the outer edge of the ice shelf can result in an EEZ far in excess of 200 nautical miles from the land mass. In this way, UNCLOS is ill-equipped to deal with the geological structure of the Antarctic continent, since UNCLOS defines baselines as the 'low-water line along the coast'.[115]

The Arctic region is ostensibly characterised (other than in respect of Arctic states' land-based ice sheets) by sea ice. However, there is some evidence of recognition of the effect of glaciers

[108] North Atlantic Marine Mammal Commission available at http://www.nammco.no/.
[109] D Caron 'The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures' (1995) 89 American Journal of International Law 154.
[110] Decided by the IWC in 1982 by a majority vote, and which came into effect in 1986: IWC 'Revised Management Scheme – Information on the background and progress of the Revised Management Scheme (RMS) "The Moratorium"' IWC (9 January 2009) available at http://www.iwcoffice.org/conservation/rms.htm#moratorium.
[111] UNCLOS art 86.
[112] ibid art 1(1).
[113] ibid art 136.
[114] S Kaye (n 67) 78.
[115] UNCLOS art 5.

in delimiting Arctic boundaries. In the 1973 Hans Island agreement between Canada and Greenland in respect of the waters between the two states, one boundary point was defined by reference to the outer edge of glaciers obstructing the Petermann Fjord, suggesting an analogous approach (albeit limited to this agreement) to the Antarctic baseline issue.[116] In both polar instances, effectively permanent ice is treated as dry land for the purposes of defining the coastal baseline.[117]

Sovereign claimants

Both poles have been subject to territorial claims from a distinct group of states. In the 1950s seven states[118] were in a dispute regarding their territorial claims to the Antarctic region which resulted in the Antarctic Treaty.[119] The Antarctic Treaty had the effect of 'freezing' existing and fresh claims to sovereignty over the Antarctic.[120] By contrast, in response to the continuing and contentious Arctic sovereign claims, cartographers at Durham's International Boundaries Research Unit have even produced an 'Arctic Map' as 'an attempt to predict the way in which the Arctic region may eventually be divided up'.[121] It is submitted that in order to protect the 'global commons' of the Arctic Ocean (being that area beyond areas of national jurisdiction and outside any areas in which extended sovereign rights – arising from successful claims by states to extend their continental shelves – are exercisable), a regional protection measure is essential.

Part 5: An effective Arctic regime for the 21st century

Adequacy of the existing Arctic legal framework

It is clear that the current legal framework as it applies to the Arctic region is both inadequate and, in many ways, inappropriate. As Arctic sea ice disappears owing to the effects of global warming, so will the final barrier to commercial exploitation, whether through shipping or natural resource extraction. UNCLOS has created an element of certainty and is without doubt evidence of the capacity of the Arctic states to cooperate and adhere to a legal regime with Arctic relevance.[122] However, UNCLOS does not address the need to protect the Arctic Ocean as a vulnerable environment per se. Indeed, UNCLOS is a 'constitution'[123] of the seas globally, and in that sense is not specific to the Arctic Ocean (sea ice is only covered in Article 234).

UNCLOS provides an inadequate legal mechanism for the Arctic Ocean for several reasons. It does not provide an effective means of settling competing/overlapping claims, many of which potentially could converge in the central Arctic Ocean.[124] Neither does it provide an adequate framework for settling sovereignty disputes over the Northwest Passage and Northern Sea Route.[125] UNCLOS sets only minimum standards for the protection of the marine

[116] S Kaye (n 67) 80.
[117] R Brubaker 'The Legal Status of the Russian Baselines in the Arctic' (1999) 30 Ocean Development & International Law 218.
[118] Namely Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom.
[119] K Bastmeijer (n 88) 6.
[120] ibid 7.
[121] P Eccleston '"Arctic Map" could help divide natural resources' *The Daily Telegraph* (6 August 2008) available at http://www.telegraph.co.uk/earth/main.jhtml?xml=/earth/2008/08/06/eaarcticmap106.xml.
[122] W Thomas (n 45).
[123] T Koivurova, E Molenaar 'International Governance and Regulation of the Marine Arctic: Overview and Gap Analysis' WWF (January 2009) 14 available at http://www.wwf.se/source.php/1223579/International%20Governance%20and%20Regulation%20of%20the%20Marine%20Arctic.pdf.
[124] D Rothwell 'Time for a new Arctic Treaty' WWF The Circle (January 2009) 6 available at http://assets.panda.org/downloads/thecircle0109.pdf.
[125] ibid 6.

environment[126] and frequently imposes obligations that are subject to qualification (often couched in aspirational terms such as 'shall endeavour' or 'appropriate').[127] Importantly, the US has not signed UNCLOS, arguing that, with the exception of Parts XI and XV,[128] UNCLOS forms part of customary international law, which is already binding on the US. The difficulty is that Part XI governs the 'Area', and is therefore central to the issue of Arctic marine governance.

An Antarctic model?

There are many principles of the Antarctic Treaty System that would readily transfer to the Arctic region. These include, in particular, the environmentally-protective aspects of the moratoria on claims to sovereignty (established by the Antarctic Treaty) and natural resource extraction (under the Antarctic Environmental Protocol). Unlike Antarctica, where claims have been 'frozen', the Arctic question involves a current and active struggle between two diametrically opposed forces. On the one hand, the commercial opportunities of the 'High North' are both significant and relevant. At the same time, the need to protect the Arctic environment cannot be overstated.

Polar adjustments

The intrinsic geological differences between the polar regions mean that different legal approaches are required. At the same time, it is submitted that UNCLOS is not, contrary to the architects of the Ilulissat Declaration, in itself capable of adequately safeguarding the Arctic region. The Arctic Ocean, and its seabed beneath, are clearly something more than just 'high seas' or the 'Area' as these terms are understood with reference to non-polar regions. The Arctic area beyond national jurisdiction requires, at the very least, a bespoke regional agreement which can adequately respond to, and regulate, the increasing commercial (and resulting environmental) threats to this region. Unlike the 'frozen' territorial claims in Antarctica, much of the Arctic region is within exercisable territorial jurisdiction. UNCLOS gives states the opportunity to extend their sovereign rights further. It is therefore submitted that an Arctic regime is required which responds to the needs of the particularly vulnerable Arctic Ocean.

The need for consensus and inclusion

Given the complexity of the Arctic problem, a unified approach is of paramount importance. The extent to which the Arctic littoral states have abided by international law in following the UNCLOS mechanism while making their various claims to extended sovereign rights gives hope that this is achievable. Despite the political and diplomatic ripples which Russia's submarine mission of 2007 to the seabed beneath the North Pole may have caused, Russia's actions were not contrary to its obligations under UNCLOS.[129] The impetus created by the Ilulissat Declaration must be harnessed and expanded. What is now needed is wider consensus and the inclusion of all the Arctic states, indigenous groups and the international community as a whole. It is submitted that consensus building is a crucial precondition for extending and strengthening the Arctic legal framework, for 'establishing appropriate institutional arrangements and substantive rules'.[130] Indeed, the success of the Antarctic

[126] T Saskina 'Limit a little, save a lot' WWF The Circle (January 2009) 30 available at http://assets.panda.org/downloads/thecircle0109.pdf. Article 197 of UNCLOS requires that: 'States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features'.
[127] T Koivurova, E Molenaar (n 123) 37.
[128] ibid 39.
[129] T Potts, C Schofield (n 40) 161.
[130] P Sands (n 93) 731.

regime is as much a result of the consensus that was achieved between competing states, as it is about the resulting environmentally protective measures.

Conclusion

An effective and overarching treaty is needed to protect the Arctic region. Currently, unlike its Antarctic counterpart, the Arctic is not governed by a specially-designated legal 'regime' or 'system'. While UNCLOS is indisputably a fundamental instrument of Arctic governance, it is a global marine 'constitution',[131] lacking in exclusively Arctic relevance.

The Arctic and Antarctic regions are undeniably different in many respects (not least of all geologically), but there are also significant similarities, in particular the need for a robust, legally binding and effective international, yet polar-centric legal mechanism. The Arctic states can learn much from the success of the comprehensive and ecologically protective Antarctic regime: most importantly, the need for a moratorium on natural resource extraction in areas of the Arctic Ocean beyond national jurisdiction.

At the same, in ensuring that the areas of the Arctic Ocean within national jurisdiction are properly and responsibly exploited, it is vital that the differences between it and the Antarctic are recognised, without overlooking the very relevant and exemplary Antarctic principles that can be applied to the north to secure its future. A complete moratorium may not be appropriate or necessary if the Arctic states, and the wider international community, can cooperate and safeguard this vulnerable region by means of a binding treaty. The Arctic and Antarctic regions are currently poles apart in respect of the effectiveness of international legal mechanisms to protect them. However, a binding treaty in respect of Arctic areas beyond national jurisdiction would enable a more Antarctic level of conservation to be achieved in the Arctic, while at the same time reflecting the poles' 'common but differentiated'[132] needs for protection.

[131] T Koivurova, E. Molenaar (n 123) 14.

[132] 'Common but differentiated' is an expression derived from Principle 7 of the Rio Declaration on Environment and Development (Rio June 1992) available at http://www.unep.org/Documents.Multilingual/Default.asp?documentID=78&articleID=1163.

NATIONAL REPORT

LEGAL RECOGNITION OF ELECTRONIC OCEAN BILLS OF LADING UNDER INDIAN LAW

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Introduction

Over the past 200 years there have been three 'revolutionary' changes in the shipping industry that have significantly impacted the complex and ever-expanding system of ocean commerce.[1] The first was the invention of the steam engine and its subsequent adaptation to ship propulsion.[2] The second is the widespread use of containers as the medium to transport goods[3] and, finally, the introduction of 'electronic data interchange'[4] (EDI) in sea transport.[5] Even though international trade transactions over the seas have for long been sustained by paper based carriage documents, the stupendous growth in trade volumes and the proliferation of automation and electronic communication forms conveyed an impression that it would be only a short time before paper would be replaced by electronic media. The possibility of such a change was grasped by the shipping world with the establishment of the Seaborne Trade Documentation System (SeaDocs) back in the 1980s.[6] However, despite the passage of nearly 30 years and the development of more advanced platforms for e-commerce, the majority of carriage documents still continue to be issued in paper form and are sent across the world by courier.

After a somewhat delayed start, India is now slowly but steadily inching towards becoming one of the major economic players in the world and in this situation trade plays an important role. However, most trade documents continue to be issued in paper form with the result that time and money is wasted, rendering trade more expensive. One of the most important reasons for this situation is the lack of and inadequate legal recognition of such documents under the law. This article uses the legal position under Indian law on paper and electronic bills of lading to demonstrate how obsolete laws can hamper the development of free trade.

Legal recognition of electronic bills of lading under Indian law

Historically, India has been one of the major trading nations and was one of the primary suppliers of raw materials that sustained the industrial revolution in Europe.[7] Since independence in 1947, the

[1] See *The Oxford Encyclopedia of Maritime History* J J Hattendorf (ed) (e-reference edn Oxford University Press USA 2007) 'Shipping Revolution'.

[2] It was Robert Fulton the American engineer and inventor who brought machine-powered ship propulsion from the experimental stage into reality in 1807. For further details, see *The Oxford Encyclopedia of Maritime History* (n 1) 'Propulsion'.

[3] ibid 'Container Ship'.

[4] This means the electronic transfer from computer to computer of information using an agreed standard to structure the information. UNCITRAL Model Law on Electronic Commerce art 2(b) available at http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf.

[5] F Gehrke *New Attempts at Electronic Documentation in Transport Bolero – The End of the Experiment, The Beginning of the Future?* (LLM Dissertation University of Cape Town 2001) available at http://lawspace.law.uct.ac.za:8080/dspace/bitstream/2165/232/1/gehrke.pdf.

[6] E T Laryea 'Paperless Shipping Documents: An Australian Perspective: International Maritime Law' (2000) 25 Tulane Maritime Law Journal 255 at 279.

[7] For instance, see *The Oxford Encyclopedia of Economic History* J Mokyr (ed) (e-reference edn Oxford University Press USA 2005) 'India'.

accent has been on developing India's agricultural base. For almost half a century the country maintained one of the most restrictive trade regimes in the world characterised by high tariffs and other barriers such as licensing and quotas, virtually cutting it off from the international trade arena.[8] In 1991, confronted with a serious economic crisis, the Government of India introduced a series of fiscal, monetary, industry, exchange rate and trade related reform measures to stimulate the economy and to integrate it with the global economy.[9] Since India joined the World Trade Organization its economy has been growing; indeed, it is now one of the fastest growing economies of the world.[10] During this period, trade has gradually picked up and in 2004 India's exports stood at a little over US$63 billion, while in 2007–08 they exceeded US$155 billion or, in other words, exports more than doubled in four years.[11] The increased trade activity during this period created nearly 136,000 new jobs.[12] However, several logistical factors still continue to hamper the free flow of trade. For instance, the time taken for clearing import cargo and shipping export cargo is 21 days and 19 days respectively in India, as against 3 days and 5 days in Singapore.[13] Again, while it takes only 3 days to initiate documentation in relation to an export from Germany, for India it is almost 11 days.[14] One major reason for the increased time is caused by the reliance on paper in facilitating these transactions.

As far as the law relating to bills of lading in India is concerned, it is embodied mainly in the 153 year old statute – the Bills of Lading Act 1856 and in the Indian Carriage of Goods by Sea Act 1925. Apart from these statutes, there are certain other laws such as the Multimodal Transportation of Goods Act 1993 that are also relevant.

The Indian Carriage of Goods by Sea Act 1925 (Indian COGSA)

The Indian COGSA, which seeks to amend the law relating to the carriage of goods by sea,[15] is modelled on the UK Carriage of Goods by Sea Act 1924. Even though India is yet to ratify either the Hague-Visby Rules or the Hamburg Rules, the Indian COGSA incorporates in its Schedule rules relating to bills of lading that are embodied in the Hague Rules. Interestingly, the Indian COGSA has been amended by the Multimodal Transportation of Goods Act 1993, incorporating certain elements of the Visby Rules and the subsequent Special Drawing Right Protocol.[16] As far as the rules relating to the form of a bill of lading are concerned, even though the Indian COGSA does not expressly mandate that a bill of lading is to be on paper, since it was drafted at a time when dematerialisation was not even contemplated it can be assumed that the Indian law envisages a bill of lading to be a tangible paper document.[17]

[8] See generally S Ahuja et al 'Economic Reform in India: Task Force Report' (January 2006) PPHA–50900: International Policy Practicum 2005 (Harris School of Public Policy University of Chicago) available at http://harrisschool.uchicago.edu/News/press-releases/IPP%20Economic%20Reform%2 0in%20India.pdf.

[9] See generally K Kalirajan 'The Impact of a Decade of India's Trade Reforms' available at http://rspas.anu.edu.au/papers/asarc/novcon2001/Kalirajan.pdf.

[10] A Thakur 'Is India the second fastest growing economy?' *The Times of India* (10 October 2008) available at http://timesofindia.indiatimes.com/Is_India_second_fastest_growing_economy/rssarticleshow/3578347.cms.

[11] Commerce and Industry Minister's Speech 'Release of Annual Supplement to Foreign Trade Policy 2004–09' available at http://pib.nic.in/archieve/others/2008/apr/h2008041143.pdf.

[12] ibid.

[13] 'FICCI-E&Y Paper Suggests 3-Fold Strategy to Reduce Transit time, Cut Logistics Cost and Attract Investment to Develop World-Class Ports' available at http://www.ficci.com/press/405/eny.doc. See also The International Bank for Reconstruction and Development/The World Bank 'Doing Business in South Asia 2007' (2007) available at http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/Publications/448813-1171300070514/overview.pdf.

[14] M Pikart 'UN/CEFACT Framework of Standards for Paperless Trade: Digital Documents, Single Window, Data Harmonization and Capacity Building' (PowerPoint presentation to the ESCWA Regional Workshop, Cairo, July 2007) available at http://www.escwa.un.org/divisions/grid/reports/3.pdf.

[15] Indian Carriage of Goods by Sea Act 1925 (No 26 of 1925) Preamble available at http://indiacode.nic.in/.

[16] Multimodal Transportation of Goods Act 1993 (No 28 of 1993) Part II of Sch I available at http://indiacode.nic.in/.

[17] V M Syam Kumar 'Legal Status of Dematerialized Bills of Lading in India' available at http://admiraltylawkochi.blogspot.com/search/label/Electronic%20Bills%20of%20lading%20admissibility%20in%20court.

The Indian Bills of Lading Act 1856

For many years the position at common law was that the transfer of a bill of lading to a consignee or endorsee did not convey to him or her the consignor's rights in the contract of carriage because under the doctrine of privity of contract neither the consignee nor the endorsee was party to the carriage contract entered into between the carrier and the shipper.[18] It was to overcome this legal complication that the Bills of Lading Act 1855 was introduced in the United Kingdom.[19] Section 1 in the corresponding bills of lading legislation in India, which is based on the British law detailing the rights that vest under bills of lading in the consignee or endorsee reads as follows:

> Every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

Further reading of this section reveals that its wording does not per se call for actual physical endorsement. Nevertheless, doubts have been raised as to whether the vesting of rights under the bill of lading in the consignee or endorsee would have effect in the absence of actual physical endorsement and transfer, even though it is possible to replicate consignment and endorsement in an electronic environment.[20]

The Multimodal Transportation of Goods Act 1993 (MTGA)[21]

The MTGA seeks to provide for the regulation of multimodal transportation of goods, from any place in India to a place outside India, on the basis of a multimodal transport contract.[22] Under the MTGA, no person can carry on or commence the business of multimodal transportation unless he is registered.[23] Perhaps the most important feature of the MTGA is that it provides for the issuance of a negotiable or non-negotiable multimodal transport document (MTD) which can be replaced by electronic data interchange messages permitted by applicable law.[24] This is an important development since most carriages of goods tend to be multimodal, involving a minimum of at least two different modes of transport, thus attracting the application of this Act.

As and when the consignor and the multimodal transport operator (MTO) enter into a contract for multimodal transportation and once the MTO takes charge of the goods, he is to issue a negotiable or non-negotiable MTD (left to the option of the consignor). The MTD is to be signed by the multimodal transport operator or by a person duly authorised by him[25] and is to be issued only after obtaining and during the subsistence of a valid insurance cover.[26] While issuing the MTD, if the MTO or his agent knows, or has reasonable grounds to suspect, that the particulars furnished by the consignor do not accurately represent the goods, the MTO or his agent has to insert in the MTD a reservation specifying the inaccuracies.[27] Failure to do so would imply that the MTO or his agent has accepted the goods in an apparently good condition.[28]

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[18] L M Carr 'Current Developments Concerning the Form of Bills of Lading – Great Britain' in A N Yiannopoulos (ed) *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems: XIVth International Congress of Comparative Law* (Kluwer Law International Netherlands 1995) 165 at 176.

[19] See also Indian Bills of Lading Act 1856 (No 9 of 1856) available at http://indiacode.nic.in/ ('Whereas by the custom of merchants a bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property').

[20] Kumar (n 17).

[21] Multimodal Transportation of Goods Act 1993 (n 16).

[22] ibid Preamble.

[23] ibid ss 3, 4.

[24] ibid s 2(la).

[25] ibid s 7(2).

[26] ibid s 7(2) proviso.

[27] ibid s 10(1).

[28] ibid s 10(2).

The MTD is to contain the following information:

- information relating to the general nature of the goods
- leading marks for identification
- the character of the goods
- the number of packages or units and their gross weight and quantity
- the apparent condition of the goods
- the name and principal place of business of the MTO
- the name of the consignor and the consignee if specified by the consignor
- the place and date of taking charge of the goods by the MTO
- the place of delivery of the goods
- whether the document is negotiable or non-negotiable
- the freight payable
- the signature of the MTO or of a person duly authorised by him
- the intended journey route
- modes of transport and places of transhipment, if known
- the terms of shipment
- a statement that the document has been issued subject to and in accordance with the MTGA
- any other particular not inconsistent with any law in force which the parties may agree to insert in the document.

It is interesting to note that the absence of any of the particulars listed above will not affect the legal character of the MTD. However, the consignor is deemed to have guaranteed to the MTO the adequacy and accuracy of the above listed items for insertion in the MTD at the time when the multimodal transport operator takes charge of the goods[29] and, in case of any loss resulting from inadequacy or inaccuracy of the particulars, the consignor shall indemnify the MTO against the same.[30] The MTD also functions as a document of title and every consignee named in the negotiable or non-negotiable MTD and every endorsee of such document, as the case may be, to whom the property in the goods mentioned therein shall pass by reason of such consignment or endorsement, shall have all the rights and liabilities of the consignor.[31]

E-BOL under the Information Technology Act 2000 (ITA) and other statutes

As revealed from the above discussion, it is clear that apart from the MTGA, none of the relevant statutes dealing with the issuance, validity and legal status of bills of lading covers situations arising out of dematerialisation. However, dematerialised bills of lading can still have legal substance under the broad rules outlining the terms of acceptability of electronic records under the ITA and other relevant statutes such as the Indian Evidence Act 1872 and the Indian Penal Code 1860.[32]

The ITA, which is based on the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange, seeks to provide legal recognition of transactions carried out by means of electronic data interchange and other means of electronic communication, which involves the use of

[29] ibid s 12(1).
[30] ibid s 12(2).
[31] ibid s 8(1).
[32] In this context it has to be noted that even though the Indian judiciary is yet to decide on the legal validity of an electronic bill of lading, the observation of the Supreme Court of India in *State of Punjab v Amritsar Beverages Limited* (2006) (7) SCC 607 is relevant, providing a broad indication as to how courts in India may react if ever confronted with this question. 'Creative interpretation had been resorted to by the Court so as to achieve a balance between the age old and rigid laws on the one hand and the advanced technology, on the other. The Judiciary always responds to the need of the changing scenario in regard to development of technologies. It uses its own interpretative principles to achieve a balance when Parliament has not responded to the need to amend the statute having regard to the developments in the field of science.'

alternatives to paper-based methods of communication and storage of information.[33] It is interesting to note that the ITA does not apply to a negotiable instrument (other than a cheque) as defined under section 13 of the Negotiable Instruments Act 1881 which includes promissory notes, bills of exchange and cheques.[34] In other words, a bill of lading, including its electronic version, is not exempted and can fall under the terms of this Act. Moreover, an electronic record under the ITA has been defined as 'data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche'.[35] A detailed reading of this definition also seals any doubts regarding whether a dematerialised bill of lading is an electronic record, subjecting it to the legal requirements as mandated by the ITA, the Indian Evidence Act 1872 and the Indian Penal Code 1860.[36]

As mentioned above, the Indian ITA is based on the UNCITRAL Model Law, which introduces a 'functional equivalence approach' whereunder, if there is a legal requirement for written documents or manual signatures etc, these standards are deemed to have been met by electronic data messages.[37] By equating electronic records and digital signatures with paper documents and manual signatures, the UNCITRAL Model Law obviates any legal uncertainty that could ensue following the use of electronic documents.[38] The Indian ITA incorporates this functional equivalence approach and carries it forward by amending certain statutes such as the Indian Evidence Act 1872 and the Indian Penal Code 1860 to give them legal effect.[39] Some of the legal issues that arise when a paper bill of lading is dematerialised are analysed below.

Document and writing requirements

The Indian COGSA 1925 defines the term 'contract of carriage' as being applicable:

> . . . only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

'Document' has been defined under section 3(18) of the General Clauses Act 1897 to 'include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter'. Even though a document need not be limited solely to a written paper document, insofar as ocean bills of lading are concerned, given the time of the enactment of the COGSA, its law-makers could only have contemplated paper bills of lading.[40] Such a situation is true not only of Indian law but also of similar legislation in other common or civil law jurisdictions.[41] There is an attempt to bypass this legal complexity by Article 6 of the UNCITRAL Model Law, which

[33] Information Technology Act 2000 (No 21 of 2000) Preamble available at http://indiacode.nic.in/.

[34] Negotiable Instruments Act 1881 (No 26 of 1881) Preamble available at http://indiacode.nic.in/ ('An Act to define and amend the law relating to Promissory Notes, Bills of Exchange and Cheques').

[35] Information Technology Act 2000 (n 33) s 2(1)(t).

[36] Indian Penal Code 1860 (No 45 of 1860) s 464 available at http://indiacode.nic.in/ (deals with the making of false documents or false electronic records). Sections 29, 167, 172, 192 and 463 of the Code have been amended to include electronic documents within the definition of 'documents'. See also Indian Evidence Act 1872 (No 1 of 1872) s 63 available at http://indiacode.nic.in/ (this section has been amended to include admissibility of computer outputs in the media, paper, optical or magnetic form). See also s 73A (prescribing procedures for verification of digital signatures) and ss 85A, 85B (raising a presumption as regards electronic contracts, electronic records, digital signature certificates and electronic messages).

[37] UNCITRAL Model Law (n 4) art 2(b).

[38] ibid art 5: 'Information shall not be denied effectiveness, validity or enforceability solely on the ground that it is in the form of a data message' and art 9(1): 'In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence: (a) on the sole ground that it is a data message: or (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the ground that it is not in its original form'.

[39] Note 36.

[40] Kumar (n 17) (noting that 'the provisions in the COGSA has been drafted keeping in mind the Bill of lading to be a tangible paper document and dematerialisation had not been in the mind of the legislature at that earlier point of time').

[41] For further details see A N Yiannopoulos 'XIVth International Congress of Comparative Law: Current Developments Concerning the Form of Bills of Lading' in A N Yiannopoulos (ed) (n 18) 5.

requires that: '[w]here the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be useable for subsequent reference'. Section 4 of the ITA is based on this Article and it sidesteps the paper and writing requirement by stating that where any law provides that information or any other matter shall be in writing or in a typewritten or printed form, notwithstanding anything contained in such law, the requirement is deemed to have been satisfied if such information or matter is rendered or made available in an electronic form and is accessible so as to be usable for subsequent reference.

Manual signature versus digital signature

Legally, a signature links the signer with the signed document and a manual signature is the most common mode that is employed to authenticate a document. The law relating to signatures has undergone a revolution with the development of electronic signatures, including digital signatures.[42] Section 5 of the ITA affords legal recognition to digital signatures.[43] It provides that notwithstanding anything contained in any law which provides that information or any document shall be authenticated by affixing the signature of any person, such requirement shall be deemed to have been satisfied if it is authenticated by digital signature affixed in the manner as may be prescribed by the Central Government.[44] Thus, it can be seen that digital signatures on an E-BOL would have legal recognition.

Evidentiary value of an E-BOL

Under the common law rule of best evidence, it is necessary that the best evidence be presented in court proceedings.[45] Accordingly, in cases where there is an original document, an electronic message may not be accepted as best evidence and, at the most, it may be treated as hearsay evidence.[46] Only in cases where no original document can be produced can an electronic message be treated as being the best available evidence.[47]

To circumvent this position, the Indian Evidence Act 1872 has been amended by the ITA and section 65B of the Indian Evidence Act 1872 provides that any information that is contained in an electronic record or computer output is deemed to be a document admissible in any court proceedings, without further proof or production of the original. However, this is subject to certain rules in respect of the computer output, namely, that it should have been produced by a computer during a period in which the computer was used regularly to store or process information for the purposes of any activities regularly carried out by the person having lawful control over the use of that computer;[48] that the computer has been operating properly during the said period, that the information contained in the

[42] Digital signatures typically require the use of two keys: a private and a public key. These are issued by a certification authorities who are trusted third parties, such as banks or companies that specialise in digital signature technology. The private key is known only to the sending party, whereas the public key is publicly available. The keys are mathematically related, such that a message decrypted with the public key could have been encrypted only with the private key. Therefore, if a sender signs a document with his private key, the recipient can use the sender's public key to confirm the authenticity of the document. For further details, see K M Lui-Kwan 'Recent Developments in Digital Signature Legislation and Electronic Commerce' (1999) 14 Berkeley Tech LJ 463 at 466–67.

[43] The UNCITRAL Model Law art 7 provides that: 'Where the law requires a signature of a person, that requirement is met in relation to a data message if: (a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all circumstances, including any relevant agreement' (n 4).

[44] Information Technology (Use of Electronic Records and Digital Signatures) Rules 2004 (GSR 582(E)/2004 India) (on file with the author).

[45] J Livermore, K Euarjai 'Electronic Bills of Lading and Functional Equivalence' (1998) 2 JILT available at http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1998_2/livermore/.

[46] ibid.

[47] ibid.

[48] If during this period the function of storing or processing information was performed regularly by computers, whether: (a) by a combination of computers; or (b) by different computers operating in succession; or (c) by different combinations of computers operating in succession; or (d) in any other manner involving the successive operation, in whatever order, of one or more computers and one or more combinations of computers, all the computers used in this period are to be treated as constituting a single computer: Evidence Act (n 36) s 65–B(3). This is an important as it covers situations where the information is generated through a network of computers as commonly occurs in shipping companies. See also Kumar (n 17).

electronic record was regularly fed into the computer and is a reproduction or derivation of such information that has been fed into the computer.[49]

Need for an express recognition of electronic transport documents

In conclusion, even though an E-BOL can be legally recognised under Indian law, this is more in relation to its existence and content; there still exists considerable legal uncertainty as to whether certain peculiar facets of a dematerialised bill of lading, including its negotiability and capacity to pass on title to the holder in due course, will receive the same legal recognition as it presently commands.[50] It is surprising that while the subsequent amendments to the relevant laws have recognised electronic multimodal transport documents, E-BOLs are yet to be afforded direct legal recognition under the most important laws. Moreover, as currently worded, some of the provisions in the general laws can even lead to conflicting interpretations. For instance, the words 'without further proof or production of the original, as evidence of any contents of the original' in section 65B of the Indian Evidence Act 1872 could be interpreted to presuppose the existence of an original document in paper form, in which case the main purpose of this effort to facilitate paperless trade could be lost.[51]

More importantly, there is the need to recast the archaic Indian COGSA 1925 and the Bills of Lading Act 1856, taking into account modern commercial conditions and practices which have serious repercussions on the manner in which an E-BOL can operate in terms of rights and liabilities. For instance, a reading of section 1 of the Bills of Lading Act 1856 reveals that the shipper's contractual rights and liabilities are transferred to a consignee or to an endorsee only if the property passes upon or by reason of' the consignment or endorsement of the bill of lading. This can create difficulties in certain situations, particularly where the property does not pass or passes independently of the transfer of the bill of lading, as in the case of bulk cargoes where, according to the law relating to the sale of goods, property would pass only after the goods are ascertained.[52] To overcome this difficulty in England, the Carriage of Goods by Sea Act 1992 (UK COGSA 1992) was enacted which repealed the Bills of Lading Act 1855 in its entirety. Section 2 of UK COGSA 1992 now provides that any lawful holder of a bill of lading, a sea waybill or a delivery order acquires the right to sue the carrier in contract for loss or damage to the goods regardless of whether property in the goods has passed or not. Such a change has not been effected in Indian law and so the right of action by the holder of the bill of lading is still linked to the passing of property. Consequently, the holder – whether of a paper bill of lading or its electronic version – has no right to sue the carrier for loss or damage to the goods unless the property in the goods passes. For a country such as India that aspires to be a major player in world trade in the coming years, there exists an urgent need to clear these uncertainties by incorporating specific provisions recognising electronic ocean bills of lading in an amended COGSA.[53] It is in this context that one must look to new Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules),[54] which contains provisions affording legal recognition of electronic bills of lading.

[49] See Evidence Act (n 36) s 65–B(2).

[50] Kumar (n 17).

[51] ibid (pointing out that in light of its objectives of the ITA 2000 it may not be possible to draw such a narrow interpretation).

[52] See generally R Low 'Replacing the Paper Bill of Lading with an Electronic Bill of Lading: Problems and Possible Solutions' (2000) 5 Int'l Trade & Bus L Ann 159.

[53] More and more jurisdictions now recognise electronic transport documents. For instance the UK COGSA 1992 provides a legal foundation to facilitate paperless trade. Section 1(5) empowers the Secretary of State to make provisions for the application of the Act to cases where an electronic communications network or any other information technology is used for effecting transactions corresponding to the issuance of a document to which the Act applies to the endorsement, delivery or other transfer of such a document or the doing of anything else in relation to such a document. The Act also provides a definition of the term information technology in s 5(1), which includes any computer or other technology by means of which information or other matter may be recorded or communicated without being reduced to documentary form. See also the South African Sea Transport Documents Act 65 of 2000, which seeks to regulate the position of certain documents relating to the carriage of goods by sea. Article 9(1)(a) of this Act states that the minister may make regulations 'prescribing the circumstances in which and the conditions subject to which a record or document produced by a telecommunication system or an electronic or other information technology system, and effecting transactions such as those effected by any sea transport document, is to be regarded as a sea transport document'.

[54] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (A/RES/63/122). The Convention opened for signature on 23 September 2009.

INTERNATIONAL AND REGIONAL ORGANISATIONS

REVIEW AND ANALYSIS

EUROPEAN UNION

THE THIRD EU MARITIME SAFETY PACKAGE – OBJECTIVES AND CHALLENGES

Jason Chuah

On 11 March 2009, the European Parliament approved the adoption of the Third EU Maritime Safety Package, the so-called Erika III Package. On 28 May 2009, the legislative package was published formally in the Official Journal and came into force on 17 June 2009. The package derives its name from the tragedy that was the sinking of the *Erika*. The legislative measures had taken three years of intensive and at times, passionate, discussions in the EU institutions and elsewhere. The package is made up of eight regulations and directives. Directives do not have direct applicability in the Member States. They need to be implemented into domestic law by Member States. The package requires all Member States to complete national implementation of the relevant directives by 20 November 2010. Regulations on the other hand have direct applicability but will not apply until the date of coming into force has fallen due.

The Erika III Package includes measures dealing with the following:

– quality of flag
– standards for classification societies
– port state control
– traffic monitoring
– accident and casualty investigations
– carrier liability (Athens Convention)
– shipowner's insurance for maritime claims.

Quality of flag

As far as the quality of EU flags is concerned, Directive 2009/21 on compliance with flag state requirements provides that Member States must ensure that the ships flying their flag will meet international standards. If a ship flying their flag is detained by a port state, they will ensure that the ship concerned will be brought into line with appropriate standards. Information about ships flying their flag should be properly kept and shared with the international community. Audits by their authorities should be carried out to ensure compliance with IMO standards. A flag state whose flag has been black-listed or grey-listed for two consecutive years must submit an explanation of the poor performance to the Commission.

Classification societies

At present the law is contained in a single directive. Erika III introduces two pieces of legislation in this connection. Directive 2009/15 will provide for the working relationship between Member States and recognised classification societies and a regulation to address issues of standards. Regulation 391/2009 will lay down the new EU recognition scheme whereby classification societies must meet certain minimum requirements and standards for recognition by the EU. It also introduces a penalty regime, in particular for breaches in safety related standards.

Port state control

The current law will be amended by Directive 2009/16 to provide for the following:

- a more stringent system will be imposed on the port state to inspect all ships calling at their ports, including those which rarely call at EU ports and those which merely make stopovers in anchorages
- the system for banning substandard ships will now encompass all ship types
- the black-list will refer to companies operating substandard ships; more frequent inspection will be carried out on their ships and/or a ship ban may be imposed
- a harmonised training programme for ship inspectors will be introduced.

Traffic monitoring

Directive 2009/17 amends the 2002 directive establishing a Community vessel traffic monitoring and information system. That system currently provides, *inter alia*, that Member States have in place plans to accommodate ships in distress in their ports or in any other protected place in the best possible conditions in order to limit the consequences of incidents at sea. The new directive requires Member States to ensure that these plans will contain, amongst other information, the financial guarantee and liability procedures in place for ships accommodated in a place of refuge. The directive also stipulates that fishing vessels over 15 metres long should gradually be fitted with automatic identification systems so that they could be easily located by port authorities. Member States are also committed to ensuring that the maritime data exchange system – SafeSeaNet – is fully adopted. At EU level, the directive will establish an EU Long Range Identification and Tracking (LRIT) centre to collect identification data and monitor shipping at long distance. A system to provide and share information about ice formation is also to be introduced throughout the EU.

The directive makes it mandatory for Member States to designate a competent independent authority to take decisions concerning the accommodation of ships in need of assistance. Consistent with the old law, the authority may:

- restrict the movement of such a ship or
- direct the ship to follow a specific course
- give formal notice to the master to stop or prevent the threat to the environment or maritime safety
- send an evaluation team to the ship to assess the degree of risk
- order the master to enter a place of refuge or
- arrange for the ship to be piloted or towed.

The European Commission undertakes to prepare a report by 31 December 2011 to comment on how Member States would compensate ports for potential economic losses as a result of accommodating a ship in distress.

Accident investigation

The directive does not attempt to make new law in this area given the very thorough coverage of the IMO code. It thus merely incorporates the IMO principles into EU law. In particular, a Member State should comply with the IMO guidance on when and how investigations into accidents should be

carried out. In line with IMO policy, Directive 2009/18 emphasises the principle that investigations should not primarily be to determine or assign civil or criminal liability. The investigation should always be about learning lessons for prevention of future accidents and, thus, establishing good practice for the international shipping community. The directive also calls for a harmonised system of investigations between Member States. At a pragmatic level, an EU database on accidents and incidents at sea will be established.

Carrier liability

The new Regulation 392/2009 will extend the provisions of the 2002 Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 to passenger ships on domestic sea voyages and to certain inland waterway vessels. The regulation also seeks to apply the Athens Convention rules on liability for loss or damage to cabin luggage to mobility equipment. Where there is death or personal injury caused by shipping accidents (eg sinking, collision), the regulation will require the carrier to pay on a strict liability basis (no fault needs to be proved). That payment should be a sum sufficient to cover the immediate financial needs of the victim. If the injury is the result of a non-shipping accident (for example, the passenger hitting his head in the jacuzzi), then the victim must prove fault on the part of the carrier. Damages will be limited to 400,000 SDR (€464,000) per passenger. All carriers must be insured. It is anticipated that the victims could seek compensation directly from the insurer.

Insurance

Directive 2009/20 obliges owners of ships with a gross tonnage of 300 or greater to possess insurance with the same limits as those in the Protocol of 1996 to Amend the International Convention on Limitation of Liability for Maritime Claims (LLMC Protocol). Proof of compliance can be inspected by the port state. Possession of a relevant certificate of insurance would suffice. Ships without the insurance may be expelled or detained and/or fined. The rules will take effect on 1 January 2012, by when EU Member States are expected to have ratified the LLMC 1996. It should however be noted that the directive does not cover damage from oil spills. Oil spills are addressed by the 1992 Civil Liability Convention (CLC) and the 1992 International Oil Pollution Fund (IOPF) Convention.

Conclusion

This is a very ambitious package, as far as EU law goes. The text of the law looks noble but, as expected, there are concerns about its implementation and enforcement at a local level. A concern stems from the fact that many of the practicalities have not been fully fleshed out. Some of these are to be carried out by Member States themselves since the majority of the measures are directives. However, not only would this lead to inconsistency of practice and emphasis between Member States, there is some uncertainty as to how the responsibilities between Member States and the EU bureaucracy are to be delineated. Member States are required to cooperate with each other in information sharing and enforcement of standards but the procedures in the cooperation system are not always formalised, thus resulting in a lack of clarity for the national authorities.

INTERNATIONAL MARITIME ORGANIZATION

PIRACY PART I

Z Oya Özçayır[1]

The first part of this article deals with the existing international legal framework in general – the United Nations Convention on the Law of the Sea (UNCLOS) and the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA). Recent further initiatives on modern piracy will be discussed in the second part in the next issue.

Definition of piracy

Many people have an image of pirates from the movies as maritime romantic Robin Hoods with their hats, hooks on their arms and a parrot on their shoulders. However, modern piracy is a violent, brutal act which may take many forms depending on the region and the equipment used by the pirates.

Background[2]

Ever since people have sailed the oceans, piracy has been a threat for maritime interests. The history of piracy goes back more than 3000 years.[3] However, compared to its history, the usage of the word 'piracy' is relatively new. Under the oldest clear definition given by the Greek historian Plutarch pirates were described as people who attacked ships and maritime cities without any legal authority.[4] For a long time the definition of piracy remained ambiguous but despite the variety of definitions states recognised that piracy posed a threat to trade and it became a crime under international law as seafaring became the usual method of transport and a major part of all states' economies. Under customary international law pirates were declared enemies of the human race (*hostes humani generis*) and piracy is one of the few crimes governed by universal jurisdiction so that any country can arrest and try them under their national jurisdiction.

International law regarding piracy

The United Nations Convention on the Law of the Sea (UNCLOS)

For centuries piracy was internationally outlawed under different definitions but it was set forth in a major international instrument for the first time under the Geneva Convention of the High Seas 1958 (Geneva Convention).[5] Under this Convention (Articles 14–21 and 22) the basic definitions of piracy which covered murder or robbery on the high seas by outlaws were extended to reflect the new conditions.[6]

[1] Maritime law consultant and author, İzmir Law Bar, Turkey. Member of IMO Roster of Experts.

[2] For detailed information about the history of piracy see J Power 'Removing the Eye Patch: Taking a Closer Look at Modern Piracy Prevention' (2007) http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=jason.power; 'Pirates! Fact & Legend' http://wwww.piratesinfo.com/history/history.php.

[3] 'Pirates! Fact & Legend' http://wwww.piratesinfo.com/history/history.php.

[4] ibid.

[5] E Barrios 'Casting A Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia' http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bciclr/28.1/03.TXT.htm.

[6] I A Shearer *Starke's International Law* (11th edn Butterworths London 1994) p 248.

Under Article 15 of the Geneva Convention piracy consists of any of the following acts:

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
   (*a*) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
   (*b*) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(2) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(3) any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.

In relation to Article 15, Article 19 provides that on the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the state which carried out the seizure may decide upon the penalties to be imposed and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

The United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982), which entered into force in 1994, restated in identical terms the definition established in the Geneva Convention[7] and included further comments on many aspects of the definition.

Types of piratical acts

Under UNCLOS Article 101 three types of piratical acts may constitute piracy:

a) any illegal acts of violence, or

b) any illegal acts of detention, or

c) any act of 'depredation' (plundering, robbing or pillaging).

These acts must be committed for private ends. This requirement means that acts inspired by political motives and which would otherwise be treated as piratical do not constitute piracy *jure gentium*,[8] thus restricting states' ability to claim universal jurisdiction over politically motivated attacks. States were concerned about interference with commercial shipping activities and unwilling to assert jurisdiction over politically motivated acts without a commercial aspect.[9]

Voluntary participation

The acts must be committed by a private ship, or a public ship which is, as a result of rebellion or other means, no longer under the discipline or effective control of the state or party that owns it. Any person participating voluntarily in the operation of a ship or of an aircraft with knowledge of the facts making it a pirate ship or aircraft is committing an offence. Under Article 103 of UNCLOS 1982 a pirate ship or aircraft is one which is 'intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act'.

[7] Piracy is defined in UNCLOS 1982 art 101 as follows:

Definition of piracy

Piracy consists of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
   (i) on the high sea, against another ship or aircraft, or against persons or property on board such ship or aircraft;
   (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in sub-paragraph (a) or (b).

[8] Shearer (n 6) p 248. It has been stated by Zou Keyuan that the words 'private ends' could have a wider interpretation: see Zou Keyuan 'Seeking Effectiveness for the Crackdown of Piracy at Sea' (2005) 59 Journal of International Affairs Fall/Winter no 1 p 119.

[9] See Barrios (n 5) fn 20; T Garmon 'International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11' (2002) 27 Tul. Mar. L.J. 257, 259.

It is generally accepted that a private vessel or aircraft can commit piracy, and that a public vessel or aircraft under the control of a crew which has mutinied may be treated as private if the crew commit piratical acts. In this connection an example was cited by Shearer of hostilities conducted at sea by insurgents in the course of a civil war.[10] The test suggested by Shearer is whether the insurgent vessels are acting under the orders of a responsible government or not; if the act is committed by a recognised government, recognised belligerents or recognised insurgents it would not be considered as piratical as it is not an act committed for private ends. However, the situation becomes more complicated if the insurgency is lacking the recognition of foreign governments.

The location of acts of piracy

Under the UNCLOS definition piracy is restricted to the 'high seas' and 'outside the jurisdiction of any state' meaning beyond the land territory, the territorial sea or other territorial jurisdiction of a given state. It is clear from this definition that piratical attacks in internal waters and territorial seas are outside the coverage of the Convention; however, the issue becomes more complicated when piratical acts are committed in the contiguous zone or within the exclusive economic zone.

One ship/two ships controversy

Under Article 101 of UNCLOS it has been stated that illegal acts of violence committed for private ends are piracy when directed '(i) on the high seas, against *another* ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State' (emphasis added). According to this definition if a ship is hijacked by the crew or passengers or any other persons who have gained access to the vessel an act of piracy will not have been committed as the offence is committed 'within' and not against the ship or aircraft, nor against the persons or property on board despite the fact that the social and economic harm would be identical to an attack that satisfied all of the UNCLOS elements.[11] In such cases the legal right to stop and seize the vessel and to arrest the hijackers on the high seas will lie with the flag state.

The following provisions of the 1982 UNCLOS are of particular reference to piracy.

> Article 100 (Duty to co-operate in the repression of piracy) All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any place outside the jurisdiction of any State.
>
> Article 104 (Retention or loss of the nationality of a pirate ship or aircraft) A pirate ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is decided by the law of the state from which such nationality was derived.
>
> Article 105 (Seizure of a pirate ship or aircraft) On the high seas, or in any place outside the jurisdiction of any State, every State may seize a ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.
>
> Article 107 (Ships and aircraft which are entitled to seize on account of piracy) A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA)[12]

Background and the IMO's work on piracy

The case law following the adoption of UNCLOS has made clear that the definition of piracy under UNCLOS did not cover many crimes committed on the high seas. The best example of this legislation gap was the *Achille Lauro* incident which took place in Egyptian waters in 1985. The Italian cruise liner

[10] Shearer (n 6) p 249.
[11] ibid p 248.
[12] For detailed information about the SUA Convention see Z Oya Özçayır 'Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA)' 2005 11 JIML 432–39.

Achille Lauro with some 100, mostly elderly, passengers on board was attacked by four members of the Palestinian Liberation Front demanding from Israel the release of a number of Palestinian prisoners. During a two-day stand-off one of the hijackers shot and killed a disabled 69-year-old American tourist (Leon Klinghoffer) and threw his body with his wheelchair overboard.

After the two-day drama, the Egyptian Government, unaware that Klinghoffer had been murdered, provided the hijackers with safe passage in exchange for freeing the ship and its passengers. The Palestinian militants initially escaped after allowing the *Achille Lauro* to dock in Egypt. Despite the fact that the US military intercepted an Egyptian plane which the hijackers were using to flee and forced it to land in Sicily, where the four hijackers were arrested, the attack was placed outside the UNCLOS definition of piracy and presumably beyond the scope of universal jurisdiction.

The *Achille Lauro* case showed the legal loopholes in the system under which the majority of the terrorists managed to evade punishment. Following this incident the international community adopted the SUA Convention in 1988 in order to establish a legal basis for prosecuting maritime violence that did not fall within the definition of piracy under UNCLOS. The Convention also contained a Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.

Although the SUA Convention was adopted in 1988 piracy had started to be a part of IMO's agenda in 1983 following a warning from Sweden that the level of piratical attacks was considered as 'alarming'. Within the same year the IMO Assembly adopted a resolution A.545 (13) on 'Measures to prevent acts of piracy and armed robbery against ships' urging the governments concerned to take, as a matter of highest priority, all necessary measures to prevent and suppress acts of piracy and armed robbery from ships in or adjacent to their waters and strengthen their security measures. With this resolution the IMO Council was asked to keep this matter under review and to take further action which might be considered necessary in the light of developments. In 1984 'Piracy and armed robbery against ships' was established as a separate and fixed item by the Maritime Safety Committee (MSC) of IMO. In 1991 the IMO Assembly adopted resolution A.683 (17) on 'Prevention and suppression of acts of piracy and armed robbery against ships' under which violent and illegal acts against ships, or property and persons on board ships, taking place in ports and territorial waters were defined as 'armed robbery'. Under this resolution member governments were urged to report to IMO all incidents of piracy and armed robbery against ships under their flags and coastal states were invited to increase their efforts to prevent and suppress such acts committed in their waters.[13]

Resolution A.922 (22) 'Code of Practice for the Investigation of the Crimes of Piracy' provided the definition of 'armed robbery against ships' as 'any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, directed against a ship or against persons or property on board such ship, within a state's jurisdiction over such offences'.

IMO continued to issue circulars and recommendations on piracy and armed robbery.[14] Starting from

[13] Focus on IMO, Piracy and Armed Robbery at Sea, January 2000, p 2.

[14] MSC/Circ.622 'Piracy and armed robbery against ships – Recommendations to governments for combating piracy and armed robbery against ships' 22.06.93.
MSC/Circ.622/Rev 1 'Piracy and armed robbery against ships – Recommendations to governments for combating piracy and armed robbery against ships' 16.06.99.
MSC/Circ.623 'Piracy and armed robbery against ships – Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships' 18.06.93.
MSC/Circ.623/Rev 1 'Piracy and armed robbery against ships – Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships' 16.06.99.
MSC/Circ.623/Rev 2 'Piracy and armed robbery against ships – Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships' 20.06.01.
MSC/Circ.623/Rev 3 'Piracy and armed robbery against ships – Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships' 29.05.02.
MSC/Circ.967 'Piracy and armed robbery against ships – Directive for Maritime Rescue Co-ordination Centres (MRCCs)' 6.6.2000.

31 July 1995 the IMO Secretariat was instructed to provide monthly reports of all incidents of piracy and armed robbery against ships reported to the Organization and, in addition, on a quarterly basis, composite reports accompanied by an analysis, on a regional basis, of the situation and an indication whether the frequency of incidents was increasing or decreasing and with advice on any new feature or pattern of significance.[15] Since July 2002 the Secretariat, as instructed by the MSC,[16] started classifying separately any reported incidents of piracy and armed robbery at sea (international or territorial waters) vis-à-vis acts of armed robbery allegedly committed in port areas, as well as attempted acts of armed robbery.[17]

Following the *Achille Lauro* incident IMO adopted resolution A.584 (14) on 'Measures to prevent unlawful acts which threaten the safety of ships and the security of their passengers and crews' was adopted by IMO's 14th Assembly. Under this resolution IMO's Maritime Safety Committee (MSC) was asked to develop detailed and practical technical measures to ensure the security of passengers and crews on board ships, by taking into account the work of the International Civil Aviation Organization (ICAO). In December 1985 IMO was requested by United Nations General Assembly to set up a study on the problem of terrorism aboard or against ships in order to make recommendations on appropriate measures.

In September 1986 the MSC issued a circular MSC/Circ.443 on 'Measures to prevent unlawful acts against passengers and crew on board ships' applicable to passenger ships engaged in international voyages of 24 hours or more and the port facilities which service them. According to the circular governments, port authorities, administrators, shipowners, shipmasters and crews are under obligation to take appropriate measures to prevent unlawful acts that may threaten passengers and crews.

In November 1986 the Governments of Austria, Egypt and Italy made a proposal to IMO to prepare a convention on the subject of unlawful acts against the safety of maritime navigation. They also submitted a draft proposed convention which would fill the gap in the present system on suppression of such acts. In March 1988, a conference in Rome adopted the SUA Convention with its Protocol; both entered into force on 1 March 1992.

Relevant provisions of SUA

The primary purpose of the SUA Convention and its Protocol is to ensure that appropriate action is taken against persons committing unlawful acts against ships and fixed platforms on the continental shelf. Unlawful acts consist of 'the seizure of ships by force; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it'.[18]

The convention may be revised or amended by IMO which would convene a conference for this purpose, at the request of one-third or 10 States Parties, whichever is the highest.

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[15] MSC/Circ.935 Ref T1/13.01 (30 September 1999).

[16] MSC 75/24 para 18.41.

[17] MSC.4/Circ.79 Ref T2–MSS/2.11.4.1 (12 January 2006).

[18] Article 3 of the SUA Convention states as follows:

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:
   a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
   b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
   c) destroys a ship or causes damage to a ship or its cargo which is likely to endanger the safe navigation of that ship; or
   d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
   e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
   f) communicates information which that person knows to be false, thereby endangering the safe navigation of a ship.
2. Any person also commits an offence if that person threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or judicial person to do or refrain from doing any act, to commit any of the offences set forth in paragraphs 1(b), (c), and (e), if that threat is likely to endanger the safe navigation of the ship in question.

Following the attack on the World Trade Center on 9/11 the IMO adopted Resolution A. 924(22) on 'Review of measures and procedures to prevent acts of terrorism which threaten the security of passengers and crews and the safety of ships' to review all existing measures which had already been adopted by IMO to combat acts of violence and crime at sea. In 2002 a diplomatic conference on maritime security adopted a series of new security measures, along with 11 conference resolutions with an entry into force date of 1 July 2004.[19] During the same year IMO Legal Committee's work on the amendment of the SUA Convention started with the aim to strengthen the SUA treaties by substantial amendments in order to provide an appropriate response to the increasing risk caused to maritime navigation by international terrorism.[20]

The revision of the SUA Convention

The Diplomatic Conference on the Revision of the SUA Treaties met at IMO from 10–14 October 2005 and adopted the amendments in the form of Protocols to the SUA treaties: 'Protocol of 2005 Convention for the Suppression of the Unlawful Acts against the Safety of Maritime Navigation' and 'Protocol of 2005 to the Convention for the Suppression of the Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf'.

In the original conventions offences are limited to acts endangering the safe navigation of a ship including seizing a ship. Under the Protocols acts that are likely to cause death or serious injury or damage, and acts committed with terrorist motives are also offences.

Under the amendments the offences included in Article 3 broadened substantially with the introduction of newly criminalised acts in Articles 3*bis*, 3*ter* and 3*quarter*.

The new Article 3bis states that:

> A person commits an offence within the meaning of the Convention if that person unlawfully and intentionally:
>
> - when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from any act:
> - uses against or on a ship or discharging from a ship any explosive, radioactive material or BCN (biological, chemical, nuclear) weapon in manner that causes or is likely to cause death or serious injury or damage;
> - discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration that causes or is likely to cause death or serious injury or damage;
> - uses a ship in a manner that causes death or serious injury or damage;
> - transports on board a ship any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, death or serious injury or damage for the purpose of intimidating a population, or compelling a Government or an international organization to do or to abstain form doing any act;
> - transports on board a ship and BCN weapon, knowing it to be a BCN weapon;
> - any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; and
> - transports on board a ship any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.

[19] These measures included a number of amendments to the 1974 Safety of Life at Sea Convention (SOLAS) with the most far reaching of them being the International Ship and Port Facility Code (ISPS) Code. The Code covers detailed security related instruments for governments, port authorities and shipping companies with mandatory and recommendatory parts.

[20] International Conference on the Revision of the SUA Treaties, Agenda Item 6.1, LEG/CONF.15/14 (20 September 2005).

> The transportation of nuclear material is not considered an offence if such item or material is transported to or from the territory of, or is otherwise transported under the control of, a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons (subject to conditions).

Under this article the transport of certain materials on board a ship is a newly-made criminal offence. However, the protocols cover quite a few materials, products and devices and it may be difficult in practice for shipowners or seafarers to inspect the relevant instruments.

Under Article 3*ter* the transport of persons involved in terrorist activities is also made a new offence. A person will be considered to have committed an offence within the meaning of the Convention if that person unlawfully or intentionally transports[21] another person on board a ship knowing that the person has committed an act that constitutes an offence under the SUA Convention or an offence set forth in any treaty listed in the Annex (which lists nine such treaties).[22] This new article considerably broadens the categories of conduct listed as offences under the SUA Convention by including the acts criminalised by other international conventions.

Both under the existing Article 3 and the new amendments a person can only be found to have committed an offence within the meaning of the Convention if that person has 'unlawfully and intentionally' committed an act which is explicitly prohibited by the Convention. If a person on board does not have knowledge of an act which is illegal under the Convention and has not intentionally participated in committing such an act, that person cannot be the subject of criminal prosecution through just being on board that vessel.

Under the new amendments it is considered an offence unlawfully and intentionally to injure or kill any person in connection with the carrying out of any of the offences in the Convention, to attempt to commit an offence, to participate as an accomplice, to organise or direct others to commit an offence, or to contribute to the committing of an offence.

Article 8 of the SUA Convention covers 'the responsibilities and roles of the master of the ship, flag state and receiving state in delivering to the authorities of any State Party any person believed to have committed an offence under the Convention, including the provision of evidence pertaining to the alleged offence'.

A new Article 8*bis* in the 2005 Protocol introduced new boarding provisions with significant implications for flag states, shipowners and seafarers. This new article includes a comprehensive set of procedures and protections to be followed if a State Party desires to board a vessel reasonably suspected of committing or attempting to commit a violation of the SUA Convention. Before such boarding the authorisation and co-operation of the flag state is required which will ensure that flag state jurisdiction is respected. Flag states may give individual express or a block authorisation. A flag

[21] Under art 1, para 1(a) transport is defined as initiating, arranging or exercising effective control, including decision-making authority, over the movement of a person or item.

[22] The treaties listed in the Annex are as follows:

1. Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.
2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.
3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.
4. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.
5. Convention on the Physical Protection of Nuclear Material, done at Vienna on 26 October 1979.
6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988.
7. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988.
8. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.
9. International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999.

state may give notification to the Secretary General of the IMO at the time of ratification of SUA Protocols to allow all its ships to be boarded or searched by the other State Parties.[23] A block authorisation may also be granted to ships where no response is received to the request to confirm the vessel's nationality within four hours of acknowledgement of its receipt.[24] The flag state has the final authority to detain, seize or forfeit the ship or seize cargo and arrest or prosecute the persons on board unless the jurisdiction of a flag state is granted to another state.[25]

Force can only be used in exceptional cases to ensure the safety of officials and persons on board or where the officials are obstructed in the execution of authorised actions.

This Article also provides protection for innocent seafarers and carriers by stating important safeguards which require the boarding party to:

(i) take due account of the need not to endanger the safety of life at sea;

(ii) ensure that all persons on board are treated in a manner which preserves their basic human dignity, and in compliance with the applicable provisions of international law, including international human rights law;

. . .

(iv) take due account of the safety and security of the ship and its cargo;

. . .

(vii) ensure that persons on board against whom proceedings may be commenced in connection with any of the offences set forth in articles 3, 3bis, 3ter or 3 quarter are afforded the protections of article 10(2), regardless of location;

(viii) ensure that the master of a ship is advised of its intention to board, and is, or has been, afforded the opportunity to contact the ship's owner and the flag State at the earliest opportunity; and

(ix) take reasonable efforts to avoid a ship being unduly detained or delayed.

These safeguards have to be applied in such a way so to achieve their aim in practice. Under the new Article States Parties are liable in cases where the measures taken according to this Article turn out to be unfounded (provided that the ship has not committed any act justifying the measures taken) and cause damage, harm or loss. Similarly, liability is incurred if the measures taken are unlawful or if it is not reasonable in the light of available information to implement the provisions of Article 8*bis*. States Parties are required to provide effective remediation in respect of such damage, harm or loss.

General overview of UNCLOS and the SUA Protocols

- The piracy provisions of UNCLOS deal only with piracy on the high seas; there is no reference to piracy in territorial waters or inland waterways. This gap created a problem of definition for acts outside the UNCLOS frame. 'Armed robbery at sea' was not an act of piracy at all. However, for the victims of these offences 'this is a distinction without difference'.[26] When piratical acts are committed inside the territorial waters of a country these are considered as 'sea robbery' under international law and dealt with under the laws of that country. In many cases domestic laws do not permit a vessel or a warship from another country to intervene in acts committed inside its territorial waters.
- The requirement under UNCLOS that piratical acts must be motivated for private ends restricts the ability of states to claim universal jurisdiction over politically motivated attacks.
- Under UNCLOS only warships and military aircraft on government service can seize a ship on account of piracy and they must have adequate grounds otherwise they will be liable for any loss

[23] SUA 2005 Protocols art 8*bis* para 5(e).
[24] ibid art 8*bis* para 5(d).
[25] ibid art 8*bis* para 8.
[26] M Murphy 'Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?' in P Lehr (ed) *Violence at Sea: Piracy in the Age of Global Terrorism* (Kindle edn Routledge 2006) p 155.

or damage. Obtaining adequate grounds generally requires a boarding party from the warship to be sent on to the suspected pirate vessel to confirm its criminal intent, which puts them at risk of becoming hostages themselves.

- Attempts were made under the SUA Convention to improve on the limitations of UNCLOS with regard to acts of piracy. However, SUA needs to be considered as complementing UNCLOS, not replacing it.
- SUA classifies offences other than piracy, in particular terrorist acts and imposes an international regime to ensure appropriate punishment of such acts; the convention could also be applicable to other criminal offences at sea.
- Both SUA and UNCLOS aim to provide an answer to the question of jurisdiction. As a framework treaty UNCLOS regulates the right to establish jurisdiction in connection with cases of piracy. SUA regulates multiple jurisdiction; in principle SUA Parties are obliged to establish jurisdiction when unlawful acts are perpetrated against their ships, in their territory or by one of their nationals but in other cases states may establish jurisdiction in connection with acts resulting in death or injury of their own citizens, or if the crime was committed to oblige this state to do or abstain from doing any act. However, under both conventions it depends on specific provisions in the criminal code of the capturing member state whether or not jurisdiction is established. Therefore the most effective results could only be achieved by adequate implementation of both UNCLOS and SUA in national law.

BOOK REVIEWS

Arnould's Law of Marine Insurance and General Average (17th edn)

Jonathan Gilman QC, Professor Robert Merkin, Claire Blanchard, Julian Cooke, Philippa Hopkins and Mark Templeman QC

Sweet & Maxwell 2008, h/b, 1808 pp, ISBN 978 0 421 72710 6, £355

Since the publication of its first edition in 1848, *Arnould's Law of Marine Insurance and General Average* has become one of the most prominent practitioner works in the field. The 16th edition of this impressive collection was published in the early 1980s and, even though a supplementary volume was released in 1997, the text was much in need of an update and a new edition was eagerly awaited.

The challenging task of modernising *Arnould* was taken up by an impressive team of lawyers drawn both from legal practice and academia. The authors resisted the temptation of rewriting *Arnould* and decided to retain many passages in the text in their original format. Undoubtedly, this was a sensible decision given that many of the fundamental principles of marine insurance law, which are of continuing relevance, evolved in the 18th and early 19th centuries. They did, however, question some of the conclusions reached in previous editions of *Arnould,* particularly in the light of recent judicial developments, and expressed their own opinions, usually in the footnotes, which itself is a significant contribution to the development of law and practice of marine insurance.

In any common law subject in the course of 16 years it is natural to expect changes in judicial approaches taken by courts on various doctrines. Perhaps the speed of such change is accelerated in commercial subjects where the scale of their commercial interest would readily encourage parties to be involved in the litigation process. This has, in fact, been the case in the realm of insurance law making this area of law one of the most vibrant areas of common law in recent years. A plethora of cases on the meaning and scope of post-contractual duty of utmost good faith, which was essentially prompted by the observations of Hirst J in *Black King Shipping Corp v Massie (The Litson Pride)* [1985] 1 Lloyd's Rep 437, made it essential to add a new chapter (Chapter 18) to the text. Understandably, the chapter also contains a comprehensive analysis on the judicial treatment of fraudulent claims, a concept which is closely associated with the post-contractual duty of utmost good faith. Similarly, the famous decision of the House of Lords in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501 on the meaning of 'materiality' in the pre-contractual context and the following case law, which provided further clarification on the concept, meant that a new chapter (Chapter 15) dealing with general principles of the doctrine of utmost good faith was required to complement *Arnould*'s comprehensive analysis of non-disclosure and misrepresentation at the pre-contractual stage. Also, judicial activity since the publication of the previous edition on the right of contribution in cases of double insurance, which possibly reached its peak in *O'Kane v Jones (The Martin P)* [2003] EWHC 3470 (Comm), [2004] 1 Lloyd's Rep 389, was the reason why the authors found it appropriate to add a short but useful chapter on double insurance and contribution (Chapter 32).

In similar fashion, developments at the EU level and especially the introduction of the Brussels Regulation 2001 (European Council Regulation 44/2001), which replaced with some amendments the Brussels Convention 1968, changed the parameters in determining the jurisdiction of the English courts over a dispute relating to a marine policy in cases where the defendant is domiciled in a European Union country. Dramatic changes have also taken place in the structure of the rules, which determines the law applicable to a policy of marine insurance. If the risk is situated in a European Union or EFTA (Iceland, Norway and Liechtenstein) country, the relevant rules are those found in the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001 (SI 2001/2635), which is designed to implement the applicable law rules contained in the EC's Second Non-Life Insurance Directive. On the other hand, if the risk is situated in another country, the law applicable to a contract of insurance is determined by the rules laid down in the Rome Convention 1980 as implemented with certain permitted derogations, in the United Kingdom by the Contracts (Applicable Law) Act 1990. Considering that none of these pieces of legislation was in force at the time of the publication of the previous edition of *Arnould*, the decision of the authors to add a new chapter

on jurisdiction and applicable law (Chapter 5) comes as no surprise.

Apart from the additional material, substantial overhauling and rewriting were inevitable in certain chapters essentially for two reasons. First, there were remarkable changes in the contractual setting shortly after the previous edition of *Arnould* was published. In the early 1980s, the market witnessed the introduction of the Institute Clauses at the expense of the SG Policy that had been used for centuries. As a result, the chapter dealing with marine risks (Chapter 23) needed to be rewritten to reflect the changes that have taken place in practice. By the same token, the chapter on Duration of Risk (Chapter 13) now includes a full commentary on the Transit Clause in the Institute Cargo Clauses. Secondly, to provide a more coherent analysis on certain legal issues to take into account the legislative developments since the publication of the previous edition, the materials in certain chapters have been rearranged. To give one example amongst many, the chapter on Persons Who May Claim on the Policy (Chapter 8) has been rearranged to incorporate the changes introduced by the Contracts (Rights of Third Parties) Act 1999.

By updating one of the classics of maritime legal literature, the authors' objective was to offer a comprehensive, analytical and up-to-date source for today's practitioners. There is no doubt that the job is well done. The final product is impressive and essential for anyone who has an interest in marine insurance, whether as a legal practitioner, insurer, insurance broker or trader. Also, there is much here for postgraduate students researching in the field.

At a time when the reform of marine insurance law is firmly on the agenda of the law reform bodies, it will be sensible before engaging in an informed debate to refer to the new edition of *Arnould* to appreciate the scope and nature of the legal rules as they currently stand. The only criticism that can be made is the fact that the coverage on protection and indemnity (P&I) insurance is not very comprehensive, even though there is more evaluation on the subject in this edition (in Chapter 5) compared with previous editions. One feels that readers would have liked to learn more on the subject, which is one of the cornerstones of marine insurance. However, it must be stressed that this is a minor omission which does not reduce the value of this impressive collection. The authors must be congratulated for making such an immense contribution to the insurance literature. Let us hope that we do not need to wait for the next edition as long as we did for this one.

BS

Reforming Marine and Commercial Insurance Law

Baris Soyer (ed)

Informa, London 2008, xvii + 294 pp,
ISBN 978-1843117742, £195

This is an excellent collection of papers, based on those delivered at a conference organised by Dr Soyer on behalf of the Institute of International Shipping and Trade Law at Swansea University. The papers are devoted to an examination of the Law Commissions' project on insurance contract law but in an avowedly commercial rather than consumer context. In this respect it is a pity that the work of the Commissions appears to have stalled somewhat, although a report on aspects of consumer insurance law is still expected later in 2009. This collection provides much food for thought, not least because on occasion contrasting views are offered both as to the need for law reform and as to what route might be taken.

There is also an appropriate mix of contributions from practitioners and academics. Following a largely descriptive account of the work of the Law Commissions up to the middle of 2008 from David Hertzell, the Commissioner now responsible for the project, there are two contrasting papers from expert City solicitors, Martin Bakes and Alan Weir, on the core questions of non-disclosure and misrepresentation. Bakes' lengthy chapter is most usefully informed by practical insights into the operation of the duty of disclosure in a commercial context and is broadly supportive of the need for reform. In contrast Weir makes a strong argument for no fundamental reform of the duty in that context with the notable exception of favouring the decisive influence test for judging materiality rather than the test confirmed by the majority of the Law Lords in *Pan Atlantic v Pine Top*. The fact that views are so divided regarding commercial insurance was no doubt a contributory factor to the Commissions' decision to proceed more quickly with consumer insurance law reform and leave commercial insurance, apart perhaps from small business insurance, on the back burner. The next chapter, by Professor Robert Merkin, rightly draws attention to the importance of reinsurance and the fact that up to then (and indeed subsequently, at least so far as publicly available information is concerned) it had largely been ignored by the Commissions in their deliberations. The final contribution solely on pre-contractual information duties is from Derrick Cole, providing a broker's perspective with his usual lucidity. As Bakes says (at p 35), in commercial insurance the

'role of the broker haunts the debate about reform'.

There follow two chapters specifically on warranties. That by Lord Justice Aikens is forthright and well-argued in urging the Commissions to proceed very carefully with regard to any changes in the commercial insurance context. Dr Soyer's is, in contrast, more sympathetic to the need for reform, albeit critical of some of the detail of the provisional recommendations, especially regarding the use of 'reasonable expectations'. Chapter 8 is a more wide-ranging contribution by Professor Howard Bennett. This is a very thoughtful overview in the context of the Marine Insurance Act generally, relating insurance contract law to other aspects of contract law and supporting the need, so far as possible, for certainty and party autonomy in a commercial context. He argues strongly that if there is to be reform of warranties, other terms that affect the risk, including exceptions, should not be ignored. He is critical of what he sees as the Commissions' priority for fairness over certainty and suggests that this could be addressed by dealing with the question of remedies for non-disclosure, misrepresentation and breach of warranty without necessarily having to do much in other respects.

The final two chapters concern aspects of the Commissions' project that had not at that time been the subject of a Consultation Paper, nor indeed have they been as yet (summer 2009). Mark Templeman QC reviews the law on insurable interest (the subject-matter of the Commissions' 4th Issues Paper). In general he supports the need for reform and indeed would go much further than the Commissions suggested at that early stage, especially regarding contingency insurances. The final contribution, by Peter MacDonald Eggers, is a robust defence of the broad applicability of the principle of utmost good faith to insurance contract law. At the time, and indeed to date, the Commissions have not put forward any of their views, provisional or otherwise, on this topic. In doing so, they will have to have due regard to what Mr Eggers says, even if, perhaps, not all of it is indisputable.

It is quite possible that, outside small business insurance, nothing will in fact emanate in the commercial and marine insurance law context by way of reform. Indeed, even the prospect of legislating consumer insurance law reform looks less likely than before. Notwithstanding that, this book constitutes a most useful collection of material, with insights and comments that will continue to be relevant whether we depend on case law for development of the law or otherwise. While I would not pretend to agree with everything that is said, there is no doubt that the views presented here are especially worthy of detailed consideration and will remain so, whatever in the end happens to the reform project.

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The Evolving Law and Practice of Voyage Charterparties

D. Rhidian Thomas (ed)

Informa, London 2009, xxxvii + 432 pp, h/b,
ISBN 978-1-8311-808-4, £250

Professor D Rhidian Thomas, Director of the Institute of International Shipping and Trade Law at Swansea University, Wales has done it again. After editing his masterful collection of essays on time charterparties, he has produced a learned tome on voyage charterparties, which tome, as Sir Anthony Evans in the Foreword advises us, merits being known as 'Thomas on Voyage Charterparties'.

Sir Anthony Evans' two-page, but cut-to-the-bone Foreword could, for its part, be compulsory reading for students in the precise writing of the English language. For example he defines a voyage charterparty as 'essentially an agreement to employ a ship for a particular cargo-carrying voyage', thus in twelve words succinctly distinguishing a voyage charterparty from a time charterparty. Professor Thomas answers with his own erudite two-page Preface, where he further refines the time/voyage charterparty distinction – a distinction that is the essence of this volume.

Thereafter follow sixteen chapters written by sixteen acknowledged experts on the subject. The first contributor is Professor Thomas himself, who explains how voyage charterparties are flexible, but also evolving. Steven Gee QC then attacks jurisdiction and arbitration clauses and Richard Lord QC expounds on the importance of the approach voyage (being in the right place at the right time).

Dr Theodora Nikaki advises us on the loading obligations under voyage charterparties and particularly under FIO (free in out) clauses and variations such as FIOS (free in and out stowed).

Charles G C H Baker revisits the obligation of seaworthiness in contracts of affreightment, Robert Gay deals with dangerous cargoes, Simon Rainey QC concerns himself with the commencement of laytime, barrister Mark Hamsher expounds on demurrage and laytime in contracts of sale and Professor Jason Chuah enlightens us on laytime and demurrage in contracts of sale.

Professor Frances Reynolds QC (the dean of the authors) next explains the complicated but important relationship between the two principal

contracts of carriage of goods the bill of lading and the voyage charterparty. Simon Baughen completes Reynolds' dissertation by an explanation of the possible liabilities of cargo interests to shipowners under voyage charterparties.

Thereafter, Professor Frank Smeele deals with the legal position of bill of lading consignees under European civil law, in particular German, Dutch and French law. LeRoy Lambert then explains the evolution and the intricacies of American maritime law, which is both federal and state law, but with an English common law origin. Professor Richard Williams describes the impact of deviation on contracts of affreightment, making sense out of a very complicated subject. And Professor Michael Furmston advises us of cancellation clauses and repudiatory breach followed by Professor Andrew Tettenborn, who ends the collection with an exposition of the important concept – 'frustration of a contract' – in this case of a voyage charterparty contract. Ninety-five pages of useful appendices of voyage charterparty forms and a compact word index follow.

But now we arrive at two essential questions the reviewer must ask of himself and of his readers, when describing any collection of essays:

– does the collection of essays have a consistent and useful theme which holds up to scrutiny?
– does the collection of essays fill a niche that the standard authoritative treatise such as *Voyage Charters* (3rd edn, Lloyd's Shipping Law Library 2007), does not already provide in its chapter after chapter exposé of the subject?

Voyage Charters it should be remembered, is by Julian Cooke, Timothy Young, Andrew Taylor of the United Kingdom and John D. Kimball, David Martowski and LeRoy Lambert of the United States of America and with 1375 pages is the acknowledged English/American treatise on voyage charterparties.

The answer to the two questions is that the collections of essays and the treatise have different, but beneficial themes, which complement one another. They present two approaches to the exposition of law. Both are useful, both add to the whole picture. The collection of essays can be more discursive, more provocative – can cover in a single article a number of points of view, which in a treatise on the subject would require the reader to dash around, find, if possible, arguments in various parts of the tome and then put them together. The treatise, it must be said, however, is a complete, logical and essential compendium.

The collection of essays has perhaps one defect – who will survive the second edition? Will the editor invite all the authors of the first edition to join in the second edition or will he perhaps have the audacity and the courage to drop one or two authors? Recently, Tiger Woods, the superb professional golfer, who had a record of winning championships one after another, 'missed the cut' in a tournament. Will one of our 'Thomas on Voyage Charterparties' authors 'miss the cut' in the second edition?

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